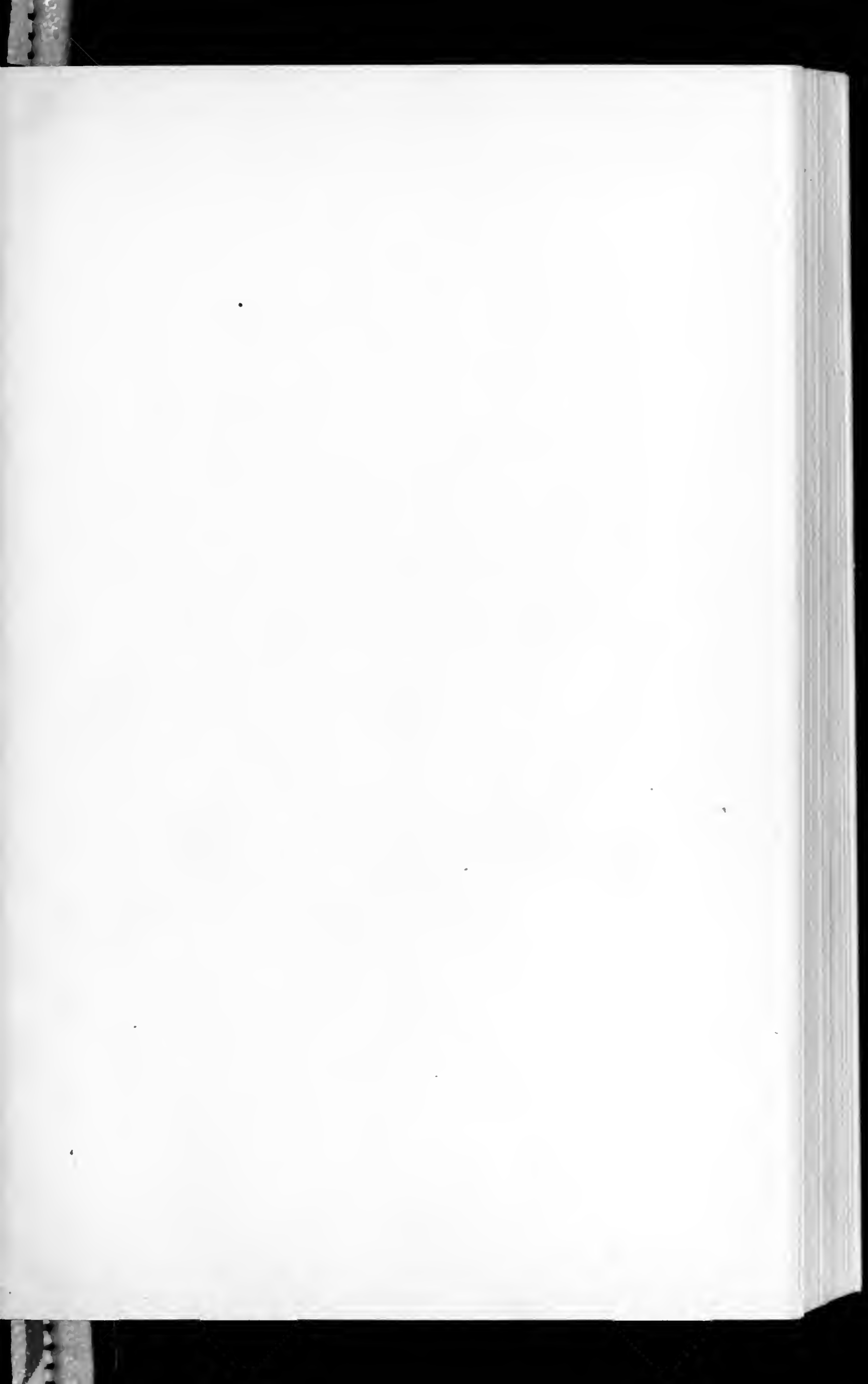


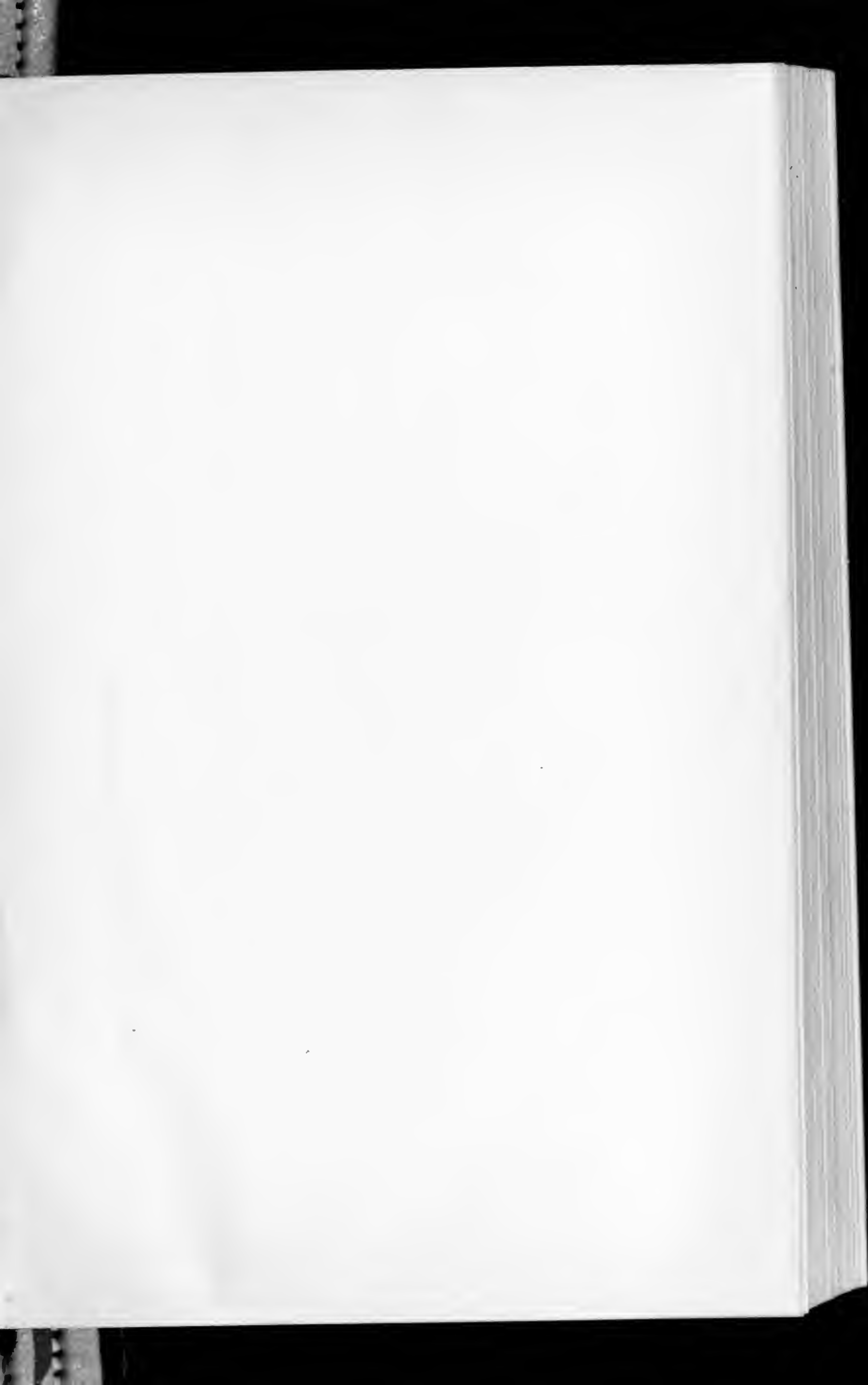
WEST
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1935 COLORADO STATUTES ANNOTATED

with cumulative pocket part service

Colorado Rules of Civil Procedure
including
Notes and References by the Bar Committee
Effective April 6, 1941
completely annotated

by the
Editorial Staff of the Publisher
under the direction
of
A. HEWSON MICHIE
CHAS. W. SUBLETT AND SAMUEL L. LEE
with the collaboration of
COLONEL PHILIP S. VAN CISE
Chairman, Revision Committee

VOLUME I
(Cited '35 C. S. A.)
1941 REPLACEMENT VOLUME

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Denver, Colorado

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DENVER, COLORADO

Foreword

The publication of this replacement volume was made necessary when the Supreme Court, on January 6, 1941, adopted the new Rules of Civil Procedure which became effective on April 6, 1941.

These rules are a combination of the Federal Rules and the Colorado Code and in addition contain some provisions that are entirely distinct from the Federal Rules and the Colorado Code. For the most part, Rules 1 to 83 follow the Federal Rules while Rules 97 to 120 are state procedure. Following Rule 120 are miscellaneous Rules of the Supreme Court, not in the Rules of Procedure. Throughout these rules certain numerical gaps have been left for the addition of any further rules which might be adopted by the Supreme Court.

The annotations consist of both Colorado decisions construing the Code and federal decisions construing the Federal Rules. In most instances Editors' notes point out the fact that the cases used must be read in the light of the aforementioned merger, and the attention of the practitioner is called to these notes.

The publishers desire to express to the individual members of the Revision Committee their great appreciation of the use of their addresses which they delivered before the Colorado Institutes. These addresses, which are to be found in Appendix D, proved very helpful to the editors in determining what changes were effected in the former procedure, and it is believed that the practitioner will be greatly aided by a careful study thereof in construing the rules.

Finally, it is a pleasure to record here our high estimation of the work done by Col. Philip S. Van Cise, Chairman of the Revision Committee. His cooperation, encouragement and constructive aid were never withheld.

THE PUBLISHERS.

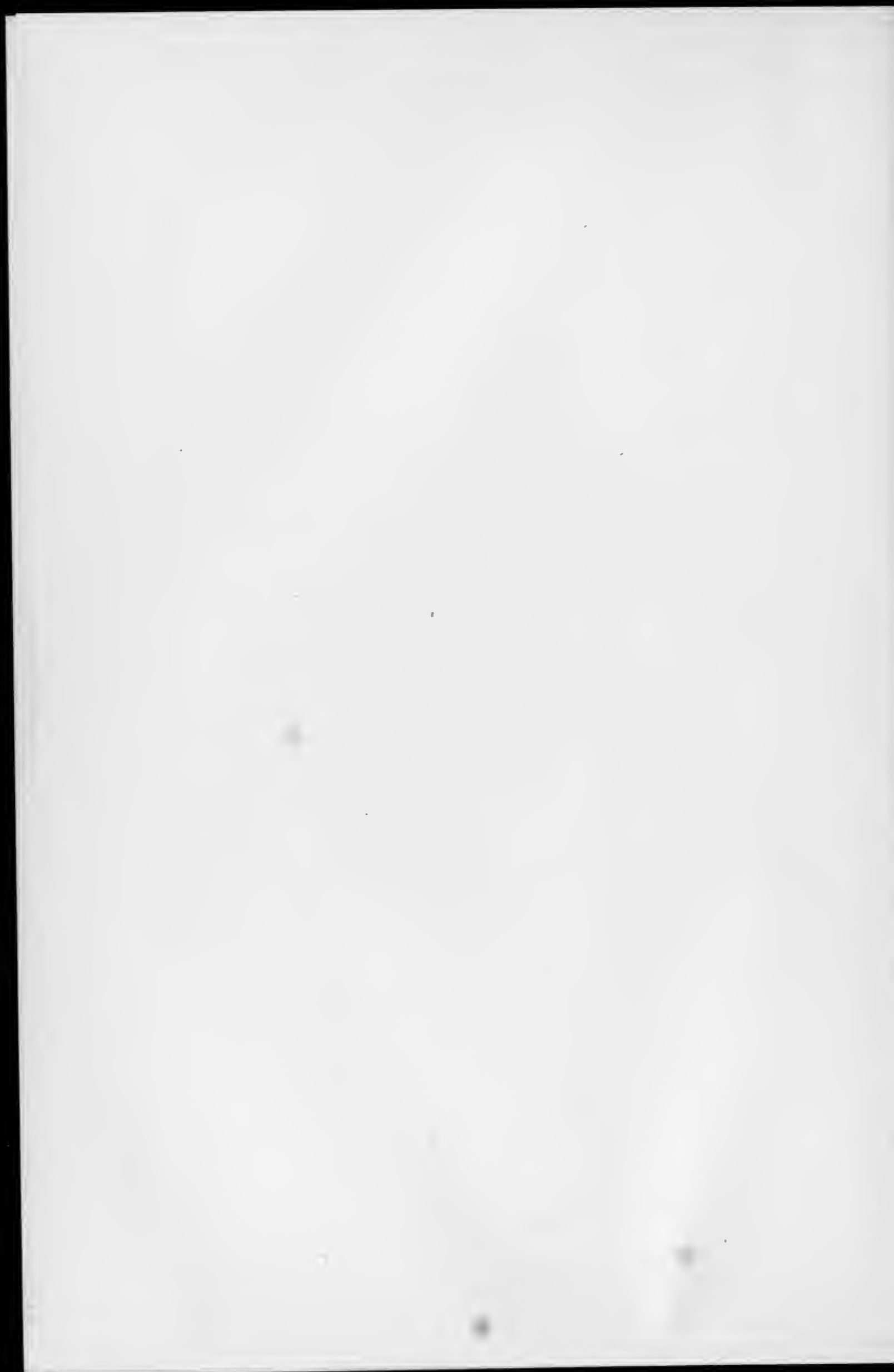


Table of Contents

	Page
Letter of Transmittal and Revision Committee Members.....	VII
Key to Rules.....	IX
Enabling Acts	X
Supreme Court Rules, Code Sections and Statutes Superseded by These Rules.....	XI
Order of Court.....	XIV
Table I. Cross-reference of Supreme Court Rules to Rules.....	XV
Table II. Cross-reference of Code to Rules.....	XVI
Chapters, Rules and Subdivisions.....	XXI
Rules 1 to 120.....	1-380
(There are no Colorado Rules 64, 72 to 76, or 86 to 96.)	
Rules 201 to 229.....	381-386
(There are no Colorado Rules 121 to 200.)	
Rules 241 to 250.....	387-388
(There are no Colorado Rules 230 to 240.)	
Rules 261 to 264.....	388
(There are no Colorado Rules 251 to 260.)	
Appendix A. Forms	390-401
Appendix B. Miscellaneous Provisions of the Code of Civil Procedure.....	403-416
Appendix C. Canons of Ethics	417
Appendix D. Addresses by Members of Revision Committee.....	427
Appendix E. Rules for Criminal Procedure in the Supreme Court.....	543



Letter of Transmittal

TO THE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF COLORADO:

At the annual meeting of the Colorado Bar Association, held in Colorado Springs in September, 1938, a resolution was unanimously adopted which provided, among other things, that the Colorado Code of Civil Procedure be amended to conform to the new Federal Rules and that a committee be appointed to draft the same.

The committee, after consultations with the Court and preliminary work by the chairman, held its first meeting in May, 1939. Thereafter its sessions were held on an average of more than once a week up to and including October 7, 1940.

The original committee was divided into fifteen groups, each under a sub-chairman. These held separate sessions and reported their work to the main committee. The initial draft of these groups was completed in February, 1940 and was printed for the use of the committee alone, although copies thereof were furnished to the Court and to interested lawyers.

From the original committee a revision committee was then selected. It completed a second draft on July 1, 1940. This was mailed to all of the 1,722 lawyers in the State of Colorado with a request that suggestions and criticisms be made. Many Colorado lawyers responded, and in addition the committee received very valuable help from Arch H. White, Clerk of the Supreme Court, John W. Willis of Washington, D. C., and Werner Ilsen and Robert E. Hone of the firm of Root, Clark, Buckner and Ballantine, of New York City.

After careful consideration of all matters submitted to it, mimeographed amendments were prepared and presented with the second draft to the September, 1940, meeting of the Colorado Bar Association.

After discussion, presided over by the committee, the Bar Association unanimously approved the work of the committee, directed that the Rules, with such amendments as the revision committee might deem proper, be submitted at the earliest possible date to the Court for its consideration and approval, and asked that if so approved the same be at once put into effect by the Court by appropriate rule.



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In accordance with said resolutions we hereby submit this, the third printed draft of the proposed Rules of Civil Procedure for the State of Colorado.*

Respectfully submitted,

THE REVISION COMMITTEE,

Philip S. Van Cise, Chairman	Golding Fairfield
Thomas Keely, 1st Vice-Chairman	Charles H. Haines, Sr.
Percy S. Morris, 2nd Vice-Chairman	Louis A. Hellerstein
Jean Breitenstein	Joseph G. Hodges
Guy K. Brewster	Arthur R. Morrison
W. Clayton Carpenter	Ira L. Quiat
Thomas C. Chapin	Charles C. Sackmann
Fred P. Cranston	John L. Zandoni
	Robert A. Theobald, Secretary

GENERAL CODE COMMITTEE

The other members of the initial committee were:

John T. Adams	John M. Meikle	Colorado Springs
Wilbur M. Alter	David J. Miller	Greeley
Walter M. Appel	Fred E. Neef	
Frazer Arnold	John E. Nelson	
Hamlet J. Barry	Godfrey Nordmark	
George Dexter Blount	J. Churchill Owen	
Charles F. Brannan	Harry S. Petersen	Pueblo
Tom M. Burgess	Harold D. Roberts	
John A. Carruthers	Donald B. Robertson	
Hal George Chapman	William Hedges Robinson, Jr.	
William L. Cohn	Royal C. Rubright	
Darwin D. Coit	Fred W. Sanborn, Jr.	
Cecil M. Draper	Fred W. Sanborn, Sr.	
Edward V. Dunklee	Jacob S. Schey	Longmont
William R. Eaton	Bernard J. Seeman	
Frank L. Fetzer	Harry S. Silverstein, Sr.	
Ernest B. Fowler	Charles J. Simon	Colorado Springs
Omar E. Garwood	M. E. H. Smith	Greeley
Benjamin Griffith	Robert L. Stearns	Boulder
John L. Griffith	Mortimer Stone	Fort Collins
Charles H. Haines, Jr.	Frank Swancara	
Mark H. Harrington	Benjamin E. Sweet	
Horace N. Hawkins, Jr.	Frank J. Trelease, Jr.	
Frank E. Hickey	John R. Turnquist	
H. Lawrence Hinkley	Hubert D. Waldo, Jr.	Greeley
Herschel Horn	R. Hickman Walker	
Gail L. Ireland	L. P. Weld	Longmont
Charles J. Kelly	Ben S. Wendelken	Colorado Springs
Harry A. King	S. Harrison White	
Arthur H. Laws	Carle Whitehead	
Bruce B. McCay	Wayne D. Williams, Jr.	
Bentley M. McMullin	Roger H. Wolcott	
	Edward L. Wood	

*This volume is the fourth printing, and represents changes made by both the Committee and the Supreme Court in the third draft.

Key to Rules of Civil Procedure

1. The Federal Rule number system (as "Rule 1") and letter designation for the subdivisions thereof (as "(a)") are followed in Rules 1 to 85. When so lettered each paragraph thereof is the same as the Federal subdivision, or contains only such minor changes as are necessary to make it applicable to Colorado courts.

2. The prefix "C", to indicate "Colorado", precedes the letter, as "C (a)", where material changes are made in the Federal subdivision, or where an entirely new subdivision is added. In the latter case the note states that there is no such Federal subdivision.

3. Where the entire rule is different from the Federal Rule of that number, it is so stated in a note at the head of the rule, and there is no "C" designation. This occurs in Rules 3, 4, 27 (a), 47, 48, 51, 57, 66, 69, 77 and 81. Rules 97 to 120 are entirely outside the scope of the Federal Rules, and have no "C" caption.

4. The bracketed references at the ends of the subdivisions mean the following:

"Code Sec.", that the old Code section is copied verbatim.

"Supplants Code Sec.", that the new subdivision supersedes the indicated Code section.

"From Code Sec.", gives the Code source.

"From Rule", gives the Federal Rule source.

"New", not based on either Federal Rule or Code.

5. The notes are by the Revision Committee of the Colorado Bar Association.

6. There are no Rules numbered 64, 72 to 76 inclusive, 86 to 96 inclusive, 121 to 200 inclusive, 230 to 240 inclusive, 251 to 260 inclusive.

7. The source reference brackets at the end of the subdivisions are to Vol. 1, C. S. A. 1935.

8. As the use of the prefix capital "C" for Colorado, is rather confusing in citations, and is only a guide for comparison with the Federal Rules, we recommend that it be omitted in references. Example: Refer to "Rule 9 (a) (1)" rather than "Rule 9 C (a) (1)".

Enabling Acts

STATUTES OF COLORADO CONFIRMING RIGHT OF THE SUPREME COURT OF COLORADO TO PRESCRIBE RULES OF PRACTICE AND PROCEDURE BY RULE

The Supreme Court shall prescribe rules of practice and procedure in all courts of record, and may change or rescind the same; provided, that no rule shall be made by the Supreme Court permitting or allowing trial judges of courts of record to comment on the evidence given on the trial. Such rules shall supersede any statute in conflict therewith. Inferior courts of record may adopt rules not in conflict with such rules or with statute.

Laws of 1913, p. 447, Sec. 1. Code Sec. 444.

The Supreme Court of the state of Colorado shall have the power to prescribe, by general rules, for the courts of record in the state of Colorado the practice and procedure in civil actions and all forms in connection therewith, provided, that no rule shall be made by the Supreme Court permitting or allowing trial judges to comment on the evidence given on the trial. Such rules shall neither abridge, enlarge, nor modify the substantive rights of any litigants. Such rules shall take effect three months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force nor effect.

Laws of 1939, Chap. 80, p. 264.

Statement by the Revision Committee as to the Supreme Court Rules, Code Sections and Statutes Superseded by These Rules

In the opinion of the committee when these rules become effective on April 6, 1941, all the rules of the Supreme Court are repealed and the hereinafter described sections of the Code of Civil Procedure, and statutes of the state of Colorado will be and the same are hereby superseded and of no further force or effect, to-wit:

1. Supreme Court Rules numbered 1 to 57, both inclusive, 84B and 85 to 91, both inclusive.

2. All of the Code of Civil Procedure, and the amendments thereto, except the following sections, or portions of sections, which are left in the statutes:

- 50 (f) Limitation of one year from March 14, 1923, to set aside judgments against unknown parties.
- 74 Libel and Slander, How Pleaded.
- 75 Same, Pleading and Evidence.
- 132 A to 132 E on method of garnishing public funds.
- 162 Last half reading: "No writ of injunction shall be granted to stay proceedings, under a judgment obtained before a justice of the peace, for a sum not exceeding twenty dollars, exclusive of costs."
- 251 Judgment docket open for inspection.
- 254 Transcript of justice's judgment may be filed in district court; Execution; Lien.
- 281 Mortgage not deemed a conveyance; Trust Deeds.
- 370 Who may administer oaths.
- 371 Affirmation; Form; Perjury.
- 397 How seal attached.
- 446 Judges and justices may take acknowledgments, etc.
- 447 Action not affected by vacancy.
- 448 Proceedings in English; Abbreviations.
- 449 Courts with seal.
- 450 Clerk to keep seal.
- 451 How seal affixed.
- 452 Juridical days.

453 Judicial holidays: "No court shall be opened, nor shall any judicial
business be transacted, on Sunday, New Year's day, Fourth of July,
Christmas day, Washington's birthday, Thanksgiving day, Fast
day, Decoration day, or on the day of a general election, except for
the following purposes:

First—To give, upon their request, instruction to a jury then
deliberating on their verdict.

Second—To receive a verdict or discharge a jury.

Third—For the exercise of the powers of a magistrate in a crimi-
nal action, or in a proceeding of a criminal nature. * *

Fifth—* * When the day fixed for the opening of a court shall
fall on any of the days mentioned in this section, the court shall
stand adjourned until the next succeeding day."

454 Adjournment by clerk in absence of judge.

455 Courts sit at county seat.

456 Actions against sheriff.

464 Powers of court.

465 When judge shall not act unless by consent.

466 Judge may not act as attorney.

467 Judge or justice not to have law partner.

470 Courts may issue proper writs—ne exeat.

471 Terms of court.

475 Judges to conserve the peace.

476 Powers of county courts and judges.

3. The following sections and portions thereof of the statutes of the state
of Colorado:

Sec. 98, Chap. 46, and Sec. 6, Chap. 50, 2 Colorado Statutes Annotated.
Secs. 73 and 74, Chap. 93, 3 Colorado Statutes Annotated.

Secs. 19, 21, that portion of Sec. 22 reading as follows: "In civil cases,
where there are two or more plaintiffs or defendants, the venue shall
not be changed, unless the application is made by or with the consent
of all the plaintiffs or defendants, as the case may be; and", also Secs. 29,
31, 32, 33 and 34, Chap. 170, and Sec. 16, Chap. 177, 4 Colorado Statutes
Annotated.

Secs. 1 and 2, Chap. 95, Session Laws 1939.

4. Any and all other statutes of the state of Colorado in conflict herewith.

Statement by the Court.

The Court is pleased to make formal acknowledgment of the painstaking
labors of the Revision Committee of the Colorado Bar Association. Without
that Committee's contribution to the task, the Court would have found it dif-
ficult, if, indeed, not wholly impossible, to have functioned to the desired pur-

pose contemplated by the enabling acts, by the authority of which the work has progressed to completion. In addition to the expression of its own appreciation of the Committee's work, the Court bespeaks the approbation of the general public, in whose interest, in final purpose, the plan was conceived.

It is to be observed that in the course of the Court's consideration of the rules the Judges were not in agreement as to all matters in relation thereto; but where differences occurred the vote of the majority is reflected in what we have promulgated and as thus stated and on final determination, the vote of the Judges was unanimous.

The intent of the rules is well expressed in the words of Rule 1, to-wit: "They shall be liberally construed to secure the just, speedy and inexpensive determination of every action." In the matter of construction, the Court conceives that it may best be advanced by its opinions written in cases presented on records in due course. Generally, it may be said, rules of construction regarded as pertinent when applied to code provisions of legislative origin, should not be thought to be foreign to any study of procedural rules of judicial emanation, as here.

It is recognized that in proceeding under these rules, need for amendments or new rules may develop. The right to exercise necessary power to that end is reserved by the Court, but in its consideration it will have regard for well advised adherence to fixed standards. Without intending to inhibit other proper means of invoking our power in the premises, we announce that whenever five or more members of the Bar of Colorado shall call our attention to the desirability of amending or setting aside any rule, or of new rules, the suggestion will have early consideration, but it will not be our purpose to act in such regard oftener than twice a year.

Order of Supreme Court

The following Rules, 1 to 63 inclusive, 65 to 71 inclusive, 77 to 85 inclusive, 97 to 120 inclusive, 201 to 229 inclusive, 241 to 250 inclusive, and 261 to 264 inclusive, were adopted by the Supreme Court of Colorado, en banc, January 6, 1941. See Order, page 616, Book 34, Records in the office of the Clerk of said Court.

(Signed) Benjamin C. Hilliard,
Chief Justice,

“ Francis E. Bouck,

“ John C. Young,

“ Norris C. Bakke,

“ William L. Knous,

“ Otto Bock,

“ H. P. Burke,

Justices.

TABLE I

This table shows the old rules of the Supreme Court of Colorado, and where they are found in these rules.

Old Rules	New Rules	Old Rules	New Rules
1.....	3	34.....	111 (f); 115 (d)
2.....	10 C (c)	35.....	111 (f)
3.....	98 (k)	36.....	115 (a)
4.....	12 (b)	36A.....	115 (h)
5.....	41 (a)	37.....	115 (c), (h)
6.....	59 C (a)	37A.....	115 (c)
7.....	51	38.....	115 (a), (b), (c), (i)
8.....	59 C (e)	39.....	115 (b), (c)
9.....	62 (a), (b)	40.....	115 (c), (d)
10.....	112 (f)	41.....	115 (c), (e)
11.....	112 (a)	42.....	115 (c)
12.....	5 (b)	43.....	117
13.....	41 (b)	44.....	Repealed
14.....	83	44A.....	115 (k)
14A.....	4 (h)	45.....	115 (k)
14B.....	Repealed	46.....	115 (f)
14C.....	97	47.....	115 (j)
15.....	119 (a)	48.....	118 (c)
16.....	119 (b)	49.....	118 (c)
17.....	115 (g)	50.....	118 (g)
18.....	111 (a), (b)	51.....	114 (c)
19.....	111 (c)	52.....	114 (a)
20.....	111 (e)	53.....	114 (a)
21.....	111 (e)	54.....	118 (e)
22.....	62 (a); 113 (a), (b)	55.....	118 (d), (f)
23.....	111 (f); 113 (a); 114 (a)	56.....	118 (h)
24.....	113 (i)	57.....	106; 116
25.....	99; 111 (g)	58 to 60.....	261 to 264
26.....	113 (j)	61 to 84.....	201 to 229
27.....	113 (c)	84A to 84J.....	241 to 250
27A.....	111 (f); 112 (a)	85.....	100 (a)
28.....	112 (a)	86.....	Repealed
29.....	111 (f); 112 (c), (d)	87.....	100 (b)
30.....	112 (b)	88.....	100 (b)
31.....	112 (a)	89.....	100 (b)
32.....	111 (f)	90.....	100 (b)
33.....	111 (f)	91.....	Repealed

TABLE II

This table shows the sections of the old Colorado Code of Civil Procedure and where they are found in these rules.

Code	Rules	Code	Rules
Parties.....		50.....	3 (b); 4 (g), (h); 9 C (a); 10 C (a); 17 C (c); 54 C (g); 60 C (b)
1.....	1 C (a); 2	50 (f).....	§ 1, appx. B
2.....	7 (a)	51.....	Part covered by 5 (b), balance superseded
3.....	17 (a)	Pleadings	
4.....	13 C (j)	52.....	7 (a)
5.....	17 (a)	53.....	7 (a)
6.....	17 C (b)	54.....	7 (a)
7.....	17 C (c)	55.....	8 C (a)
8.....	17 C (c)	56.....	7 (c); 12 (b)
9.....	17 C (b)	57.....	7 (c)
10.....	19 (a); 20 (a)	58.....	7 (c)
11.....	19 (a); 20 (a)	59.....	15 (a)
12.....	19 (a); 23 (a)	60.....	12 (b)
13.....	20 C (c)	61.....	12 (h)
14.....	4 (e); 54 C (e)	62.....	8 (b)
15.....	25 (a) C (1), (c)	63.....	13 (a)
16.....	13 (h)	64.....	13 (j) C (k)
17.....	24 (a), (b)	65.....	8 (e) (2); 10 (b)
18.....	22	66.....	11; 12 C (a), C (e), (f); 112 (a)
19.....	8 C (a)	67.....	11
20.....	42 (a)	68.....	11
21.....	20 (a)	69.....	12 C (e)
22.....	24 (a), (b), C (c)	70.....	8 C (a); 105 (g)
23.....	24 C (c)	71.....	9 C (e)
24.....	20 (b)	72.....	9 C (c)
Place of Trial.		73.....	9 C (h)
25.....	98 (a)	74.....	§ 2, appx. B
26.....	98 (a)	75.....	§ 3, appx. B
27.....	98 (f)	76.....	10 (b); 18 (a)
28.....	98 (b) (2)	77.....	8 (d)
29.....	98 (c)	78.....	12 (f)
30.....	Superseded	79.....	7 (c); 15 (a)
31.....	98 (f), (g)	80.....	7 (c); 15 (d)
32.....	97 (g)	81.....	15 (a); 60 C (b); 110 (a)
33.....	98 (g), (k)	82.....	10 C (a)
Commence-		83.....	1 C (a); 8 (f)
ment of		84.....	15 (b); 61
Action.....		Replevin	
34.....	3 (a)	85.....	104 (a)
35.....	4 (b)	86.....	104 (b)
36.....	4 (c); 12 C (a)	87.....	104 (c)
37.....	Form 1, appx. A	88.....	104 (d)
38.....	105 (f)	89.....	104 (e)
39.....	4 (d)	90.....	104 (f)
40.....	4 (e) (1) to (9), incl.	91.....	104 (g)
41.....	1 C (a), 4 (j)	92.....	104 (h)
42.....	4 (d)	93.....	104 (i)
43.....	4 (b)	94.....	104 (j)
44.....	4 (i), (k)	95.....	104 (k)
45.....	4 (d), (g), (h)	96.....	104 (l)
46.....	4 (e), (g), (h)	Attachments	
46A.....	1 C (a)	97.....	102 (a)
47.....	4 (h)		
48.....	20 (a), (b); 54 C (e)		
49.....	4 (i)		

TABLE II—Continued

Code	Rules	Code	Rules
98.....	102 (b)	155.....	103 (w)
99.....	102 (j)	156.....	103 (x)
100.....	102 (k)	157.....	1 C (a); 103 (y)
101.....	102 (l)	158.....	102 (aa)
102.....	102 (m)		
103.....	42 (b); 102 (l), (n)	Injunctions	
104.....	102 (d)	159.....	65 C (i); 97; last half is in 2 C, S. A., Chap. 46, Sec. 160
105.....	102 (m), (o)	160.....	65
106.....	102 (c)	161.....	65 C (g)
107.....	102 (p)	162.....	98 (d); last half to statutes (§ 9, appx. B)
108.....	102 (e)	163.....	65 C (c)
109.....	102 (a)	164.....	65 C (c)
110 to		165.....	65 (b), C (c)
114.....	Repealed in 1927	166.....	107 (a)
115.....	102 (g)	167.....	65
116.....	Statutes	168.....	65 C (g)
117.....	102 (r)	169.....	43 C (e); 65 (a)
118.....	102 (s)	170.....	43 C (e); 65
119.....	102 (t)	171.....	4
120.....	102 (u)	172.....	77 (a)
121.....	102 (v)	173.....	65 C (c)
122.....	102 (w)	174.....	77 (b)
123.....	102 (x)	175.....	65 (b); 110 (d)
124.....	102 (y)	176.....	65 C (i)
125.....	102 (h)	177.....	65
126.....	102 (z)	178.....	18 (b)
127.....	102 (i)	178A.....	65 C (i)
128.....	102 (q); 110 (a)		
Garnishments		Receivers	
129.....	103 (a)	179.....	67 C (b)
130.....	103 (b)	180.....	66 (a)
131.....	Superseded	181.....	7 (a), (b); 43 C (e)
132.....	Superseded	182.....	Superseded
132A } 132B } 132C } 132D } 132E }	Left in Statutes (§ § 4 to 8, appx. B) but procedure portions placed in Rule 103 (c)	183.....	66 (b)
133.....	4 (b); 103 (d); Form 23	Dismissals	
134.....	4 (b); 103 (d); Form 23	184.....	41 (a)
135.....	103 (e)	185.....	54 (b)
136.....	103 (f); Form 23	Defaults	
137.....	103 (g)	186.....	55 (b), C (i)
138.....	103 (h)	187.....	54 (c)
139.....	14 (a)		
140.....	110 (b)	Issues	
141.....	103 (i)	188.....	Superseded
142.....	103 (j)	189.....	12 (b)
143.....	103 (k)	190.....	Superseded
144.....	103 (l)	191.....	38 (a); 39 (b); 52 C (a)
145.....	103 (m)	192.....	39 C (d)
146.....	103 (n)	193.....	40 C
147.....	103 (o)	194.....	40 C
148.....	103 (p)	195.....	7 (b) C (1)
149.....	103 (q)		
150.....	103 (r)	Jurors	
151.....	103 (s)	196.....	38 (d); 39 (a)
152.....	103 (t)	197.....	48 C
153.....	103 (u)		
154.....	103 (v)		

TABLE II—Continued

Code	Rules	Code	Rules
198.....	47 (i)	250.....	79 C (d)
199.....	47 (h)	251.....	§ 10, appx. B
200.....	47 (e)	252.....	Superseded. This is ver-
201.....	47 (f)		batim copy of 3 C. S. A.,
202.....	47 (f)		Chap. 93, Sec. 2 and dupli-
203.....	47 (g)		cation thereof.
204.....	47 (c)	253.....	58 C (b)
		254.....	§ 11, appx. B
Jury Trials		Scire Facias	
205.....	51	255.....	106 (a)
206.....	47 (k)	256.....	106 (a)
207.....	Superseded	257.....	106 (a)
208.....	Superseded	258.....	106 (a)
209.....	47 (j)	259.....	106 (a)
210.....	47 (l)	260.....	106 (a)
211.....	47 (m)		
212.....	47 (n)	Revival	
213.....	47 (o)	261.....	54 C (h)
214.....	47 (p)	262.....	54 C (h)
215.....	47 (q)	263.....	54 C (h)
216.....	47 (r)	264.....	54 C (h)
217.....	47 (s)		
Verdict		Supl. Proc.	
218.....	49 (a)	265.....	69 (d)
219.....	49 (a)	266.....	69 (d)
220.....	Superseded	267.....	69 (c)
221.....	Superseded	268.....	69 (e)
222.....	79 (a)	269.....	69 (g)
		270.....	69 (f)
Referees		271.....	69 (f)
223.....	53 (a)		
224.....	53 (b)	Foreclosures	
225.....	53 (a)	of Mtgs.	
226.....	53 (b)	272.....	105
227.....	53 (b)	273.....	105
228.....	53	274.....	105
229.....	53 (c)		
230.....	53 (a)	Quiet Title	
231.....	53 (c)	275.....	105
232.....	53 (e)	276.....	105
233.....	53 (e)	276A.....	105 (d)
234.....	53 (e)		
235.....	53 (a)	Recovery of	
New Trials		Realty	
236.....	59 C (a)	277.....	105
237.....	59 C (a)	278.....	105 (e)
238.....	59 (b), (c)	279.....	34; 105
239.....	59 (c)	280.....	34; 105
240.....	Superseded	281.....	§ 12, appx. B
241.....	54 (a)	282.....	105
242.....	20 (a); 54 (b)	283.....	105
243.....	20 (a); 54 (b)	284.....	105
244.....	50 (b); 58 (a)		
245.....	50 (b)	Action for	
246.....	54 (b)	Possession	
247.....	104 (m)	285.....	105
248.....	79 C (d)	286.....	105
249.....	54 C (f)	287.....	105

TABLE II—Continued

Code	Rules	Code	Rules
288.....	105	333.....	106
289.....	49 (a)	334.....	106
290.....	25 (a) C (1)	335.....	106
291.....	49 (b)	336.....	106
292.....	105	337.....	106
293.....	105	338.....	106
294.....	105	339.....	106
295.....	105	340.....	106
296.....	105	341.....	106
297.....	1 C (a)		
		Mandamus	
Disputed Boundaries		342.....	106
298.....	105	343.....	106
299.....	105	344.....	106
300.....	105	345.....	106
301.....	105	346.....	106
302.....	105	347.....	106
303.....	105	348.....	106
304.....	105	349.....	106
305.....	105	350.....	106
306.....	105	351.....	106
307.....	105	352.....	106
308.....	105	353.....	106
309.....	105	354.....	106
		355.....	106
		Contempt	
Agreed Case		356.....	37 (b) (1); 107 (a)
310.....	7 C (d)	357.....	107 (b), (c)
311.....	Superseded	358.....	107 (c)
312.....	Superseded	359.....	107 (c)
		360.....	107 (c)
Compromise		361.....	107 (c)
313.....	68	362.....	107 (c)
		363.....	107 (d)
Arbitration		364.....	107 (d)
314.....	109 (a)	365.....	107 (d)
315.....	109 (b)	366.....	107 (e)
316.....	109 (c)	367.....	107 (c)
317.....	109 (d)	368.....	107 (c)
318.....	109 (e)	369.....	107 (b)
319.....	109 (f)		
320.....	109 (g)	Oaths	
		370.....	§ 13, appx. B
Usurpation		371.....	§ 14, appx. B
321.....	106		
322.....	106	Affidavits	
323.....	106	372.....	108
324.....	106	373.....	108
325.....	106	374.....	108
326.....	106	375.....	108
327.....	106		
328.....	106	Depositions	
329.....	106 (a); 118 (b)	376.....	26 (a); 30 (a)
330.....	106 (a); 116; 118 (b)	377.....	28 (a); 30 (a)
		378.....	26 (d), (e); 30 (e), (f); 32 (a), (c)
Certiorari		379.....	26 (d), (e), C (f)
331.....	106	380.....	45 C (e)
332.....	106	381.....	31 C (a)

TABLE II—Continued

Code	Rules	Code	Rules
382.....	26 (a); 45 C (d)	428.....	113 (c), (g)
383.....	26 (a)	429.....	113 (e), (f)
384.....	28 (a); 30 (g); 31 C (a), (d)	430.....	113 (d)
385.....	31 C (a)	431.....	111 (d)
386.....	31 C (a)	432.....	113 (h)
387.....	37 (a)	433.....	112 (a)
388.....	26 (e); 32 (c) (d)	434.....	111 (e)
389.....	30 (a)	435.....	111 (e)
Inspection		436.....	118 (a)
390.....	34; 37 (a), (b)	437.....	111 (a); 112 (a); 118 (f)
391.....	43 C (a)	438.....	118 (e)
392.....	43 C (a) C (g)	439.....	61, 118 (f)
393.....	44 (a)	440.....	118 (d)
394.....	44 (a)	441.....	Superseded
395.....	44 (a), C (e)	442.....	115 (a), (b)
396.....	44 C (f)	443.....	46
397.....	§ 15, appx. B	Misc.	
Mines		444.....	Enabling Act
398.....	Superseded	445.....	77 (a); (b)
399.....	34	446.....	§ 16, appx. B
Perpetuate		447.....	§ 17, appx. B
Testimony		448.....	§ 18, appx. B
400.....	27 (a)	449.....	§ 19, appx. B
401.....	27 (a)	450.....	§ 20, appx. B
402.....	27 (a)	451.....	§ 21, appx. B
403.....	27 (a)	452.....	§ 22, appx. B
404.....	27 (a)	453.....	Par. Fourth and 1st half
405.....	27 (a)		Par. Fifth superseded as
Motions			duplicated by Code Sec. 127,
406.....	7 (b) C (1)		found in Rule 102 (i). Bal-
407.....	7 (b) C (1); 77 (b)		ance to statutes (§ 23, appx.
408.....	6 C (d), (e)		B)
409.....	Superseded	454.....	§ 24, appx. B
410.....	5 (b)	455.....	§ 25, appx. B
411.....	5 (b)	456.....	§ 26, appx. B
412.....	5 (b)	457.....	110 (b)
413.....	5 (b)	458.....	Superseded
414.....	5 (a)	459.....	44 C (d)
415.....	5 (b)	460.....	80 C (a)
416.....	79 (a)	461.....	69 (b)
417.....	6 (a), C (b)	462.....	42 C (c)
418.....	1 C (a)	463.....	42 C (c)
419.....	5 (a)	464.....	§ 27, appx. B
Writs of		465.....	§ 28, appx. B
Error		466.....	§ 29, appx. B
420.....	112 (f)	467.....	§ 30, appx. B
421.....	111 (f)	468.....	Superseded
422.....	46	469.....	Superseded
423.....	112 (a)	470.....	§ 31, appx. B
424.....	59 C (e)	471.....	§ 32, appx. B
425.....	62 (a); 111 (a)	472.....	77 (b)
426.....	Superseded	473.....	98 (h)
427.....	111 (b)	474.....	97
		475.....	§ 33, appx. B
		476.....	§ 34, appx. B
		477.....	45 (c)
		478.....	110 (b)
		479.....	1

	Page
Chapter I. Scope of Rules, One Form of Action, Commencement of Action, Service of Process, Pleadings, Motions and Orders:	
Rule 1. Scope of Rules:	
C (a) Procedure Governed	1
C (b) Effective Date.....	1
Rule 2. One Form of Action.....	4
Rule 3. Commencement of Action:	
(a) How Commenced.....	5
(b) Time of Jurisdiction	5
Rule 4. Process:	
(a) To What Applicable.....	7
(b) Issuance	7
(c) Contents of Summons.....	7
(d) By Whom Served.....	7
(e) Personal Service in State.....	7
(f) Personal Service Outside the State.....	8
(g) Other Service	8
(h) Publication	9
(i) Manner of Proof.....	9
(j) Amendment	10
(k) Refusal of Copy.....	10
Rule 5. Service and Filing of Pleadings and Other Papers:	
(a) Service: When Required.....	23
(b) Service:	
1. How Made.....	23
C 2. Resident Attorney.....	24
(c) Numerous Defendants	24
C (d) Filing and Serving.....	24
(e) Filing with Court Defined.....	24
Rule 6. Time:	
(a) Computation	25
C (b) Enlargement	25
(c) Unaffected by Expiration of Term.....	26
C (d) Notice: Motions; Affidavits.....	26
(e) Additional Time on Service by Mail.....	26
Chapter II. Pleadings and Motions:	
Rule 7. Pleadings Allowed; Form of Motions:	
(a) Pleadings	29
(b) Motions and Other Papers.....	29
(c) Demurrers. Pleas, Etc., Abolished.....	29
C (d) Agreed Case; Procedure	29
Rule 8. General Rules of Pleading:	
C (a) Claims for Relief.....	31
(b) Defenses; Form of Denials.....	31
(c) Affirmative Defenses and Mitigating Circumstances.....	32

Chapter II. Pleadings and Motions—Continued	Page
Rule 8. General Rules of Pleading—Continued	
(d) Effect of Failure to Deny.....	32
(e) Pleading to Be Concise and Direct; Consistency.....	32
(f) Construction of Pleadings.....	33
Rule 9. Pleading Special Matters:	
C (a) (1) Capacity	40
C (2) Identification of Unknown Party.....	40
C (3) Interest of Unknown Parties.....	40
C (4) Description of Interest.....	40
(b) Fraud, Mistake, Condition of the Mind.....	40
C (c) Conditions Precedent	40
(d) Official Document or Act.....	41
C (e) Judgment	41
(f) Time and Place.....	41
(g) Special Damage	41
C (h) Pleading Statute.....	41
Rule 10. Form of Pleadings:	
C (a) Caption: Names of Parties.....	44
(b) Paragraphs: Separate Statements	44
C (c) Adoption by Reference; Exhibits	44
Rule 11. Signing of Pleadings.....	46
Rule 12. Defenses and Objections—When and How Presented—By Plead- ing or Motion—Motion for Judgment on Pleadings:	
C (a) Responsive Pleadings; When Presented.....	47
C (b) Defenses; How Presented.....	47
(c) Motion for Judgment on the Pleadings.....	48
(d) Preliminary Hearings.....	48
C (e) Motion for Separate Statement or for More Definite Statement or Bill of Particulars.....	48
(f) Motion to Strike.....	49
(g) Consolidation of Motions.....	49
(h) Waiver of Defenses.....	49
Rule 13. Counterclaim and Cross-Claim:	
(a) Compulsory Counterclaims.....	66
(b) Permissive Counterclaims.....	66
(c) Counterclaim Exceeding Opposing Claim.....	66
(d) Stricken as Federal.....	66
(e) Counterclaim Maturing or Acquired after Pleading.....	66
(i) Omitted Counterclaim	66
(g) Cross-Claim against Co-Party.....	66
(h) Additional Parties May Be Brought in.....	66
C (i) Separate Judgments.....	66
C (j) Claims against Assignee.....	67
C (k) Claims against Personal Representative.....	67
C (l) County Court Claim in Excess of \$2,000.00.....	67
Rule 14. Third-Party Practice:	
(a) When Defendant May Bring in Third Party.....	72
(b) When Plaintiff May Bring in Third Party.....	72
Rule 15. Amended and Supplemental Pleadings:	
(a) Amendments	75
(b) Amendments to Conform to the Evidence.....	75
(c) Relation Back of Amendments.....	75
(d) Supplemental Pleadings.....	75
Rule 16. Pre-Trial Procedure; Formulating Issues.....	80

Chapter III. Parties:	Page
Rule 17. Parties Plaintiff and Defendant; Capacity:	
(a) Real Party in Interest.....	83
C (b) Capacity to Sue or Be Sued.....	83
C (c) Infants or Incompetent Persons.....	83
Rule 18. Joinder of Claims and Remedies:	
(a) Joinder of Claims.....	89
(b) Joinder of Remedies; Fraudulent Conveyances.....	89
Rule 19. Necessary Joinder of Parties:	
(a) Necessary Joinder	92
C (b) Effect of Failure to Join.....	93
(c) Same: Names of Omitted Persons and Reasons for Non-Joinder to Be Plead	93
Rule 20. Permissive Joinder of Parties:	
(a) Permissive Joinder	95
(b) Separate Trials.....	96
C (c) Parties Jointly or Severally Liable.....	96
Rule 21. Misjoinder and Non-Joinder of Parties.....	100
Rule 22. Interpleader	102
Rule 23. Class Actions:	
(a) Representation	103
(b) Secondary Action by Shareholders.....	103
(c) Dismissal or Compromise.....	103
Rule 24. Intervention:	
(a) Intervention of Right.....	106
(b) Permissive Intervention.....	106
C (c) Procedure	106
Rule 25. Substitution of Parties:	
(a) Death	109
(b) Incompetency	110
(c) Transfer of Interest.....	110
(d) Public Officers; Death or Separation from Office.....	110
C (e) Substitution at any Stage.....	110
Chapter IV. Depositions and Discovery:	
Rule 26. Depositions Pending Action:	
(a) When Depositions May Be Taken.....	113
(b) Scope of Examination.....	113
(c) Examination and Cross-Examination.....	113
(d) Use of Depositions.....	113
(e) Objections to Admissibility.....	114
C (f) Effect of Taking or Using Depositions.....	114
Rule 27. Depositions Before Action or Pending Appeal:	
(a) Before Action:	
(1) Petition; Order, Notice.....	121
(2) Testimony Taken.....	122
(3) Proofs Prima Facie Evidence.....	123
(4) How and When Used.....	123
C (b) After Judgment or after Writ of Error.....	123
Rule 28. Persons Before Whom Depositions May Be Taken:	
(a) Within the United States.....	124
(b) In Foreign Countries.....	124
C (c) Disqualification for Interest.....	124
C (d) Outside Colorado.....	124

Chapter IV. Depositions and Discovery—Continued	Page
Rule 29. Stipulations Regarding the Taking of Depositions.....	125
Rule 30. Depositions upon Oral Examination:	
(a) Notice of Examination; Time and Place.....	125
(b) Orders for the Protection of Parties and Deponents.....	125
(c) Record of Examination; Oath; Objections.....	126
(d) Motion to Terminate or Limit Examination.....	126
(e) Submission to Witness; Changes; Signing.....	126
(f) Certification and Filing by Officer; Copies; Notice of Filing.....	127
(g) Failure to Attend or to Serve Subpoena; Expenses.....	127
C (h) Notice to Absent or Unknown Parties.....	127
Rule 31. Depositions of Witnesses upon Written Interrogatories:	
C (a) Serving Interrogatories; Notice.....	133
(b) Officer to Take Responses and Prepare Record.....	134
(c) Notice of Filing.....	134
(d) Orders for the Protection of Parties and Deponents.....	134
Rule 32. Effect of Errors and Irregularities in Depositions:	
(a) As to Notice	135
(b) As to Disqualification of Officer	135
(c) As to Taking of Deposition.....	135
(d) As to Completion and Return of Deposition.....	135
Rule 33. Interrogatories to Parties.....	136
Rule 34. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.....	142
Rule 35. Physical and Mental Examination of Persons:	
(a) Order for Examination.....	149
(b) Report of Findings	149
Rule 36. Admission of Facts and of Genuineness of Documents:	
(a) Request for Admission.....	151
(b) Effect of Admission.....	151
Rule 37. Refusal to Make Discovery; Consequences:	
(a) Refusal to Answer.....	154
(b) Failure to Comply with Order:	
(1) Contempt	155
(2) Other Consequences	155
(c) Expenses on Refusal to Admit.....	155
(d) Failure of Party to Attend or Serve Answers.....	156

Chapter V. Trials:

Rule 38. Jury Trial:	
(a) Where Jury Right Exists.....	157
(b) Demand	157
(c) Same: Specification of Issues.....	157
(d) Waiver	157
Rule 39. Trial by Jury or by the Court:	
(a) By Jury.....	162
(b) By the Court	162
(c) Advisory Jury and Trial by Consent.....	162
C (d) Issue of Law Disposed of First.....	162
Rule 40. C Assignment of Cases for Trial.....	164

Rule 41. Dismissal of Actions:	
(a) Voluntary Dismissal: Effect Thereof:	
(1) By Plaintiff; By Stipulation.....	165
(2) By Order of Court.....	165
(b) Involuntary Dismissal:	
(1) By Defendant	165
C (2) By the Court	166
(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim.....	166
(d) Costs of Previously-Dismissed Action.....	166
Rule 42. Consolidation; Separate Trials:	
(a) Consolidation	171
(b) Separate Trials	172
C (c) Court Sessions Public; When Closed.....	172
Rule 43. Evidence:	
C (a) Form and Admissibility.....	174
C (b) Scope of Examination and Cross-Examination.....	174
(c) Record of Excluded Evidence.....	174
(d) Affirmation in Lieu of Oath.....	175
C (e) Evidence on Motions	175
C (f) Secondary Evidence	175
C (g) Explaining Alterations in Documents.....	175
Rule 44. Proof of Official Record:	
(a) Authentication of Copy.....	177
(b) Proof of Lack of Record.....	178
(c) Other Proof.....	178
C (d) Certified Copies of Record Read in Evidence.....	178
C (e) Seal Dispensed with.....	178
C (f) Statutes and Laws of Other States and Countries.....	178
Rule 45. Subpoena:	
C (a) For Attendance of Witnesses; Form; Issuance.....	179
(b) For Production of Documentary Evidence	180
(c) Service	180
C (d) Subpoena for Taking Depositions; Place of Examination.....	180
C (e) Subpoena for a Hearing or Trial.....	180
Rule 46. Exceptions Unnecessary.....	183
Rule 47. Jurors:	
(a) Examination of Jurors.....	184
(b) Alternate Jurors.....	184
(c) Challenge to Array	184
(d) Challenge to Individual Jurors.....	184
(e) Challenges for Cause.....	184
(f) Order and Determination of Challenge for Cause.....	185
(g) Order of Selecting Jury.....	185
(h) Peremptory Challenges	185
(i) Oath of Jurors	185
(j) When Juror Discharged.....	185
(k) Examination of Premises by Jury.....	185
(l) Deliberation of Jury	185
(m) Papers Taken by Jury.....	186
(n) Additional Instructions	186
(o) New Trial if No Verdict.....	186
(p) When Sealed Verdict.....	186

Chapter V. Trials—Continued	Page
Rule 47. Jurors—Continued	
(q) Declaration of Verdict.....	186
(r) Correction of Verdict.....	186
(s) Verdict Recorded; Disagreement.....	186
Rule 48. Number of Jurors.....	192
Rule 49. Special Verdicts and Interrogatories:	
(a) Special Verdicts.....	193
(b) General Verdict Accompanied by Answer to Interrogatories.....	193
Rule 50. Motion for a Directed Verdict:	
(a) When Made: Effect	195
(b) Reservation of Decision on Motion.....	195
Rule 51. Instructions to Jury.....	197
Rule 52. Findings by the Court:	
C (a) Effect	201
(b) Amendment	201
Rule 53. Masters:	
(a) Appointment and Compensation.....	203
(b) Reference	203
(c) Powers	203
(d) Proceedings:	
(1) Meetings	204
(2) Witnesses	204
(3) Statement of Accounts.....	204
(e) Report:	
(1) Contents and Filing.....	204
(2) In Non-Jury Actions.....	205
(3) In Jury Actions.....	205
(4) Stipulation as to Findings.....	205
(5) Draft Report.....	205
Chapter VI. Judgment:	
Rule 54. Judgment: Costs:	
(a) Definition: Form	209
(b) Judgment at Various Stages.....	209
(c) Demand for Judgment.....	209
(d) Costs	209
C (e) Against Partnership	210
C (f) After Death, How Payable.....	210
C (g) Against Unknown Defendants.....	210
C (h) Revival of Judgments.....	210
Rule 55. Default:	
(a) Entry	212
(b) Judgment:	
C (1) By the Clerk.....	212
(2) By the Court.....	212
(c) Setting Aside Default.....	213
(d) Plaintiffs, Counterclaimants, Cross-Claimants.....	213
(e) Judgment Against an Officer or Agency of the State of Colorado.....	213
C (f) Judgment on Substituted Service.....	213

Chapter VI. Judgment—Continued	Page
Rule 56. Summary Judgment:	
(a) For Claimant.....	215
(b) For Defending Party.....	215
C (c) Motion and Proceedings Thereon.....	215
(d) Case Not Fully Adjudicated on Motion.....	215
(e) Form of Affidavit; Further Testimony.....	215
C (f) When Affidavits Are Unavailable.....	216
(g) Affidavits Made in Bad Faith.....	216
Rule 57. Declaratory Judgments.....	223
(a) Power to Declare Rights, etc.; Force of Declaration.....	223
(b) Who May Obtain Declaration of Rights.....	223
(c) Contract Construed Before Breach.....	223
(d) For What Purpose Interested Persons May Have Rights Declared...	223
(e) Not a Limitation.....	224
(f) When Court May Refuse to Declare Rights.....	224
(g) Review	224
(h) Further Relief.....	224
(i) Issues of Fact.....	224
(j) Parties, Municipal Ordinances.....	224
(k) Rule is Remedial—Purpose.....	224
(l) Interpretation and Construction.....	225
Rule 58. Entry and Satisfaction of Judgment:	
(a) Entry	231
C (b) Satisfaction	231
Rule 59. New Trials:	
C (a) Grounds	232
(b) Time for Motion.....	233
(c) Time for Filing and Serving Affidavits.....	233
(d) On Initiative of Court.....	233
C (e) No Review Unless Made.....	233
Rule 60. Relief from Judgment or Order:	
(a) Clerical Mistakes.....	241
C (b) Mistake; Inadvertence; Surprise; Excusable Neglect.....	241
Rule 61. Harmless Error.....	242
Rule 62. Stay of Proceedings to Enforce a Judgment:	
(a) Automatic Stay; Exceptions; Injunctions, Receiverships.....	243
(b) Stay on Motion for New Trial or for Judgment.....	244
Rule 63. Disability of a Judge.....	244
Rule 64. Omitted as Federal Procedure.....	244
Chapter VII. Injunctions, Receivers, Deposit in Court, Offer of Judgment.....	245
Rule 65. Injunctions:	
(a) Preliminary; Notice.....	245
(b) Temporary Restraining Order; Notice; Hearing; Duration.....	245
C (c) Security	245
(d) Form and Scope of Injunction or Restraining Order.....	246
(e) [Stricken]	246
C (f) Mandatory	246
C (g) When Relief Granted.....	246
C (h) When Inapplicable.....	246
C (i) State Jurisdiction When Suit Commenced in Federal Court: Stay of Proceedings; Notice; Writ of Error.....	246

Chapter VII.	Injunctions, Receivers, Deposit in Court, Offer of Judgment—Cont'd	Page
Rule 66.	Receivers:	
(a)	When Appointed.....	248
(b)	Oath and Bond; Suit on Bond.....	249
Rule 67.	Deposit in Court:	
C (a)	By Party.....	251
C (b)	By Trustee.....	252
Rule 68.	Offer of Judgment.....	252
Chapter VIII.	Execution and Supplementary Proceedings; Judgment for Specific Acts; Vesting Title; Proceedings in Behalf of and Against Persons not Parties.	
Rule 69.	Execution and Proceedings Subsequent to Judgment:	
(a)	In General.....	255
(b)	Execution for Costs.....	255
(c)	Debtor of Judgment Debtor may Pay Sheriff.....	255
(d)	Order for Appearance of Judgment Debtor; Arrest.....	255
(e)	Order for Appearance of Debtor of Judgment Debtor.....	256
(f)	Order for Property to be Applied on Judgment; Contempt.....	256
(g)	Witnesses	256
(h)	Depositions	256
Rule 70.	Judgment for Specific Acts; Vesting Title.....	258
Rule 71.	Process in Behalf of and against Persons Not Parties.....	258
Rules 72 to 76:		
	Omitted as Federal Appellate Practice.....	259
Chapter IX.	Court Administration:	
Rule 77.	Courts and Clerks:	
(a)	Courts Always Open.....	260
(b)	Proceedings in Court and Chambers.....	260
(c)	Clerk's Office and Orders by Clerk.....	260
(d)	Orders in Any County.....	260
Rule 78.	Motion Day.....	261
Rule 79.	Books Kept by the Clerk and Entries Therein:	
C (a)	Civil Docket.....	261
C (b)	Civil Order Book.....	261
C (c)	Indices; Calendars.....	261
C (d)	Judgment Docket.....	262
Rule 80.	Reporter; Stenographic Report or Transcript as Evidence:	
C (a)	Reporter	262
C (b)	Official Reporter.....	262
(c)	Stenographic Report or Transcript as Evidence.....	262
Chapter X.	General Provisions:	
Rule 81.	Applicability in General:	
(a)	Special Statutory Proceedings.....	263
(b)	Divorce and Separate Maintenance.....	263
(c)	Appeals from County to District Court.....	263
Rule 82.	Jurisdiction Unaffected.....	263
Rule 83.	Rules by Trial Courts.....	264
Rule 84.	Forms	265
Rule 85.	Title	265

Chapter XI. Change of Judge; Place of Trial; Water Rights:	Page
Rule 97. Change of Judge.....	266
Rule 98. Place of Trial:	
(a) Venue for Property Franchises and Utilities.....	267
(b) Venue for Recovery of Penalty, etc.....	267
(c) Venue for Tort, Contract and Other Actions.....	267
(d) Venue for Injunctions to Stay Proceedings.....	267
(e) Power to Change Venue.....	267
(f) Causes of Change.....	267
(g) Change from County.....	268
(h) Transfers where Concurrent Jurisdiction.....	268
(i) Place Changed if All Parties Agree.....	268
(j) Parties Must Agree on Change.....	268
(k) Only One Change; No Waiver.....	268
Rule 99. Water Rights	284
Chapter XII. Contested Elections:	
Rule 100. Contested Elections:	
(a) Statement of Contest.....	285
(b) Trial	285
Chapter XIII. Seizure of Person or Property:	
Rule 101. Arrest and Exemplary Damages:	
(a) Body Execution.....	286
(b) Term of Commitment.....	286
(c) Costs	286
(d) Exemplary Damages	286
Rule 102. Attachments:	
(a) Any time Before Judgment; Security in Lieu of.....	293
(b) Affidavit; Causes	293
(c) Plaintiff to Give Bond.....	294
(d) Clerk Issues Writ of Attachment.....	295
(e) Contents of Writ.....	295
(f) Service; How Made.....	295
(g) Execution of Writ.....	295
(h) Return of Writ.....	296
(i) Execution of Writ on Sunday or Legal Holiday.....	296
(j) No Final Judgment Until 30 Days after Levy:	
(1) Creditors	296
(2) Judgment Creditors.....	296
(k) Dismissal by One Creditor Does Not Affect Others.....	296
(l) Final Judgment Pro-rated; When Creditors Preferred.....	296
(m) Insolvent Defendant; Creditors Prorate.....	297
(n) When Suit Transferred to District Court.....	297
(1) Indivisible Property over \$2,000.00.....	297
(2) Intervener or Attachment Creditor.....	297
(o) Attachment Upon Debts Not Due.....	298
(p) Traverse of Affidavit.....	298
(q) Amendment of Affidavit.....	298
(r) Intervention; Damages	298
(s) Perishable Property May be Sold.....	298
(t) Application of Proceeds.....	299
(u) Balance Due; Surplus.....	299
(v) Procedure When Judgment for Defendant.....	299

Chapter XIII. Seizure of Person or Property—Continued	Page
Rule 102. Attachments—Continued	
(w) Deifendant Release Property; Bond.....	299
(x) Conditions of Bond. Liability of Sheriff.....	299
(y) Application to Discharge Attachment.....	300
(z) New Bond, When Ordered; Failure to Furnish.....	300
(aa) New Trial; Appeal and Writs of Error.....	300
Rule 103. Garnishment:	
(a) When Writ Issues.....	313
(b) Garnishee Summoned, When.....	313
(c) Garnishment of Public Official.....	314
(d) Writ Issued by Officer; Alias and Pluries Writs.....	314
(e) When Jurisdiction Acquired.....	314
(f) Interrogatories Answered Under Oath—Failure to Answer.....	314
(g) Garnishee Need Not Plead Exemption.....	314
(h) Garnishee Not Required to Defend Claims of Third Persons.....	314
(i) Garnishee to Deliver Property; Sale; Judgment.....	315
(j) Garnishee Released Upon Delivery of Property.....	315
(k) Refusal of Garnishee to Answer Default Judgment.....	315
(l) Traverse of Answer.....	315
(m) Trial of Traverse Issue; Judgment.....	316
(n) Intervention by Motion.....	316
(o) Garnishee May Claim Set-off.....	316
(p) Garnishee Not Liable on Instruments Not Due.....	316
(q) Effect of Judgment Against Garnishee.....	316
(r) Discharge of Garnishee No Bar to Action by Defendant.....	316
(s) Liability of Garnishee on Debt Not Due.....	316
(t) Plaintiff May Pay Lien and Be Subrogated.....	317
(u) Subrogation, Where Pledge Held Under Condition.....	317
(v) Disposition of Delivered Property, Redemption Money; Indemnity....	317
(w) Refusal to Deliver Property.....	317
(x) Taxation of Costs; Fees of Garnishee.....	317
(y) Remedies of Judgment Creditors.....	317
(z) Release Upon Bond.....	317
Rule 104. Replevin:	
(a) Personal Property.....	323
(b) Causes; Affidavit.....	323
(c) Bond; Writ.....	323
(d) Exception to Sureties; Liability of Clerk.....	324
(e) When Returned to Defendant. Bond.....	324
(f) Qualifications of Sureties. New Bond.....	324
(g) Amended or Additional Bonds.....	325
(h) Sheriff May Break Buildings; When.....	325
(i) Duty of Sheriff in Holding Goods.....	325
(j) Claims by Third Person; Indemnity to Sheriff.....	325
(k) Custodian of Property; Bond.....	325
(l) When Sheriff Files Papers.....	325
(m) Judgment.....	325
Chapter XIV. Real Estate:	
Rule 105. Actions Concerning Real Estate:	
(a) Complete Adjudication of Rights.....	332
(b) Record Interest; Actual Possession Requires Occupant be Party.....	332
(c) Disclaimer Saves Costs.....	332

Chapter XIV. Real Estate—Continued	Page
Rule 105. Actions Concerning Real Estate—Continued	
(d) Execution of Quit Claim Deed Saves Costs.....	332
(e) Set-off for Improvements.....	332
(f) Lis Pendens.....	333
(g) Description of Real Property.....	333
Chapter XV. Remedial Writs and Contempt:	
Rule 106. Forms of Writs Abolished:	
(a) Writs Abolished.....	334
(1) Civil Habeas Corpus.....	334
(2) Mandamus	334
(3) Quo Warranto	334
(4) Certiorari and Prohibition.....	334
(5) Scire Facias.....	335
(b) Under Statutes	335
Rule 107. Civil Contempt:	
(a) Definition	344
(b) In Presence of Court.....	344
(c) Out of Presence of Court.....	344
(d) Trial and Punishment.....	345
(e) Criminal Prosecution and Criminal Contempt; Limitations.....	345
Chapter XVI. Affidavits, Arbitration, Miscellaneous:	
Rule 108. Affidavits	350
Rule 109. Arbitration:	
(a) Controversies May be Arbitrated.....	350
(b) Articles of Agreement; Award.....	350
(c) Oaths of Arbitrators.....	350
(d) Powers of Arbitrators.....	350
(e) Award Filed; Judgment; Execution.....	351
(f) Fees of Arbitrators.....	351
(g) Arbitrated Matters Held Adjudicated, Except for Fraud, etc.....	351
Rule 110. Miscellaneous:	
(a) Amendments	354
(b) Use of Terms	354
(c) Certificate	355
(d) Cross-claimants, Counterclaimants and Third-Party Claimants.....	355
Chapter XVII. Supreme Court Proceedings:	
Rule 111. Writ of Error:	
(a) Matters Reviewable.....	356
(b) Limitation on Time of Issuance.....	356
(c) How Obtained	356
(d) Joint or Several Writs.....	356
(e) Summons to Hear Errors; Contents; Service.....	357
(f) Specification of Points	357
(g) Review of Adjudication of Water Priorities.....	357
Rule 112. Record on Error:	
(a) Preparation: Certification	360
(b) Costs; By Whom Paid.....	361
(c) Stipulation as to Record.....	361
(d) Agreed Record	361
(e) Agreed Statement	361
(f) Transcript; Objections; Certification.....	361
(g) More Than One Writ.....	362

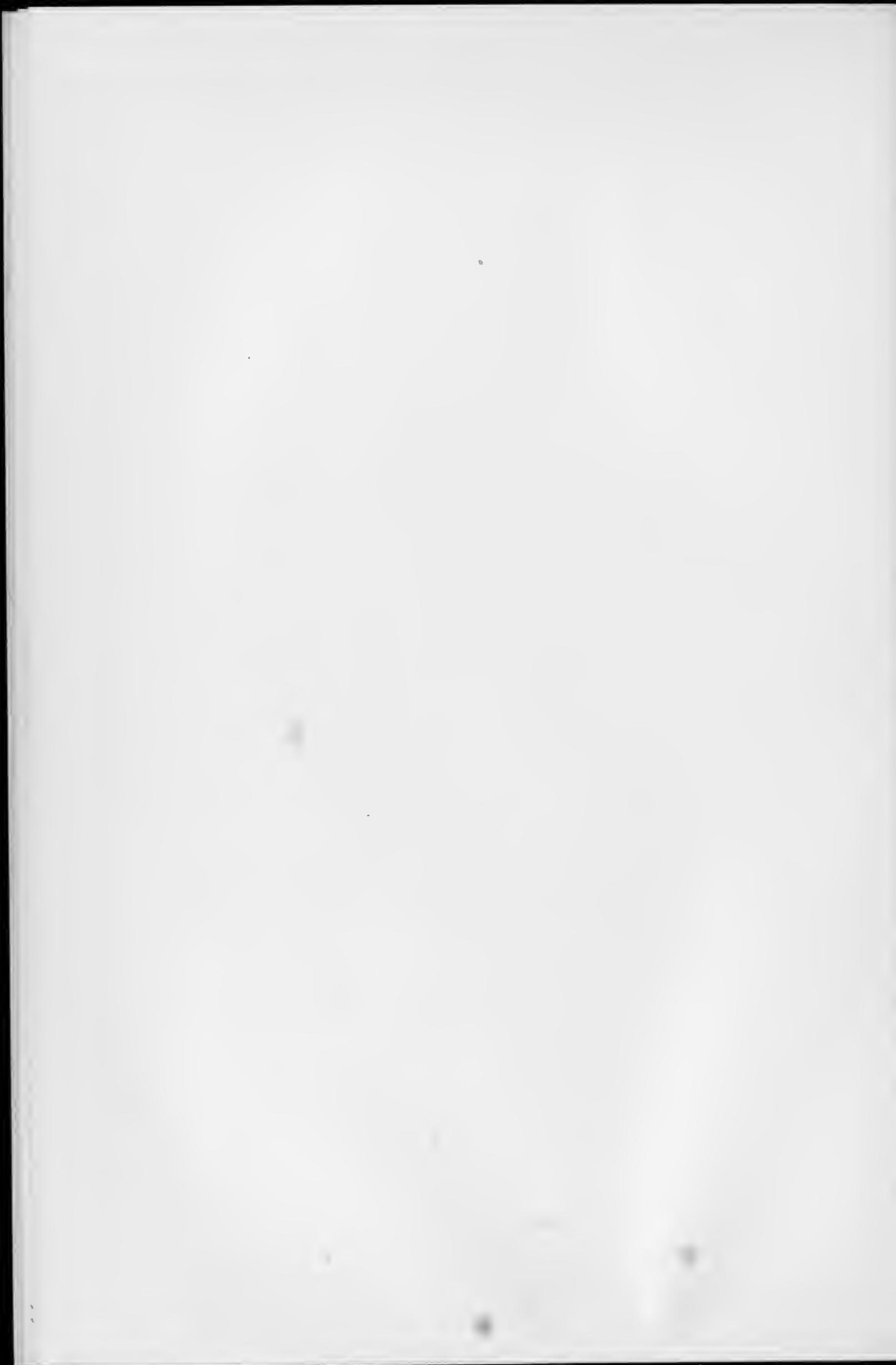
Chapter XVII. Supreme Court Proceedings—Continued	Page
Rule 113. Supersedeas and Stay of Execution:	
(a) Application for; After Record Filed.....	362
(b) Review of Stay of Execution: Verified Statement.....	362
(c) Bond	363
(d) When Bond Not Required.....	363
(e) Bond: Amendment: Increase	364
(f) Bond: Liability of Surety.....	364
(g) Bond: Release of Lien; Notice of Lis Pendens.....	364
(h) Bond Effective as to Parties Filing Same.....	364
(i) Endorsement When Granted.....	364
(j) Stay of Execution	364
Rule 114. Costs:	
(a) Fees of Clerk.....	366
(b) Proceedings by Poor Person.....	366
(c) Costs	366
(d) Statement to Trial Court.....	366
Rule 115. Abstracts, Briefs, Motions and Withdrawal of Papers.....	367
(a) Abstracts of Record; Contents.....	367
(b) Briefs, When Filed.....	367
(c) Briefs, Contents	367
(d) Failure to File Abstract or Brief.....	368
(e) Time to File.....	368
(f) Motions and Briefs Thereon.....	369
(g) Amicus Curiae	369
(h) Printing or Typewriting Abstracts and Briefs.....	369
(i) Copies to be Served or Filed.....	369
(j) Withdrawal of Papers from Files.....	369
(k) Industrial Commission.....	369
Rule 116. Original Jurisdiction	372
Rule 117. Oral Arguments	374
Rule 118. Disposition of Cause:	
(a) Failure to Prosecute Writ.....	374
(b) Advancement on Docket	374
(c) Rehearings	375
(d) Affirmation	375
(e) Reversal	375
(f) Disposition of Cause.....	375
(g) Remittitur	375
(h) Copies of Opinion.....	376
Rule 119. Sessions and Terms:	
(a) Sessions En Banc and in Departments.....	378
(b) Terms	378
Chapter XVIII. Military Service Provisions:	
Rule 120. Orders Authorizing Sales Under Powers:	
(a) Motion and Notice.....	379
(b) Sales of Real Estate.....	379
(c) Hearing and Order.....	379
(d) Return of Sale.....	380
(e) Docket Fee.....	380

Chapter XIX. Rules Governing Admissions to the Bar:	Page
Rule 201. Examining Committees.....	381
Rule 202. Classifications of Applicants.....	381
Rule 203. Applications in Duplicate; When Filed.....	381
Rule 204. Affidavit as to Qualifications; Examination Fees.....	382
Rule 205. Additional Affidavit in Classes A, B, and C.....	382
Rule 206. Proof of Requirements.....	382
Rule 207. Qualifications Preliminary to Law Study.....	382
Rule 208. Classes C and D.....	382
Rule 209. Admissions Not Entitled to Credit.....	382
Rule 210. Proof of Moral and Ethical Qualifications.....	382
Rule 211. Proof of Educational Qualifications	383
Rule 212. Proof of Legal Educational Qualifications	383
Rule 213. Special Credits in Class C.....	383
Rule 214. Semi-Annual Examinations.....	383
Rule 215. Character Certificates Transferred to Bar Committee.....	383
Rule 216. Personal Interviews.....	383
Rule 217. Additional Examinations	383
Rule 218. Notice of Applications; Objections; Reports and Recommendations	384
Rule 219. Applications Considered; Objections Heard.....	384
Rule 220. All Admissions by Order En Banc.....	384
Rule 221. Date for Administration of Oath.....	385
Rule 222. Oath of Admission, Discipline for Violation, and Code of Ethics.....	385
Rule 223. Violation of Oath Cause for Discipline.....	385
Rule 224. Effect of Disbarment in Another State.....	385
Rule 225. Disbarment Upon Conviction of a Felony; Reinstatement.....	385
Rule 226. Persons Not Permitted to Practice.....	386
Rule 227. Rules Applicable to Probate Practice.....	386
Rule 228. Canons of Ethics	386
Rule 229. Establishment and Administration of "Examination Fund".....	386
Chapter XX. Discipline of Attorneys:	
Rule 241. Title of Proceedings.....	387
Rule 242. Pleadings, Service	387
Rule 243. Evidence	387
Rule 244. Delay	387
Rule 245. Briefs and Arguments.....	387
Rule 246. Orders	387
Rule 247. Costs	387
Rule 248. Duty of Grievance Committee	387
Rule 249. Informal Hearings.....	387
Rule 250. Attorney General	388
Chapter XXI. Library:	
Rule 261. Abstracts and Briefs.....	388
Rule 262. Withdrawal of Books; Abuse of Privileges.....	388
Rule 263. Silence in Library.....	388
Rule 264. Proof of Parts of Book.....	388

Appendix A. Forms:	Page
Form 1. Summons	390
Form 2. Allegation of Jurisdiction.....	390
Form 3. Complaint on a Promissory Note.....	390
Form 4. Complaint on an Account.....	391
Form 5. Complaint for Goods Sold and Delivered.....	391
Form 6. Complaint for Money Lent.....	391
Form 7. Complaint for Money Paid by Mistake.....	391
Form 8. Complaint for Money Had and Received.....	392
Form 9. Complaint for Negligence.....	392
Form 10. Complaint for Negligence Where Plaintiff Is Unable to Determine Definitely Whether the Person Responsible Is C. D. or E. F. or Whether Both Are Responsible and Where His Evidence May Justify a Finding of Wilfulness or of Recklessness or of Negligence	392
Form 11. Complaint for Conversion.....	392
Form 12. Complaint for Specific Performance of Contract to Convey Land....	393
Form 13. Complaint on Claim for Debt and to Set Aside Fraudulent Con- veyance under Rule 18(b).....	393
Form 14. Complaint for Interpleader and Declaratory Relief.....	393
Form 15. Motion to Dismiss, Presenting Defenses of Failure to State a Claim, and of Lack of Service of Process.....	394
Form 16. Answer Presenting Defenses under Rule 12(b).....	395
Form 17. Answer to Complaint Set Forth in Form 8, with Counterclaim for Interpleader	396
Form 18. Motion to Bring in Third-Party Defendant.....	396
Form 19. Motion to Intervene as a Defendant under Rule 24.....	398
Form 20. Motion for Production of Documents, etc., under Rule 34.....	399
Form 21. Request for Admission under Rule 36.....	400
Form 22. Allegation of Reason for Omitting Party.....	400
Form 23. Writ of Garnishment.....	401

Appendix B. Miscellaneous Provisions of the Code of Civil Procedure:	
Sec. 1. Limitation of One Year from March 14, 1923, to Set Aside Judg- ment against Unknown Parties.....	403
Sec. 2. Libel and Slander; How Pleaded.....	403
Sec. 3. Same; Pleading and Evidence.....	403
Sec. 4. Funds of State and Municipal Corporations Subject to Garnishment; Salaries and Fees Exempt.....	406
Sec. 5. Other Salaries, Wages and Fees.....	406
Sec. 6. Summons; How Served.....	406
Sec. 7. Garnishee to Answer.....	407
Sec. 8. Order of Court.....	407
Sec. 9. Injunction to Stay Proceedings at Law; Venue.....	407
Sec. 10. Judgment Docket Open for Inspection.....	407
Sec. 11. Transcript of Justice's Judgment May Be Filed in District Court; Execution; Lien.....	407
Sec. 12. Mortgage Not Deemed a Conveyance; Trust Deeds.....	408
Sec. 13. Who May Administer Oaths.....	411
Sec. 14. Affirmation; Form; Perjury.....	411

	Page
Appendix B. Miscellaneous Provisions of the Code of Civil Procedure—Continued	
Sec. 15. How Seal Attached.....	412
Sec. 16. Judges and Justices May Take Acknowledgments, etc.....	412
Sec. 17. Action Not Affected by Vacancy.....	412
Sec. 18. Proceedings in English; Abbreviations.....	412
Sec. 19. Courts with Seal.....	413
Sec. 20. Clerk to Keep Seal.....	413
Sec. 21. How Seal Affixed.....	413
Sec. 22. Juridical Days.....	413
Sec. 23. Judicial Holidays.....	413
Sec. 24. Adjournment by Clerk in Absence of Judge.....	413
Sec. 25. Courts Sit at County Seat.....	414
Sec. 26. Actions against Sheriff.....	414
Sec. 27. Powers of Court.....	415
Sec. 28. When Judge Shall Not Act Unless by Consent.....	415
Sec. 29. Judge May Not Act as Attorney.....	415
Sec. 30. Judge or Justice Not to Have Law Partner.....	416
Sec. 31. Courts May Issue Proper Writs; Ne Exeat.....	416
Sec. 32. Terms of Court; When and Where Held.....	416
Sec. 33. Judges to Conserve the Peace.....	416
Sec. 34. Powers of County Courts and Judges.....	416
Appendix C. Canons of Ethics	417
Appendix D. Addresses by Members of Revision Committee.....	427
Appendix E. Criminal Rules	543



COLORADO RULES OF CIVIL PROCEDURE

INCLUDING

NOTES AND REFERENCES BY THE BAR COMMITTEE

CHAPTER I.

SCOPE OF RULES, ONE FORM OF ACTION,
COMMENCEMENT OF ACTION, SERVICE OF PROCESS,
PLEADINGS, MOTIONS AND ORDERS.

Rule 1. Scope of Rules.

C (a) Procedure Governed. These rules govern the procedure in the supreme, district, county and juvenile courts, or in any other court of record which may be hereafter created in the state of Colorado, in all actions, suits and proceedings of a civil nature, whether cognizable at law or in equity, and in all special statutory proceedings, except as stated in Rule 81. They shall be liberally construed to secure the just, speedy, and inexpensive determination of every action. [From Federal Rule 1, and Code Secs. 1, 41, 46 A, 83, 157, 297, 418, and 479.]

Committee Note.

See Rules 8 (f) and 110 (a) for construction of pleadings and amendments.

C (b) Effective Date. These rules will take effect on April 6, 1941, and thereafter all laws in conflict therewith shall be of no further force or effect. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies. [From Federal Rule 86.]

- I. Scope and Purpose of Rules.
- II. Substantive Law as applied to Procedure.

References.

For a concise summary of the provisions of the Federal Rules, see article entitled, "Digest of New Federal Rules of Civil Procedure" by Mr. G. Dexter Blount of the Denver Bar in Nebraska Law Bulletin, vol. XVII, p. 391. See also, the discussion of

the new rules in the article entitled, "Some Current Trends in the Construction of the Federal Rules" by Mr. James A. Pike, in the George Washington Law Rev., vol. IX, pp. 26 et. seq. For a discussion of this rule, see Address no. 3 in appx. D.

I. SCOPE AND PURPOSE OF RULES.

With certain exceptions these rules are a completed merger of the Federal Rules

and the Code.—Except for the excluded special proceedings, which are enumerated in Rule 81, these rules are a completed merger of the Federal Rules and the Code. In the main the committee has made one system of practice for both courts, in the main both federal and Colorado decisions will be applicable to the subdivisions of the rules because the committee has followed the same structural system, and in the main believe that our proposed rules will be a great advance on the Code of Civil Procedure. See article entitled, "The Federal Rules from the Standpoint of the Colorado Code" by Col. Philip S Van Cise, Chairman of Rules Committee, Dicta XVII, no. 7. pp. 170, 176.

They were adopted to simplify practice.—One of the primary purposes of Rules of Civil Procedure is to simplify practice in the federal courts and to eliminate the doing of useless things. Miles Laboratories v Seignious, 30 F. Supp. 549.

The rules were adopted not only to simplify procedure but to relieve rather than add to the burden of the motion judge. Nekrasoff v United States Rubber Co., 27 F. Supp. 953.

The purpose of the rules is to cut through the maze of technicalities which have heretofore existed, and to enable the court to do a greater measure of moral justice under the law. Mackerer v New York Cent. R. Co., 1 F. R. D. 408.

Courts should construe the new Rules of Civil Procedure so as to work substantial justice in all cases and avoid a strict, technical interpretation which might work a hardship on the litigants. United States v One Ford Coupe, 26 F. Supp. 598.

And to secure a just, speedy and inexpensive determination of every action.—The scope of the Rules of Civil Procedure requires their construction to secure a just, speedy and inexpensive determination of every action. Thomas v Goldstone, 27 F. Supp. 297; Michels v Ripley, 1 F. R. D. 332; Jacobson v Stock & Sons, 1 F. R. D. 138; McPherrin v Hartford Fire Ins. Co., 1 F. R. D. 88; National Bondholders Corp. v McClintic, 99 F. (2d) 595.

In an able and well-considered article entitled, "Twelve Months Under the New Rules of Civil Procedure," by Mr. Holtzoff, in American Bar Association Journal, January 1940 issue, p. 45, Mr. Holtzoff has succinctly stated the purposes of the new rules, as follows: "The purpose of the new procedure has been to throw into discard the technicalities that acted as a brake on the progress of a lawsuit; to abolish what has been so aptly termed as 'the sporting theory of justice'; to provide efficient machinery for the ascertainment of truth; and to expedite a determination of each con-

troversy on the merits." Mackerer v New York Cent. R. Co., 1 F. R. D. 408, 410.

The intention of the rules is to expedite litigation, to save cost, and principally and primarily to reach justice by obtaining a full disclosure of the truth in connection with any controversy. Boysell Co. v Colonial Coverlet Co., 29 F. Supp. 122.

The rules were promulgated for purpose of expediting litigation and conserving the time of the courts, and at the same time of securing to all parties the protection of rights and interests which law and justice require. Madison v Cobb, 29 F. Supp. 881.

To require uniform practice and procedure.—One of the purposes for the adoption of the uniform rules was to require uniform practice and procedure. Oklahoma v Missouri-Kansas-Texas R. Co., 29 F. Supp. 968.

The purpose in adoption of the new rules was to unify and simplify the procedure in District Courts in civil actions. United States v Schine Chain Theatres, 1 F. R. D. 205.

To dispose of whole controversies in one action.—The rules are designed to enable the disposition of a whole controversy of interested parties' conflicting claims, at one time and in one action, provided all parties can be brought before court and matter decided without prejudicing rights of any party. United States v American Surety Co., 25 F. Supp. 700.

And to permit decision on the merits with a minimum of procedural incumbrances.—The Rules of Civil Procedure were enacted for the purpose of permitting decision on the merits with a minimum of procedural incumbrances. Fox v House, 29 F. Supp. 673. See United States v 20.08 Acres of Land, etc., 35 F. Supp. 265.

The purpose of the Rules of Civil Procedure is to eliminate technicalities, delays, and expenses and to secure prompt and effective adjudication on the merits when a cause of action is set forth. Marin v Knopf, 1 F. R. D. 436.

The Federal Rules contemplate decision of controversies on merits without unreasonable delay, rather than dismissal thereof on technicalities. Moore v Illinois Cent. R. Co., 24 F. Supp. 731.

The rules permit court to deal with case on the merits, and look through form to substance. Giesy v American Nat. Bank, 31 F. Supp. 524. Such was the state of the law in Colorado prior to the adoption of the new rules. See Waite v People, 83 Colo. 162, 175, 262 p. 1009.

Proceeding for directory orders for purpose of correcting record in a criminal case

to show actual sentence imposed and for determination of period of imprisonment required to be served by petitioner, wherein petitioner filed order to show cause, petition, and affidavit, and represented proceeding as one brought under Civil Procedure Rules, and certain of respondents voluntarily appeared and failed to object to form of pleadings, and requested court to consider matter on merits, court would ignore irregularities which were apparent and would consider matter as being a properly instituted proceeding for relief. *United States v. Rollnick*, 33 F. Supp. 863.

Liberality rather than restriction of interpretation should be the guiding rule in applying the Rules of Civil Procedure. *Chemo-Mechanical Water Imp. Co. v. Milwaukee*, 29 F. Supp. 45. See *Gray v. Schoonmaker*, 30 F. Supp. 1019; *United States v. Crescent Amusement Co.*, 31 F. Supp. 730.

The new procedural rules must be given a liberal interpretation, but must not be so construed as to cause or encourage delay in the speedy disposition of cases. *United States v. Shuman*, 1 F. R. D. 251.

Niceties of argument which lose sight of the purposes of the rules should find no place in the interpretation of such rules. *French & Sons v. Carleton Venetian Blind Co.*, 1 F. R. D. 178.

But the courts should not thereby circumvent the rules.—*Cohen v. Pennsylvania R. Co.*, 30 F. Supp. 419. See *Johnson v. Schlitz Brewing Co.*, 28 F. Supp. 650.

The rules were designed to permit liberal examination and discovery, but were not intended to be made the vehicle through which one litigant could make use of opponent's preparation of case. *McCarthy v. Palmer*, 29 F. Supp. 585.

Although rules are to be liberally construed, it was never intended to revolutionize practice by allowing fishing excursions. *French & Sons v. Carleton Venetian Blind Co.*, 30 F. Supp. 903.

The rules of civil procedure cannot be successfully invoked to make material relevant that is not within the issues of the cause. *McInerney v. McDonald Const. Co.*, 28 F. Supp. 557.

Cited in *Lewis v. United Air Lines Transport Corp.*, 31 F. Supp. 617; *Baker v. Sisk*, 1 F. R. D. 232.

II. SUBSTANTIVE LAW AS APPLIED TO PROCEDURE.

Cross reference.—See Address no. 2 in appx. D.

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, denied to the national government

any "general law" outside of specific statutory or constitutional grants of power and admonished the federal courts to look to the state precedents for the basic law which they should apply except for those federal specialties definitely committed to them. See article entitled, "The Tompkins Case and the Federal Rules" by Hon. Charles E. Clark, 1 F. R. D. 417.

In personal injury case removed to federal court from state court, wherein defendant moved to have issue of fraudulent release tried by court without a jury, federal court would submit issue to jury with other legal issues, in accordance with common practice and approved procedure under state's code pleading, thus avoiding conflict between law in federal and state courts where law is not declared by Federal Constitution, statute, controlling decision, or rules of civil procedure. *Beagle v. Northern Pac. Ry. Co.*, 32 F. Supp. 17, wherein it was said that this is a typical situation where the rule in *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, should be applied.

Statute on libel and slander and statutes of limitations.—*Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, holds that in matters of substantive law where the claim arises under the state law, not only are the federal courts bound by the interpretation placed by the state courts upon the statutes of the state, but are also bound by the state construction of the common and non-statutory law of the state. So far the committee has found only two places in Colorado where these matters of substantive law might apply to pleading. The first is the Colorado statute on libel and slander, section 75 of the code (now § 3, appx. B). The second instance is the difference between the statutes of limitations on causes of action arising in Colorado and those arising in a foreign state. See article entitled, "The Federal Rules from the Standpoint of the Colorado Code" by Col. Philip S. Van Cise, Chairman of Rules Committee, Dicta XVII, no. 7, p. 170.

The abolition of distinctions in forms of actions does not preclude application of state statutes of limitations based upon differences in forms of action. *Williamson v. Columbia Gas, etc., Corp.*, 110 F. (2d) 15.

Burden of proof as affected by substantive law.—In Illinois and New York the statutes require the plaintiff in a damage suit to plead and prove his freedom from contributory negligence. This was held substantive law, which must be followed. *Francis v. Humphrey*, 25 F. Supp. 1; *Schopp v. Muller Dairies*, 25 F. Supp. 50. In matters of evidence and procedure therein, the committee likewise finds that where

substantive law enters in, the state decisions control. One Colorado rule comes to mind. In an unbroken line of decisions, from *Knox v McFarran*, 4 Colo. 586, to *Fleming v McFerson*, 94 Colo. 1, 28 p. (2d) 1013, the Colorado Supreme Court has held that a party has the right to rely upon a recorded deed, and that the burden of showing that he is not a bona fide purchaser for value is upon the one so asserting. This is the same as the Texas rule.

And the Supreme Court of the United States, in *Cities Service Oil Co. v Dunlap*, 308 U. S. 208, 60 S. Ct. 201, 84 L. Ed. 185, held in an action to quiet title by the holder of the recorded deed that the burden of proving those facts was on the respondent. See article entitled, "The Federal Rules from the Standpoint of the Colorado Code" by Col. Philip S. Van Cise, Chairman of Rules Committee, *Dicta XVII*, no. 7, p. 170.

Rule 2. One Form of Action.

There shall be one form of action to be known as "civil action."

Cross reference.—For discussion of this rule, see Address no. 3 in appx. D.

Law and equity are united in one form of action.—There is first, of course, the union of law and equity, with but one form of action, the so-called united procedure, wherein there are no longer different entrances to the court, or different sides of the court when you get there. There is just one form of proceeding for all civil actions. See article entitled, "Fundamental Changes Effected By the New Federal Rules" by Hon. Charles E. Clark, *XV Tenn. Law Rev.*, no. 6, pp. 551, 552.

Thus a litigant is not required to choose between pursuit of remedy at law or remedy in equity. *Palmer v Palmer*, 31 F. Supp. 861.

And a suit is not subject to be dismissed on ground that it is in form a suit in equity whereas it should have been brought as a suit at law. *Thermex Co. v Lawson*, 25 F. Supp. 414.

Nor is a bill of complaint setting forth a cause of action at law rather than in equity required to be amended for purpose of transferring action to law side of court in view of procedural rule stating that there shall be one form of action to be known as civil action. *Independence Shares Corp. v Deckert*, 108 F. (2d) 51.

With the advent of the new rules, federal equity rule regarding transfer of action at law erroneously begun as suit in equity and statute regarding amendments to pleadings when case has been brought on wrong side of court have been superseded. *Grauman v City Co.*, 31 F. Supp. 172.

The new rules have rendered anachronistic the technical niceties pertaining to

terms of court as to both law and equity. *Sprague v Ticonic Nat. Bank*, 307 U. S. 161, 59 S. Ct. 777, 83 L. Ed. 1184.

But substantive distinctions between law and equity are not abolished.—The new Rules of Civil Procedure abolishing procedural distinctions between actions and forms of action at law and in equity have not abolished the substantive distinction between law and equity. *Grauman v City Co.*, 31 F. Supp. 172. See notes to Rule 38, analysis line II, B, 1.

The Rules of Civil Procedure have abolished the distinction in procedure between law and equity but they have not abolished the distinction between legal and equitable remedies. *Williams v Collier*, 32 F. Supp. 321.

By moving to transfer case from equity to law side of court, defendant submitted to jurisdiction of the court and could not then reserve right to object to venue of suit, especially under new federal rules of civil procedure which provided for only one civil action without distinction as to whether relief is to be legal or equitable. *Commonwealth Trust Co. v Reconstruction Finance Corp.*, 28 F. Supp. 586.

For "the forms of action and the distinction between law and equity are still important in three connections: (1) the determination of the applicable period of limitation; (2) the application of the substantive law and the propriety of certain remedies; and (3) the determination of the right to jury trial." See article entitled, "Some Current Trends in the Construction of the Federal Rules" by Mr. James A. Pike in the *George Washington Law Rev.*, vol. IX, pp. 26, 29.

Under the new Rules of Civil Procedure, the distinction between legal and equitable relief becomes important only when a party demands a jury trial. *Grauman v City Co.*, 31 F. Supp. 172.

Relief should be granted when any basis therefor exists.—Under federal rules of civil procedure abolishing differences in the forms of claims, a plaintiff may recover, not on the basis of his allegations of damages or his theory of damages, but on the basis of facts shown in the record, and should be denied relief only when he is entitled to none under the facts proved. *Nester v Western Union Tel. Co.*, 25 F. Supp. 478.

Thus a court which could not grant injunction against trade-mark infringement

was not, under new rules, required to dismiss claim without prejudice, but had jurisdiction to grant an accounting for damages and profits. *Scovill Mfg. Co. v United States Elec. Mfg. Corp.*, 31 F. Supp. 115.

Where amended complaint charged that defendants conspired to defraud, that by reason of certain fraudulent representations made with knowledge of their falsity, and that by further reason of violation of California Corporate Securities Act, plaintiff and others were induced to purchase beneficial interests in stocks, and that the stocks were worth less than 10 per cent. of the purchase price, defendants' motion to dismiss because plaintiffs had adequate remedy at law was denied, in view of the new rules. *Grauman v City Co.*, 31 F. Supp. 172.

Rule 3. Commencement of Action.

Committee Note.

This rule is entirely state procedure.

(a) **How Commenced.** A civil action is commenced (1) by filing a complaint with the court, or (2) by the service of a summons. The complaint must be filed within 10 days after the summons is served, or the action may be dismissed without notice, and in such case the court may, in its discretion, if it shall be of the opinion that the action was vexatiously commenced, tax a reasonable attorney's fee as costs in favor of the defendant, to be recovered of the plaintiff or his attorney. [From Code Sec. 34 and Supreme Court Rule 1.]

Committee Note.

This differs from the federal procedure in Rule 3, which requires the complaint to be filed before summons is issued, while under Federal Rule 4 the summons is only issued by the clerk.

(b) **Time of Jurisdiction.** The court shall have jurisdiction from the time of filing the complaint or service of the summons. [From Code Sec. 50.]

I. How Commenced.

II. Time of Jurisdiction.

Cross Reference.

For a discussion of this rule, see Address no. 3 in appx. D.

I. HOW COMMENCED.

Cross reference.—As to form of summons, see Form I in appx. A.

Editor's note.—The Code of 1877, provided in § 29, that "civil actions * * * shall be commenced by the filing of a complaint with the clerk of the court in

which the action is brought, and the issuing of a summons therein." A very material change was made in the Code of 1887, § 32 by providing that "civil actions shall be commenced by the filing of a complaint * * * or by the service of a summons." *Stevens v Carson*, 21 Colo. 280, 282, 40 P. 569.

The practice act of 1885 required the pleadings in a cause to be filed with the clerk within ten days after service by the defendant of a copy of his answer on the attorney of the plaintiff, but imposed no duty in this regard upon the defendant. It likewise required the pleadings to be so filed in all cases before judgment or default

should be entered. Under this act a defendant who served a copy of his answer in apt time upon the attorney, and thus formed an issue, was entitled to defend the action although his answer was not tendered for filing within the ten days; and the court erred in denying his application for leave to file his answer, and in rendering judgment by default against him. *Haley v. Breeze*, 16 Colo. 167, 26 P. 343.

Under federal procedural rules, an action is not commenced until a complaint has been filed with the court. *Simonin's Sons v. American Can Co.*, 26 F. Supp. 420. But note that under the instant Colorado provision, a civil action is also commenced "by the service of a summons."

Actions may properly be held to be commenced for one purpose though not for another. *Green v. Davis*, 67 Colo. 52, 54, 185 P. 369.

Dismissal for failure to file complaint within time allowed is discretionary.—Authority to dismiss an action for failure to file the complaint within the time prescribed rests in the sound legal discretion of the court. *Knight v. Fisher*, 15 Colo. 176, 25 P. 78, cited in notes, 24 L. R. A. (N. S.) 35, 52 A. L. R. 44, 84 A. L. R. 254; *Burkhardt v. Haycox*, 19 Colo. 339, 343, 35 P. 730.

This is because the phrase "may be dismissed" is not the language of a command, nor of a penalty. It indicates rather that the authority of the court to dismiss the action rests in sound legal discretion. It should be accordingly so exercised. *Knight v. Fisher*, 15 Colo. 176, 179, 25 P. 78, cited in notes, 24 L. R. A. (N. S.) 35, 52 A. L. R. 44, 84 A. L. R. 254.

But this discretion should not be arbitrarily exercised. *Burkhardt v. Haycox*, 19 Colo. 339, 343, 35 P. 730, citing *Knight v. Fisher*, 15 Colo. 176, 25 P. 78, cited in notes, 24 L. R. A. (N. S.) 35, 52 A. L. R. 44, 84 A. L. R. 254.

In *Hoy v. Leonard*, 13 Colo. App. 449, 451, 59 P. 229, it was said that in view of the fact alone that defendants did not interpose the motion to dismiss until nearly one year after the filing of the complaint, it would seem to conclusively appear that there was no abuse of discretion in denying the motion.

Case reinstated where seasonable complaint mislaid.—Where a case has, arbitrarily and ex parte, been dismissed at the instance of defendant without notice to plaintiff on the alleged ground of failure to file the complaint within ten days, the court may, on a showing that the complaint had been seasonably lodged in the clerk's office and had been mislaid, set aside the dismissal and reinstate the case. *Howell v. Goldberg*, 98 Colo. 412, 56 P. (2d) 1330.

Examples under Federal Rules.—Where complaint in action by residents of Delaware for injuries sustained in automobile collision in Pennsylvania was filed in Federal District Court for Eastern District of New York within two years after collision, action was not barred by two-year limitation of Pennsylvania statute though service of summons and complaint was not made until after expiration of two-year period. *Gallagher v. Carroll*, 27 F. Supp. 568.

An action by Delaware resident for injuries sustained in automobile collision in Pennsylvania was "commenced," as respects limitations, when complaint was filed in Federal District Court for Eastern District of New York. *Id.*

An action on notes was "commenced" by the filing of the complaint and the issuance of the original writ before notes were barred by Michigan six-year statute of limitations, and plaintiff's rights were preserved even though notes were barred when service was actually obtained on defendant. *Schram v. Koppin*, 35 F. Supp. 313.

II. TIME OF JURISDICTION.

Filing of complaint gives jurisdiction of subject-matter but not of person.—The filing of a complaint gives the court jurisdiction of the subject-matter of the action, not of the person. *Empire Ranch, etc., Co. v. Coldren*, 51 Colo. 115, 123, 117 P. 1005, cited in note, 25 A. L. R. 1259.

And court has jurisdiction if complaint states facts which authorize entry of judgment.—Where a complaint was filed stating facts which, if proven, would authorize the court to enter a judgment in favor of the plaintiff and against defendant for the indebtedness claimed, an action was pending on such date, and on such date the court had acquired jurisdiction thereof. *Powell v. National Bank*, 19 Colo. App. 57, 63, 74 P. 536.

Even if such complaint contains no prayer for judgment.—Where a complaint was filed alleging facts which would entitle plaintiff to a money judgment, it was sufficient to give the court jurisdiction of the subject-matter notwithstanding the complaint contained no demand or prayer for judgment. *Powell v. National Bank*, 19 Colo. App. 57, 74 P. 536.

And dismissal is not justified because of lack of jurisdiction of defendant's person.—It would not be proper to dismiss the cause, even though jurisdiction of defendant's person was lacking, where the action was instituted and jurisdiction of the court acquired by the filing of the complaint. *Everett v. Wilson*, 34 Colo. 476, 481, 83 P. 211, cited in note, 55 A. L. R. 1127.

Rule 4. Process.**Committee Note.**

All of this rule is state procedure, modified, except subdivision (j), which is Federal Rule 4 (h) verbatim.

(a) **To What Applicable.** This rule applies to all process except as otherwise provided by these rules. [New.]

Committee Note.

For subpoena see Rule 45; for attachment see Rule 102 (f).

(b) **Issuance of Summons by Attorney or Clerk: All Other Process by Clerk.** The summons may be signed and issued by the clerk, under the seal of the court, or it may be signed and issued by the attorney for the plaintiff. Separate, additional or amended summons may issue against any defendant at any time. All other process shall be issued by the clerk, except the writ of garnishment which shall be issued by the sheriff. [From Code Secs. 35, 43, 133 and 134.]

Committee Note.

For garnishment see Rule 103 (d).

(c) **Contents of Summons.** The summons shall contain the name of the court, the names or designation of the parties to the action, the county in which it is brought, be directed to the defendant, state the time within which the defendant is required to appear and defend, and shall notify him that in case of his failure to do so, judgment by default will be rendered against him. If the summons be served without a copy of the complaint, or by publication, the summons shall briefly state the sum of money or other relief demanded. If an execution is sought against the body of the defendant, the summons shall state that the action is founded upon tort. [From Code Sec. 36, and 3 C. S. A., Chap. 93, Secs. 73, 74.]

(d) **By Whom Served.** Process may be served:

(1) Within the state, by the sheriff of the county where the service is made, or by his deputy, or by any other person over the age of 18 years, not a party to the action. [From Code Secs. 39, 42, 162.]

(2) In another state or United States territory, by the sheriff of the county where the service is made, or by his deputy, or by a United States marshal, or his deputy. [From Code Sec. 45.]

(3) In a foreign country, by a United States consul, or by some person over the age of 18 years appointed by such consul. [From Code Sec. 45.]

(e) **Personal Service in State.** Personal service within the state shall be as follows:

(1) Upon a natural person over the age of 18 years, by delivering a copy thereof to him, or by leaving a copy at his usual place of abode, with some member of his family over the age of 18 years, or at his usual place of business, with his stenographer, bookkeeper, or chief clerk; or by delivering

a copy to an agent authorized by appointment or by law to receive service of process. [From Code Sec. 40, first, second, third.]

(2) Upon a natural person, under the age of 18 years, by delivering a copy thereof to him and a copy thereof to his father, mother or guardian, or if there be none in the state, then by delivering a copy thereof to any person in whose care or control he may be, or with whom he resides, or in whose service he is employed. [From Code Sec. 40, tenth.]

(3) Upon a person for whom a conservator has been appointed, by delivering a copy thereof to such conservator. [From Code Sec. 40, eleventh.]

(4) Upon a partnership, or other unincorporated association, by delivering a copy thereof to one or more of the partners or associates, or a managing or general agent thereof. [From Code Sec. 14.]

(5) Upon a private corporation, by delivering a copy thereof to any officer, manager, general agent, or agent for process. If no such officer or agent can be found in the county in which the action is brought, such copy may be delivered to any stockholder, agent, member or principal employee found in such county. If such service be upon a person other than an executive officer, the secretary, general agent, or agent for process, then the clerk shall mail a copy thereof to the corporation at its last known address, at least 15 days before default is entered. [From Code Sec. 40, seventh, eighth, ninth, and Sec. 46.]

(6) Upon a municipal corporation, by delivering a copy thereof to the mayor or clerk of such corporation. [From Code Sec. 40, fourth.]

(7) Upon a county, by delivering a copy thereof to the county clerk or his chief deputy. [From Code Sec. 40, fifth.]

(8) Upon a school district, by delivering a copy thereof to the clerk or one of the directors of such school district. [From Code Sec. 40, sixth.]

(9) Upon a department or agency of the state, subject to suit, by delivering a copy thereof to the principal officer, chief clerk, or other executive employee thereof. [New.]

(f) **Personal Service Outside the State.** Personal service outside the state upon a natural person over the age of 18 years may be made (1) in any action where the person served is a resident of this state and (2) in any action affecting specific property or status or in any other proceeding in rem without regard to the residence of the person served; such service shall be made by delivering a copy of the process together with a copy of the complaint in person to the person served. [Wyo. Comp. Statutes 1920, Secs. 5636, 5641.]

Committee Note.

Under *Milliken v. Meyer*, 311 U. S., 61 S. Ct. 339, 85 L. Ed. 269, a judgment in personam may be entered upon personal service of process outside the state upon a resident of this state.

(g) **Other Service.** Service by mail or publication shall be allowed only in cases affecting specific property or status or in other proceedings in rem. [From Code Sec. 45.]

(1) If the person to be served is without the state of Colorado, the party desiring service by mail shall file a motion verified by the oath of such party or of some one in his behalf for an order for service by mail. Such motion shall state the facts showing why such method of service is advisable, and the address of the person to be served. The court may, after hearing the motion ex parte, direct the clerk to send by registered mail a copy of the process and a copy of the complaint, addressed to such person at such address, requesting a return receipt signed by addressee only. Such service shall be complete on the date of the filing of the clerk's proof thereof, together with such return receipt attached thereto signed by such addressee. [New.]

(2) Service by publication may be had on the following parties:

(i) Unknown persons. [From Code Sec. 50 (b).]

(ii) Domestic corporations. When such corporation cannot be served because no person can be found upon whom such service can be made. [From Code Sec. 46.]

(iii) Foreign corporations. When such corporation has not appointed a statutory agent for process, or when the agent appointed cannot be found at the address stated in such appointment. [New.]

(iv) Non-residents of the state; persons who have departed from the state without intention of returning; persons who conceal themselves to avoid service of process; or persons whose residence and whereabouts are unknown and who cannot be found in the county where the case is pending. [From Code Sec. 45 (b).]

(h) **Publication.** The party desiring service of process by publication shall file a motion verified by the oath of such party or of some one in his behalf for an order of publication. It shall state the facts authorizing such service, and shall show the efforts, if any, that have been made to obtain personal service within this state and shall give the address, or last known address, of each person to be served or shall state that the same is unknown. The court shall hear the motion ex parte and, if satisfied that due diligence has been used to obtain personal service within this state, or that efforts to obtain the same would have been of no avail, shall order publication of the process in a newspaper published in the county in which the action is pending. Such publication shall be made at least once a week for four successive weeks. Within 10 days after the order the clerk shall mail a copy of the process to each person whose address has been stated in the motion. Service shall be complete on the day of the last publication. If no newspaper be published in the county, the court shall designate one in some adjoining county. [From Supreme Court Rule 14 A, Code Secs. 45, 46, 47 and 50.]

Committee Note.

Four weeks means five publications. See 4 C. S. A., Chap. 130, Sec. 6, for number of publications; see the balance of the chapter as to publication generally.

(i) **Manner of Proof.** Proof of service of process shall be made as follows:

(1) If served by a sheriff or United States marshal, or a deputy, by his certificate with a statement as to date, place and manner of service. [From Code Sec. 49.]

(2) If by any other person, by his affidavit thereof, with the same statement. [From Code Sec. 49.]

(3) If by mail, by the certificate of the clerk showing the date of the mailing, and the date he received the return receipt. [New.]

(4) If by publication, by the affidavit of publication, together with the certificate of the clerk as to the mailing of copy of the process where required. [From Code Sec. 49.]

(5) By the written admission or waiver of service by the person to be served, duly acknowledged. [From Code Sec. 44.]

Committee Note.

For certificate see Rule 110 (c).

(j) **Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued. [This is Federal Rule 4 (h) verbatim. It supplants Code Sec. 41.]

(k) **Refusal of Copy.** If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof. [From Code Sec. 44.]

I. Issuance of Summons by Attorney or Clerk.

II. Contents of Summons.

- A. In General
- B. Naming of Parties.
- C. Statement of Nature of Action.
- D. Statement of Money or Other Relief Demanded.
- E. Raising, Waiving and Curing Defects.

III. By Whom Served.

IV. Personal Service in State.

- A. General Consideration.
- B. Upon Person Over Eighteen Year of Age.
- C. Upon Person Under Eighteen Years of Age.
- D. Upon a Partnership.
- E. Upon a Private Corporation.

V. Personal Service Outside the State.

VI. Publication.

- A. General Consideration.
- B. When Proper.

C. Proceedings to Obtain.

- 1. General Rules.
- 2. The Affidavit.
 - a. In General.
 - b. Must Give Address or State That It Is Unknown.
 - c. Affidavits Held Sufficient.
- 3. Order.
- 4. The Publication.
- 5. Mailing of Summons.

VII. Manner of Proof.

- A. General Consideration.
- B. Written Admissions or Waiver.

Cross Reference.

For a discussion of this rule see Address no. 3 in appx. D.

I. ISSUANCE OF SUMMONS BY ATTORNEY OR CLERK.

Editor's note.—Most of the cases appearing below were decided prior to the promulgation of the rules. Since this rule is, for the most part, state procedure (see

committee note) it is thought by the editor that these cases may prove helpful to the Colorado practitioner.

Lawyer may issue summons.—About 1912 the Supreme Court made a rule limiting the issuance of summons to the clerk, and such a protest arose from the bar that it was quickly repealed. The advantage of the practice is that in case of an emergency a lawyer can forthwith get out a summons and serve the defendant, and this is of particular value in a large city or when the lawyer does not live in the county seat. Hence the Colorado practice was retained and the lawyer can issue the summons. However, many lawyers wonder about the constitutional right of a lawyer to issue a summons, which is a court process in the name of "The People of the State of Colorado." See article entitled, "The Federal Rules from the Standpoint of the Colorado Code" by Col. Philip S. Van Cise, Chairman of Rules Committee, Dicta XVII, no. 7, pp. 170, 173.

A summons not issued and signed either by the clerk or plaintiff's attorney is no summons, and an acceptance of service of a purported summons which was signed by neither the clerk nor plaintiff's attorney would be no acceptance of service of summons. But entry of appearance by defendant to an action waives objections to summons or service thereof. *Russell v Craig*, 10 Colo. App. 428, 51 P. 1017.

A summons is not a "writ" or "process" within meaning of constitution.—In *Porter v Vandercook*, 11 Wis. 70, it was held that "the summons provided for by the code is not a 'writ' or 'process' within the meaning of the constitution." *Comet Consol. Min. Co. v Frost*, 15 Colo. 310, 313, 25 P. 506. See also, *Hanna v Russell*, 12 Minn. 80 (Gil. 43); *Bailey v Williams*, 6 Ore. 71; *Nichols v Burlington, etc., Plank-road Co.*, 4 G. Greene (Iowa) 42, 44.

In *Gilmer v Bird*, 15 Fla. 411, cited in *Comet Consol. Min. Co. v Frost*, 15 Colo. 310, 313, 25 P. 506, it was said that "there is no definition of 'process,' given by any accepted authority, which implies that any writ or method by which a suit is commenced is necessarily 'process.' A party is entitled to notice and to a hearing under the constitution before he can be affected, but it is nowhere declared or required that that notice shall be only a writ issuing out of a court."

And therefore may be signed by attorney and need not be under seal of court. *Rand v Pantagraph Co.*, 1 Colo. App. 270, 28 P. 661, cited in note, 20 L. R. A. 425. Such a summons is subject to amendment by the court. *Erdman v Hardesty*, 14 Colo. App. 395, 60 P. 360.

A county judge may elect to perform the duties of clerk of his court and when he does so elect is authorized to issue and sign all processes from his court. But when a clerk has been appointed by a county judge, so long as the appointment is not revoked, the clerk or his deputy alone has power to discharge the clerical duties of the office, and a summons issued and signed by the judge is void notwithstanding the disqualification of the clerk to act on account of absence or sickness. *McNevins v McNevins*, 28 Colo. 245, 64 P. 199.

Defect of service cured by additional summons.—A defect of service in Pennsylvania upon foreign corporation which was served by deputy sheriff who was not specially appointed for that purpose could be cured under Federal Rule 4a by issuing an additional summons delivering it to a person specially appointed to serve it upon secretary of the commonwealth pursuant to provisions of Federal Rule 4b and a deputy sheriff could be appointed to make such service under Federal Rule 4c. *Dehne v Hillman Inv. Co.*, 110 F. (2d) 456.

II. CONTENTS OF SUMMONS.

A. In General.

Editor's note.—The cases appearing below construe provisions of the Code of Civil Procedure and must be read in the light of this fact.

Its office is to notify the defendant that an action has been brought against him and by whom, the place and court in which the same is brought, the relief demanded, and the time within which he must appear and answer in order to escape a judgment by default. *Burkhardt v Haycox*, 19 Colo. 339, 341, 35 P. 730.

Statute directing that process be in specified form is usually mandatory.—In *Sidwell v Schumacher*, 99 Ill. 426, it is said: "While there is some conflict of authority upon this subject, yet it is believed that the weight of authority establishes the proposition, that where the law expressly directs that process shall be in a specified form, and issued in a particular manner, such a provision is mandatory, and a failure on the part of the official whose duty it is to issue is, to comply with the law in that respect, will render such process void." *Smith v Aurich*, 6 Colo. 388, 391, cited in note, 44 L. R. A. (N. S.) 145.

But statute is satisfied if its object is accomplished even though exact language is not used.—If all of the material objects are clearly accomplished by the process, although other language be used than that of the statute, it would be unreasonable to say that the defendant might be heard to complain. *Kimball v Castagnio*, 8 Colo. 525, 526, 9 P. 488, cited in note, 40 Am. St. Rep. 433.

And omission of words "judgment by" before the word "default" is not necessarily fatal.—The omission to insert the words "judgment by" before the word "default" in the process in *Kimball v. Castagnio*, 8 Colo. 525, 526, 9 P. 488, cited in note, 40 Am. St. Rep. 433, was a clerical mistake; and it was held that defendant could hardly have been deceived or misled thereby. This omission, however, might be serious if there were nothing else in the process to cure the defect. But we find the following language also used: "You are hereby required to appear * * * and answer to the complaint filed herein, * * * or judgment by default will be taken against you, according to the prayer of the complaint."

And a defect to void the summons must be such as will mislead defendant to his prejudice.—It is manifest without argument that a defect in the summons which will be sufficient to constitute it void or erroneous must be of such a character as to mislead the defendant to his prejudice, and to prejudicially affect, or tend to so affect, some substantial right. This doctrine has also been repeatedly affirmed by both the supreme court and the court of appeals in respect to all errors occurring in the trial of a cause. *Rich v. Collins*, 12 Colo. App. 511, 513, 56 P. 207.

There is a wide difference between a total failure and an inaccuracy or incompleteness of a required statement, and especially so where the inaccuracy does not prejudicially affect a party nor tend in any manner to his injury. *Rich v. Collins*, 12 Colo. App. 511, 515, 56 P. 207.

B. Naming of Parties.

The words "et al" do not satisfy requirements that parties shall be named.—In the case of *Lyman v. Milton*, 44 Cal. 630, the supreme court of California considered the effect of a failure in a summons to comply with the provision, "The summons shall state the parties to the action." The defendants were Martha Ellen Milton, a widow, and her infant daughter, Ida Milton. The mother had been appointed administratrix of the estate of her deceased husband. The summons was entitled, "W. Lyman, plaintiff, v. M. E. Milton (administratrix, etc.) et al., defendants." A motion to quash the summons on the ground that it was radically defective in not stating the parties to the action, was made and overruled in the lower court. Upon this point the supreme court held that the words "et al" were of no significance, and that the summons did not state the parties to the action. *Smith v. Aurich*, 6 Colo. 388, 392, cited in note, 44 L. R. A. (N. S.) 145.

But an abbreviation of person's name may suffice to identify party.—Defendant is

not misled to his prejudice by a summons giving the Christian name of the plaintiff as "Sam." It is well and universally known as an abbreviation of Samuel, and in addition to this, the recitals of the summons itself in regard to the employment were sufficient to unquestionably identify the party. The motion to quash was not made until after the complaint was filed, and in this the plaintiff's name was given as "Samuel." *Rich v. Collins*, 12 Colo. App. 511, 514, 56 P. 207.

C. Statement of Nature of Action.

The early statute required the summons to state "the cause and general nature of the action."—In *Barndollar v. Patton*, 5 Colo. 46, 49, the following form was used: "The said action is brought to recover of the defendants herein named the sum of seven hundred twenty-six and 51/100 dollars, evidenced by a promissory note dated December 1, 1873, which is more fully set forth in the plaintiff's complaint, filed in this court in this action, duly verified, together with interest and the costs of this suit." While we cannot pronounce this a model, either in form or substance, of the notice required, yet under the liberal intendments of our code practice, it may be regarded as a sufficient compliance with the statute.

But by a subsequent statute it became no longer necessary.—Nor is it necessary that the summons shall "state the nature of the action" as was required by the Code of 1887 before the amendment of 1889. *Burkhardt v. Haycox*, 19 Colo. 339, 341, 35 P. 730; *Rich v. Collins*, 12 Colo. App. 511, 513, 56 P. 207.

And even under the early statute statement of nature of action was not necessary if copy of complaint was served.—Section 34 of the Civil Code of 1887, from which this rule derived, did not require that a summons should contain a statement of the nature of the action, if a copy of the complaint was served therewith; and when the return of the sheriff showed that a copy of the complaint had been served with the summons, the court acquired jurisdiction to enter the default of the defendant on his failure to appear. *Swein v. Newell*, 19 Colo. 397, 35 P. 734.

Summons in an action based on tort for false representations should show that the action was to recover damages for obtaining money from plaintiff by false and fraudulent representations, or by deceit. *Erisman v. McCarty*, 77 Colo. 289, 236 P. 777, cited in notes, 46 A. L. R. 170, 51 A. L. R. 51, 135.

Sufficiency of showing that action is on contract.—A summons stating that the action is for the recovery of money and interest thereon and attorney fees according to

the terms of each held to show that the action is on contract. *Erisman v. McCarty*, 77 Colo. 289, 236 P. 777, cited in notes, 46 A. L. R. 170, 51 A. L. R. 51, 135.

D. Statement of Money or Other Relief Demanded.

Editor's note.—It is again pointed out that the cases below construe provisions of the Code of Civil Procedure.

The prayer of the complaint was not an essential part of the pleading, and the cause of action was not to be determined therefrom, but resort thereto could be had not only to determine what the pleader intended by the complaint itself but what his adversary might be led to believe therefrom. *Green v. Davis*, 67 Colo. 52, 56, 185 P. 369.

So, a summons in a suit for contribution which stated that the action was brought to recover judgment for such amount as should be found to be due from each defendant, was not vulnerable to a motion to quash on the ground that it did not state the amount of money demanded. *Taylor v. Hake*, 92 Colo. 330, 20 P. (2d) 546.

The early cases held that summons which failed to comply with the provision of § 36 of the Code of Civil Procedure that it shall briefly state the sum of money or other relief demanded in the action, was fatally defective, and motion to quash should be sustained. See *Farris v. Walter*, 2 Colo. App. 450, 31 P. 231, cited in notes, 44 L. R. A. (N. S.) 145, 47 L. R. A. (N. S.) 855, Ann. Cas. 1913E, 331.

And under our code the form of the prayer seemed to be immaterial. *Waterbury v. Fisher*, 5 Colo. App. 362, 371, 38 P. 846; *Powell v. National Bank*, 19 Colo. App. 57, 62, 74 P. 536.

The prayer for relief could be aided by statements in complaint where copy thereof was served with summons.—Action to foreclose a mortgage. The complaint prayed judgment for the mortgage debt, in an amount stated, interest thereon, and for two specified sums paid by plaintiff for taxes, for the sale of the mortgaged premises, and judgment for any deficiency. The summons failed to mention the moneys demanded for taxes paid, but a copy of the complaint was served with it. Held, that the omission did not affect any substantial right of defendant, the defendant could not have been misled thereby, and that under §§ 36, 41 of the Code of Civil Procedure a motion to quash the summons was properly denied. *Sage Inv. Co. v. Haley*, 59 Colo. 504, 149 P. 437.

The summons in *Burkhardt v. Haycox*, 19 Colo. 339, 342, 35 P. 730, did not state in so many words the sum of money or

other relief demanded; but it stated that the action was brought to "recover damages for the wrongful taking and conversion by the defendants of certain goods and chattels * * * owned by plaintiff," describing the same as set forth in the complaint, and stating that if defendants fail to appear and answer, judgment by default will be taken against them according to the prayer of the complaint. The complaint stated the value of the property alleged to have been converted by defendants, and the sum of money demanded in consequence thereof. It was said that the summons could not be considered manifestly misleading in respect to the statement of the relief demanded. See also, *Sage Inv. Co. v. Haley*, 59 Colo. 504, 508, 149 P. 437.

While the summons in *Griffing v. Smith*, 26 Colo. App. 220, 221, 142 P. 202, did not state the sum of money demanded, it did state that "the said action is brought to recover salary for services as foreman of the Pro Patria mill at Rico, Colorado, in 1906 and 1907, as will more fully appear from the complaint in said action to which reference is here made." It was held good.

Under the early law it was held that since our practice did not require a copy of the complaint to be served with the summons, the reference to this pleading in no way aided the defective description in the summons. *Atchison, etc., R. Co. v. Nicholls*, 8 Colo. 188, 191, 6 P. 512, cited in notes, 40 Am. St. Rep. 433, 21 L. R. A. 858, 44 L. R. A. (N. S.) 143, 47 L. R. A. (N. S.) 855, Ann. Cas. 1913E, 331, decided under wording of statute in Code of 1877.

But statements in summons that were wholly indefinite could not be aided by reference to complaint.—The phrase, "in consequence of certain acts and doings of said defendants," is too indefinite to be capable of itself of imparting any information whatever, as to what the defendant is called upon to answer. Nor can an expression so void of advice be aided, under our practice, by reference to the complaint. *Smith v. Aurich*, 6 Colo. 388, 390, cited in note, 44 L. R. A. (N. S.) 145.

And copy of complaint was not required to be served with summons.—Our code did not require as that of California does, that a copy of the complaint must be served with the summons. *Smith v. Aurich*, 6 Colo. 388, 391, cited in note, 44 L. R. A. (N. S.) 145.

Service of the complaint is not essential to jurisdiction, nor a necessary part of the record proper. Seeley v. Taylor, 17 Colo. 70, 79, 28 P. 461, 723.

"The relief demanded does not limit the plaintiff in respect to the remedy which he may have; the court will disregard the

prayer and rely upon the facts alleged and proved as the basis of its remedial action." Pomeroy's Remedies and Remedial Rights, §§ 71, 83, 580, and cases cited; *Nevin v Lulu*, etc., *Silver Min. Co.*, 10 Colo. 357, 364, 15 P. 611, cited in notes, 8 Am. St. Rep. 230, 31 Am. St. Rep. 169, 20 L. R. A. 372, L. R. A. 1918B, 527; *Powell v National Bank*, 19 Colo. App. 57, 62, 74 P. 536.

Principle that clerk must look to summons alone for amount demanded applies only to entry of judgment.—There is no imperative reason, so far as the service and notice and the entry of default is concerned, why the summons should state the sum of money demanded in this case that would not be equally imperative in a case like *Burkhardt v Haycox*, 19 Colo. 339, 35 P. 730. This contention, that the clerk must look to the summons alone for the amount demanded, therefore, can be applied only to the lawful power of the clerk to enter the judgment, and as the clerk did not enter the judgment in this case, but only entered the default, such contention fails for lack of application. *Griffing v Smith*, 26 Colo. App. 220, 223, 142 P. 202.

E. Raising, Waiving and Curing Defects.

Summons issued upon a defective complaint, but amendable, was not void.—A complaint which is defective, but amendable, cannot be regarded as entirely void (*Archibald v Thompson*, 2 Colo. 388, 391, cited in notes, Ann. Cas. 1913B, 831, 1 A. L. R. 1571); nor can a summons be so regarded merely because it is issued upon such a complaint. It is of no importance that a copy of the original complaint was attached to the summons as served upon the respondents, because they were bound to take notice of the statute relating to amendments, and, if they chose to act on the assumption either that the plaintiff would not seek an amendment or that the court would not permit one, they did so at their peril. *Goodman v Ft. Collins*, 164 F. 970, 972.

If copy served on defendant was sufficient the deficiencies in certified copy were immaterial.—Where a certified copy of a summons obtained from the clerk of the court below, and purporting to have been served on defendant, is deficient in naming the parties, but the copy of the summons certified to the court in the transcript of the record as served on the defendant does not show such deficiency, an objection that the summons served in the action did not name the parties will not be considered. *Tabor v Goss*, etc. Mfg. Co., 11 Colo. 419, 18 P. 537, cited in notes, 8 L. R. A. 129, 20 L. R. A. 407, 24 L. R. A. 297.

III. BY WHOM SERVED.

Service by plaintiff's attorney held void.—From its language it was of the opinion

that § 39 of the Code of Civil Procedure was never intended to authorize the service of summons by the attorneys in the case. *Nelson v Chittenden*, 53 Colo. 30, 37, 123 P. 656, Ann. Cas. 1914A, 1198.

The words "or by any person not a party to the action" (appearing in § 39 of the Code of Civil Procedure) were intended to mean any other person competent to make the service, which, of necessity, excludes the attorneys in the case, they being incompetent. *Id.*

In *Nelson v Chittenden*, 23 Colo. App. 123, 127 P. 923, cited in notes, Ann. Cas. 1914A, 1202, Ann. Cas. 1917E, 121, it was further held that where the name Egbert More was subscribed to the complaint; the summons was served by E. More, and this same person subscribed the praecipe for a default, as attorney for plaintiff, held, nothing appearing to the contrary, it was to be presumed that the person who served the summons was the same person who appeared as attorney for the plaintiffs.

Service by the plaintiff himself is void.—Under the statutes of this state the service of a summons by a plaintiff in the cause is void, and a judgment entered in the absence of the defendant and upon such service is a nullity. *Toenniges v Drake*, 7 Colo. 471, 4 P. 790.

As to performance of duties by coroner when sheriff a party to action, see vol. 2, ch. 45, § 120 and the note thereto.

Officer is not required to go outside county in which action is pending.—The sheriff, or person not a party to the action, to whom the summons in a civil action is delivered for service, is not, in his search for the defendant, required to go outside the county in which the action brought is pending. The return thereon by such officer or person, that defendant cannot after diligent search be found therein, constitutes a proper and sufficient basis for publication of summons. *Gamewell v Strumpler*, 84 Colo. 459, 271 P. 180.

And the sheriff loses his official character when he passes out of his own county. In serving a summons in another county he acts merely as an individual, and the service must be shown by his affidavit. His mere return, unsworn, is no evidence of the service, and judgment rendered upon such return of service, not otherwise shown, is void. *Munson v Pawnee Cattle Co.*, 53 Colo. 337, 126 P. 275, cited in notes, Ann. Cas. 1913B, 30, 68 A. L. R. 397.

IV. PERSONAL SERVICE IN STATE.

A. General Consideration.

Voluntary appearance of a party is equivalent to personal service of process. *Mun-*

son *v* Luxford, 95 Colo. 12, 13, 34 P. (2d) 91.

The return on a summons being in proper form and showing service in accordance with the statute, the burden is upon defendant to overthrow the return by clear and convincing proof. *Gibbs v Ison*, 76 Colo. 240, 230 P. 784.

B. Upon Person Over Eighteen Years of Age.

Editor's note.—The Colorado practitioner must bear in mind that the federal cases must be considered in light of the fact that some of the federal provisions, though similar to, are not identical with the corresponding Colorado provisions. For example, under the Federal Rule, service may be made on a person "of suitable age and discretion" while under the Colorado rule on a person "over the age of 18 years."

Sufficiency of service.—A marshal's certificate stating that on certain date the marshal received summons and complaint and thereafter on a certain date he served named individual for his wife was insufficient for failure to show where service was made and that the person served was one of suitable age and discretion. *Scheerger v Wiencek*, 34 F. Supp. 805.

Where it appeared that defendant was retired policeman who spent most of his time traveling about country in an automobile and trailer, that until fall of 1937 he lived in New York, that he then bought trailer and went to Florida, that both automobile and trailer had New York license plates, that in application for license defendant gave house owned by his brother in New York as defendant's address, and that defendant applied for 1940 license from South Carolina stating that he was resident of New York, summons and complaint left at home of defendant's brother was left at defendant's "usual place of abode" and gave court jurisdiction over defendant. *Skidmore v Green*, 33 F. Supp. 529.

C. Upon Person Under Eighteen Years of Age.

Editor's note.—Note that the committee has fixed the age at 18, rather than 15 as provided by § 40 of the Code of Civil Procedure.

Service held sufficient.—Under § 40 of the Code of Civil Procedure the service of summons upon an infant over the age of fourteen years, but not upon the guardian, no guardian ad litem being appointed, but the record reciting that the infant defendant appeared by his next friend as well as by attorney, was held sufficient service, and the appearance authorized. *Filmore v Russell*, 6 Colo. 171, construing the Code of 1877.

D. Upon a Partnership.

The general rule at common law was that where the obligation was joint only, all the joint obligors must be made parties defendant, and must be sued jointly. *Sargeant v Grimes*, 70 F. (2d) 121, 122.

The purpose of § 14 of the Code of Civil Procedure was to change the common-law rule and provide a procedure whereby a partnership could be sued upon a partnership obligation, service made upon one or more but not all of the partners, and a judgment rendered binding the partnership and its property, and the individual property of the partners served as partners. *Sargeant v Grimes*, 70 F. (2d) 121, 122.

And the section only provided a method of suing a partnership in addition to the remedy already existing. *Peabody v Oleson*, 15 Colo. App. 346, 349, 62 P. 234, cited in notes, 43 L. R. A. (N. S.) 542, Ann. Cas. 1918D, 1136.

It made the service of summons upon one partner sufficient to bring the partnership into court, and bind its property by the judgment. In such case no personal judgment could be obtained against the partners not served; and, as to them, the judgment rendered could bind only their interests in the partnership property. The judgment should be against the partnership, and in a proper manner the individual property of the member or members served, might be reached for the purpose of satisfying it. *Peabody v Oleson*, 15 Colo. App. 346, 349, 62 P. 234, cited in notes, 43 L. R. A. (N. S.) 542, Ann. Cas. 1918D, 1136, citing *Craig v Smith*, 10 Colo. 220, 15 P. 337, cited in notes, 43 L. R. A. (N. S.) 542, Ann. Cas. 1918D, 1136; *Dessauer v Koppin*, 3 Colo. App. 115, 32 P. 182, cited in notes, 43 L. R. A. (N. S.) 542, Ann. Cas. 1918D, 1136. See *Sawyer v Armstrong*, 23 Colo. 287, 47 P. 391, cited in note, 43 L. R. A. (N. S.) 542; *Ellsberry v Block*, 28 Colo. 477, 65 P. 629, cited in notes, 43 L. R. A. (N. S.) 542, Ann. Cas. 1918D, 1136; *Blythe v Cordingly*, 20 Colo. App. 508, 512, 80 P. 495, cited in notes, 43 L. R. A. (N. S.) 542, 1 A. L. R. 1605.

Sufficient service of summons.—Service of summons upon a member of a partnership, by leaving a copy of the summons and complaint at his usual place of residence with a member of his family over 15 years of age, was held a sufficient service on the partnership under § 14 of the Code of Civil Procedure. *Barnes v Colorado Springs, etc., Ry. Co.*, 42 Colo. 461, 94 P. 570, cited in notes, Ann. Cas. 1913A, 97, Ann. Cas. 1914D, 882, 884, Ann. Cas. 1918B, 11. But note the change of age to 18 instead of 15.

§ 14 of the Code of Civil Procedure was cumulative merely, and did not affect the right to sue all the members of the firm

by their several individual names and obtain a joint judgment against them as partners. *Peabody v Oleson*, 15 Colo. App. 346, 62 P. 234, cited in notes, 43 L. R. A. (N. S.) 542, Ann. Cas. 1918D, 1136.

A judgment on co-partnership promissory notes merged the notes into the judgment, although only one of the partners was served with summons or appeared in the action, and suit could not thereafter be maintained on the notes against the partners not served. *Blythe v Cordingly*, 20 Colo. App. 508, 80 P. 495, cited in notes, 43 L. R. A. (N. S.) 542, 1 A. L. R. 1605.

Any member being served with summons had notice that he may appear in the case and set up any defense to the partnership liability or to his liability as a partner. *Denver Nat. Bank v Grimes*, 97 Colo. 158, 47 P. (2d) 862, citing *Sargeant v Grimes*, 70 F. (2d) 121.

Court has jurisdiction of a partner who is served with summons for purpose of proceeding to final judgment against him.—A judgment having been entered against a partnership and execution thereon having been returned unsatisfied, under the provisions of § 14 of the Code of Civil Procedure the court had, and continued to have, jurisdiction of a partner who had been served with summons, for the purpose of proceeding to final judgment against him. *Denver Nat. Bank v Grimes*, 97 Colo. 158, 47 P. (2d) 862.

Judgment against a partnership binds the joint property of the associates and the separate property of members duly served with process. *Denver Nat. Bank v Grimes*, 97 Colo. 158, 47 P. (2d) 862.

Amendment adding name of another partner is not a change of the cause of action.—Where an action was brought against a partnership under the proper partnership name and against one partner who was served with summons, an amendment setting forth the name of another partner and making him a party to the action was not a change of the cause of action by changing the parties to the contract sued on, where the partnership named in the amendment and the contract sued on were the same as those named in the original. *Adamson v Bergen*, 15 Colo. App. 396, 62 P. 629.

Where it was error to render judgment against partners for an individual debt.—Where in an action upon a partnership debt only one of the two partners was served with summons and a judgment was entered against the individual partner served but no judgment was entered against the partnership and the other partner was afterwards brought in by scire facias under the provisions of §§ 255-260 of the Code of Civil

Procedure and a judgment was entered against said partner as for an individual debt, in the absence of a judgment against the firm it was error to render judgment against the defendants as for an individual debt. *Ellsberry v Block*, 28 Colo. 477, 65 P. 629, cited in notes, 43 L. R. A. (N. S.) 542, Ann. Cas. 1918D, 1136.

An action may be maintained against a subordinate or branch organization or association upon a mutual benefit insurance policy, where the policy is the obligation of the subordinate or branch association, although the association is under the control of, and the certificate was under the seal of, a supreme lodge. On a policy in which the obligation was that "The Board of Control of the Endowment Rank, Knights of Pythias of the World will pay" an action was properly brought against such rank under its associate name. *Endowment Rank v Powell*, 25 Colo. 154, 53 P. 285, cited in note, 88 A. L. R. 166.

Where firm was not allowed to contend that it was not a party.—Defendants say that a partnership may be sued either under § 14 of the Code of Civil Procedure by its common name, in which event the judgment binds only the joint property and the separate property of the parties served, or by an action against all the individual partners jointly, in which case all must be served and the judgment must be a joint judgment against all. They insist that the latter method is the one here followed hence no judgment can stand against the firm. Plaintiffs, however, contend that they followed the course provided by § 14 of the Code of Civil Procedure and that this complaint is to be distinguished from that in *Peabody v Oleson*, 15 Colo. App. 346, 62 P. 234, cited in notes, 43 L. R. A. (N. S.) 542, Ann. Cas. 1918D, 1136, and similar cases, in that here, in addition to the description in the caption, the body of the complaint itself alleges that defendants were co-partners doing business under the firm name and style of The Printing Company. The most that can possibly be said against this position is that the intention to sue the partnership itself under its firm name was in doubt. That doubt defendants themselves disposed of. Three of the individual partners were served. The other appeared and The Printing Company appeared and has continued to appear throughout the proceedings, including those in this court, and the question is here raised for the first time. The Printing Company, having thus construed the complaint, answered in the action, participated in the trial, and suffered a judgment against it, cannot be heard for the first time in this court to contend that it was not a party, nor escape that judgment if there is evidence to sustain it, and the record is otherwise free from reversible

error. *Allen v Gilman*, 74 Colo. 116, 118, 218 P. 1044.

E. Upon a Private Corporation.

To bind a corporation the service of process must be upon the identical agent provided by the statute. *Great West Min. Co. v Woodmas of Alston Min. Co.*, 12 Colo. 46, 20 P. 771, 13 Am. St. Rep. 204, cited in notes, 13 Am. St. Rep. 493, 15 Am. St. Rep. 142, 16 Am. St. Rep. 511, 17 Am. St. Rep. 143, 19 Am. St. Rep. 218, 345, 20 Am. St. Rep. 779, 21 Am. St. Rep. 358, 23 Am. St. Rep. 21, 27 Am. St. Rep. 733, 28 Am. St. Rep. 293, 29 Am. St. Rep. 157, 459, 30 Am. St. Rep. 545, 33 Am. St. Rep. 662, 35 Am. St. Rep. 588, 38 Am. St. Rep. 412, 43 Am. St. Rep. 532, 44 Am. St. Rep. 716, 48 Am. St. Rep. 352, 50 Am. St. Rep. 256, 52 Am. St. Rep. 269, 54 Am. St. Rep. 223, 247, 57 Am. St. Rep. 675, 950, 58 Am. St. Rep. 139, 750, 60 Am. St. Rep. 648, 61 Am. St. Rep. 491, 577, 644, 70 Am. St. Rep. 416, 82 Am. St. Rep. 501, 84 Am. St. Rep. 746, 114 Am. St. Rep. 803, 126 Am. St. Rep. 42, 137 Am. St. Rep. 59, 7 L. R. A. 829, 21 L. R. A. 43, 848, 851, 852, 853, 856, 857, 859, 860, 14 L. R. A. (N. S.) 215, 39 A. L. R. 419, 88 A. L. R. 15, 31, 34, 61, 73. See also, *Chambers Bros. & Co. v King Wrought-Iron Bridge Manufactory*, 16 Kan. 270; *Kennedy v Hibernia Sav., etc., Soc.*, 38 Cal. 151; *Watertown v Robinson*, 59 Wis. 513, 17 N. W. 542; *Aiken v Quartz Rock, etc., Gold Min. Co.*, 6 Cal. 187; *O'Brien v Shaw's, etc., Canal Co.*, 10 Cal. 343; *Reddington v Mariposa Land, etc., Co.*, 19 Hun. 405; *Cherry v North, etc., R. Co.*, 59 Ga. 446; *Union Pac. R. Co. v Miller*, 87 Ill. 45.

Service upon the vice-president of a corporation is sufficient, even though the return does not show that the president could not be found in the county. *Comet Consol. Min. Co. v Frost*, 15 Colo. 310, 25 P. 506.

Service on appointed agent.—A corporation's "sales representative" who was denominated a "general manager" for purposes of business negotiations, and as such negotiated contract, was an "agent authorized by appointment" to receive service of process, within Federal Rule authorizing service of process on him in action against the corporation on the contract. And the corporation could not contend that such person was only a "sales representative" so as to avoid service of process against the corporation on such person. *Cohen v Physical Culture Shoe Co.*, 28 F. Supp. 679.

Service is good although certificate appointing agent is not filed in county where service is made.—See the note to § 110, ch. 41, vol. 2, p. 700 et seq., analysis line III.

And it is not limited to appointed agent.—See this catchline under analysis line III

in note to § 110, ch. 41, vol. 2, p. 700, where the authorities are collected. In addition, see *Union Mut. Life Co. v District Court*, 97 Colo. 108, 47 P. (2d) 401.

Service on commission agent.—A service of summons and complaint on sales representative of foreign corporation which was not registered in the state and which had not appointed an agent upon whom service could be made but which sold its products in the state through representatives who were paid on a commission basis and who maintained offices which were identified by name of the corporation was a valid service upon the corporation. *Fort Wayne Corrugated Paper Co. v Anchor Hocking Glass Corp.*, 31 F. Supp. 403.

In an action against a corporation upon a claim for services by an agent assigned by such agent to plaintiff, service of summons upon the agent who assigned the claim is not a sufficient service on the corporation. *White House Mountain Gold Min. Co. v Powell*, 30 Colo. 397, 70 P. 679.

A person engaged in settling an insurance loss in state is an agent.—A foreign life insurance corporation employed an adjusting company to settle a loss sustained in Colorado; an employee of the latter company was given the insurance company's files, drafts for payment of any sum agreed upon in settlement of the claim, and invested with full power to make the adjustment. In these circumstances it is held that such employee of the adjustment company was the agent of the insurance company and that service of process on him was service on the latter company. *Union Mut. Life Co. v District Court*, 97 Colo. 108, 47 P. (2d) 401.

And service may properly be made upon agent of receivers who have displaced ordinary officers.—The receivers of a foreign corporation, who by their appointment as such displaced the ordinary officers of the corporation, are to be treated as foreign receivers, and if the return of the sheriff shows a service that would have been sufficient upon the corporation under its ordinary management, it must be equally sufficient if made upon an agent of the receivers when the affairs of the corporation are under the management of the latter. *Ganebin v Phelan*, 5 Colo. 83, 84, cited in notes, 85 Am. St. Rep. 935, 26 L. R. A. 218, 47 L. R. A. (N. S.) 181, Ann. Cas. 1915B, 597.

But it is only in the event that no agent is found in the county, that service may be had upon a stockholder. *Venner v Denver Union Water Co.*, 15 Colo. App. 495, 504, 63 P. 1061, 122 Am. St. Rep. 1042, cited in note, 40 L. R. A. (N. S.) 842.

In a suit against a foreign corporation, service must be made upon it by delivering

a copy of the summons to its agent found within the county where the action is brought. And it is only in case such agent is not found within the county, that substituted service is valid. Service upon a stockholder, unless there is a failure to find the agent, is a nullity. *Id.*

A person is still a stockholder where he gratuitously and for undefined reason transfers his stock.—One who gratuitously transfers his stock in a foreign corporation to trustees, whose names he does not know, for some unknown and undefined purpose, and at the same time contributes \$50 to cover the expense of the transfer, is still a stockholder in such foreign corporation. *Colorado Iron-Works v Sierra Grande Min. Co.*, 15 Colo. 499, 25 P. 325, 22 Am. St. Rep. 433, cited in notes, 23 Am. St. Rep. 306, 25 Am. St. Rep. 931, 32 Am. St. Rep. 320, 34 Am. St. Rep. 393, 58 Am. St. Rep. 866, 14 L. R. A. 532, 24 L. R. A. 295, 50 L. R. A. 593, L. R. A. 1917E, 1158, 30 A. L. R. 292.

Officer may reside in another state if at time of service he is temporarily in this state.—Under § 40 of the Code of Civil Procedure service was legally sufficient when made on an officer of the corporation whose residence was in another state, and who is at the time of service temporarily in this state on business not connected with the corporation; and the fact that such officer invited such service would be pertinent in determining the validity thereof. *Venner v Denver Union Water Co.*, 40 Colo. 212, 90 P. 623, 122 Am. St. Rep. 1036, cited in notes, 123 Am. St. Rep. 204, 125 Am. St. Rep. 610, 38 L. R. A. (N. S.) 721, L. R. A. 1916E, 246, Ann. Cas. 1917D, 233, 10 A. L. R. 560, 20 A. L. R. 269.

Thus where nonresident director of foreign corporation with sales office in New York City came into New York state to spend week-end at his summer home and remained for conference on Tuesday because it suited his own convenience rather than to have conference on Monday and was served in New York City with process in actions against director individually and against the corporation by person with whom conference was had, service in neither action could be set aside on ground that person served was "fraudulently induced" to come within the jurisdiction, and process could be served upon him anywhere in the state. *Schwarz v Artercraft Silk Hosiery Mills*, 110 F. (2d) 465.

The contracting of a debt was a sufficient doing business within this state to render the corporation amenable to the courts of this state, if jurisdiction could be obtained by service of process as provided in § 40 of the Code of Civil Procedure. *Colorado Iron-Works v Sierra Grande Min. Co.*, 15 Colo. 499, 511, 25 P. 325, 22 Am. St. Rep. 433, cited in notes, 23 Am. St. Rep. 306, 25

Am. St. Rep. 931, 32 Am. St. Rep. 320, 34 Am. St. Rep. 393, 58 Am. St. Rep. 866, 14 L. R. A. 532, 24 L. R. A. 295, 50 L. R. A. 593, L. R. A. 1917E, 1158, 30 A. L. R. 292.

V. PERSONAL SERVICE OUTSIDE THE STATE.

See committee note under subdivision (f). See also, Address no. 2 in appx. D, wherein subdivision (f) is discussed.

VI. PUBLICATION.

A. General Consideration.

Proceedings after constructive service are voidable but not void.—The decided weight of authority is to the effect that when jurisdiction has been obtained by the service of process, actual or constructive, all subsequent proceedings are exercise of jurisdiction, and however erroneous, they are not void, but voidable only, and not subject to collateral attack. *Brown v Tucker*, 7 Colo. 30, 34, 1 P. 221.

B. When Proper.

Goods of absent defendant may be levied upon under attachment sued out after institution of suit.—In *Brown v Tucker*, 7 Colo. 30, 36, 1 P. 221, an attachment was sued out after the institution of the suit, and levied upon a stock of goods belonging to Collins, the absent debtor, after which the action proceeded to judgment. In respect to a case of this nature, the supreme court, in *Pennoyer v Neff*, 95 U. S. (5 Otto) 714, 24 L. Ed. 565, cited with approval the opinion of Mr. Justice Miller in *Cooper v Reynolds*, 77 U. S. (10 Wall.) 308, 315, 19 L. Ed. 931, saying, "in the opinion there delivered we have a clear statement of the law as to the efficacy of such actions, and the jurisdiction of the court over them." See generally as to attachment of non-resident's property, *Atchison, etc., R. Co. v Maggard*, 6 Colo. App. 85, 39 P. 985, cited in notes, 67 L. R. A. 219, 222, 223, 1 L. R. A. (N. S.) 195, 3 L. R. A. (N. S.) 611, 27 A. L. R. 1404; *Everett v Connecticut Mut. Life Ins. Co.*, 4 Colo. App. 509, 36 P. 616, cited in notes, 69 Am. St. Rep. 122, 67 L. R. A. 218, 3 L. R. A. (N. S.) 611, 51 L. R. A. (N. S.) 599, 27 A. L. R. 1404.

The statutory ground for such service must exist; that is, that the defendant can not be personally served with summons within the state, for the reason which the code specifies. Where, then, as in the case at bar, it appears from the affidavit for publication that the affiant, after due diligence, is unable to learn the whereabouts, residence, or postoffice address of a defendant, coupled with the further statements that he either resides out of the state, or has departed therefrom without the intention of returning, or conceals himself to avoid

the service of process, it logically follows that the defendant is either a non-resident of the state, has departed from the state without the intention of returning, or conceals himself to avoid the service of process. *Hanshue v. Martin Inv. Co.*, 67 Colo. 189, 195, 184 P. 289, following *Greene v. Gibson*, 53 Colo. 346, 127 P. 239.

Substituted service can only be had in one of enumerated cases.—To render a publication of summons effective for any purpose, it must be made in one of the enumerated cases. *Hanscom v. Hanscom*, 6 Colo. App. 97, 39 P. 885, cited in notes, 102 Am. St. Rep. 703, 38 L. R. A. (N. S.) 954, Ann. Cas. 1913D, 1135, Ann. Cas. 1914D, 888, 6 A. L. R. 59, 29 A. L. R. 1381, 1392, 38 A. L. R. 269, 79 A. L. R. 255, 421.

Actions "in the nature of actions in rem" may be supported by constructive service as fully as those truly "in rem." *Kern v. Wilson*, 91 Colo. 355, 357, 14 P. (2d) 1014, citing *Galpin v. Page*, 3 Sawy. 93, 9 Fed. Cas. 1126, No. 5206, and other authorities.

Proceedings by wife to charge husband's property with alimony is a proceeding in rem.—Where the plaintiff seeks to charge her husband's property with her alimony, and to set aside conveyances made in fraud of her rights, the suit is a proceeding in rem, within the meaning of the statute. *Hanscom v. Hanscom*, 6 Colo. App. 97, 39 P. 885, cited in notes, 102 Am. St. Rep. 703, 38 L. R. A. (N. S.) 954, Ann. Cas. 1913D, 1135, Ann. Cas. 1914D, 888, 6 A. L. R. 59, 29 A. L. R. 1381, 1392, 38 A. L. R. 269, 79 A. L. R. 255, 421.

A judgment obtained where the service of summons was made by publication, except in case of divorce, binds only the property brought within the jurisdiction of the court. *Hanscom v. Hanscom*, 6 Colo. App. 97, 39 P. 885, cited in notes, 102 Am. St. Rep. 703, 38 L. R. A. (N. S.) 954, Ann. Cas. 1913D, 1135, Ann. Cas. 1914D, 888, 6 A. L. R. 59, 29 A. L. R. 1381, 1392, 38 A. L. R. 269, 79 A. L. R. 255, 421. Divorce cases formerly were expressly enumerated in this section.—Ed. note.

And a creditor's bill was a proceeding in rem, within the meaning of § 45 of the Code of Civil Procedure. *Shuck v. Quackenbush*, 75 Colo. 592, 604, 227 P. 1041, 38 A. L. R. 259. It also affects specific property. In addition to this authority the following cases asserting the power of courts by publication of summons in a creditor's bill to ascertain the amount of the debt and cause the same to be satisfied out of property in the state which the court has thereby drawn within its jurisdiction, are: *Day v. Washburn*, 65 U. S. (24 How.) 352, 16 L. Ed. 712, *Heidritter v. Elizabeth Oilcloth Co.*, 112 U. S. 294, 5 S. Ct. 135, 28 L. Ed. 729; *Boswell v. Otis*, 50 U. S. (9 How.) 336, 13 L. Ed. 164; *Arndt*

v. Griggs, 134 U. S. 316, 10 S. Ct. 557, 33 L. Ed. 918; *Jennings v. Rocky Bar Gold Min. Co.*, 29 Wash. 726, 70 P. 136; *Cooper v. Reynolds*, 77 U. S. (10 Wall.) 308, 19 L. Ed. 931; *Pennoyer v. Neff*, 95 U. S. (5 Otto) 714, 24 L. Ed. 565; *First Nat. Bank v. Gage*, 93 Ill. 172; *Miller v. Sherry*, 69 U. S. (2 Wall.) 237, 238, 17 L. Ed. 827.

C. Proceedings to Obtain.

1. General Rules.

Constructive service by publication is a right given by statute; and in this jurisdiction the rule is that every material requirement in relation thereto must be strictly complied with to give the court jurisdiction in the premises. *O'Rear v. Lazarus*, 8 Colo. 608, 9 P. 621, cited in note, 19 L. R. A. 818; *Beckett v. Cuenin*, 15 Colo. 281, 25 P. 167, 22 Am. St. Rep. 399, cited in notes, 24 Am. St. Rep. 217, 29 Am. St. Rep. 433, 810, 32 Am. St. Rep. 639, 58 Am. St. Rep. 742, 61 Am. St. Rep. 486, 62 Am. St. Rep. 549, 89 Am. St. Rep. 762, 91 Am. St. Rep. 379; *Trowbridge v. Allen*, 48 Colo. 419, 110 P. 193, cited in note, Ann. Cas. 1913B, 30; *Empire Ranch, etc., Co. v. Coldren*, 51 Colo. 115, 117 P. 1005, cited in note, 25 A. L. R. 1259; *Jotter v. Marvin*, 67 Colo. 548, 549, 189 P. 19; *Brown v. Tucker*, 7 Colo. 30, 33, 1 P. 221.

And nothing excuses omissions or insufficient statements.—1 Black on Judgments (2 Ed.) § 232; *Sylph Min. etc., Co. v. Williams*, 4 Colo. App. 345, 36 P. 80; *Beckett v. Cuenin*, 15 Colo. 281, 25 P. 167, 22 Am. St. Rep. 399, cited in notes, 24 Am. St. Rep. 217, 29 Am. St. Rep. 433, 810, 32 Am. St. Rep. 639, 58 Am. St. Rep. 742, 61 Am. St. Rep. 486, 62 Am. St. Rep. 549, 89 Am. St. Rep. 762, 91 Am. St. Rep. 379; *Trowbridge v. Allen*, 48 Colo. 419, 110 P. 193, cited in note, Ann. Cas. 1913B, 30; *Empire Ranch, etc., Co. v. Coldren*, 51 Colo. 115, 117 P. 1005, cited in note, 25 A. L. R. 1259. See *Gibson v. Wagner*, 25 Colo. App. 129, 131, 136 P. 93, cited in note, 25 A. L. R. 1260. See also, *Roberts v. Roberts*, 3 Colo. App. 6, 31 P. 941, cited in note, 61 Am. St. Rep. 495, applying the rule in divorce suit.

While experience demonstrates that this mode of giving a court jurisdiction of the person is necessary in many instances, yet courts are jealous of abuses in the application thereof. They tolerate the omission of no material step required by law in connection therewith. *Israel v. Arthur*, 7 Colo. 5, 7, 1 P. 438, cited in notes, 19 L. R. A. 816, 57 L. R. A. 595, Ann. Cas. 1915B, 431, 71 A. L. R. 287.

This is because this method of obtaining service is in derogation of the common law.—*O'Rear v. Lazarus*, 8 Colo. 608, 9 P. 621, cited in note, 19 L. R. A. 818.

This necessity to strictly follow the statute in these cases has long been estab-

lished, and it has been repeatedly adjudged by our supreme court that every material requirement of the statute concerning the publication of summons must be carefully and strictly pursued, in order to give the court jurisdiction. *O'Rear v Lazarus*, 8 Colo. 608, 9 P. 621, cited in note, 19 L. R. A. 818; *Davis v Mouat Lbr. Co.*, 2 Colo. App. 381, 387, 31 P. 187, cited in notes, Ann. Cas. 1918B, 6, 8.

And if statute is not complied with the service may be collaterally attacked.—In obtaining constructive service of process by publication, a compliance with the method pointed out by the code must be observed, and if the record being offered in evidence shows affirmatively that the code provisions relating to service by publication were not complied with, it may be attacked in a collateral proceeding, and the recital in the judgment or decree based upon such record, that service was had, or that the steps were complied with, does not change the rule. *Trowbridge v Allen*, 48 Colo. 419, 422, 110 P. 193, cited in note, Ann. Cas. 1913B, 30, citing *Israel v Arthur*, 7 Colo. 5, 1 P. 438, cited in notes, 19 L. R. A. 816, 57 L. R. A. 595, Ann. Cas. 1915B, 431, 71 A. L. R. 287. The syllabus in *Hughes v Cummings*, 7 Colo. 203, 2 P. 928, is somewhat misleading.

Nevertheless errors in the service of summons by publication may be waived by the appearance and answer of defendant to the merits. *New York, etc., Min. Co. v Gill*, 7 Colo. 100, 2 P. 5, cited in note, 16 L. R. A. (N. S.) 180.

The authorities are in conflict as to whether the constructive service may be presumed regular where record is silent.—There is some conflict of authority upon the question as to whether, in an attempt to secure constructive service by publication, any presumption of regularity will be indulged in, the record being entirely silent. It has been held that a compliance with the material requirements of the statute must appear on the face of the record. On the other hand, courts of high authority have announced that such presumptions are applicable to the proceedings of courts of superior jurisdiction, whether such proceedings rest upon actual or constructive service. It was unnecessary, however, to determine this question in *Israel v Arthur*, 7 Colo. 5, 7, 1 P. 438, cited in notes, 19 L. R. A. 816, 57 L. R. A. 595, Ann. Cas. 1915B, 431, 71 A. L. R. 287.

Where the judgment is against a non-resident defendant and there is no personal service, reliance being placed wholly upon service by publication, the rule seems to be that the record must affirmatively show all the essential jurisdictional facts. This rule is not entirely undisputed, but it is sanctioned by the weight of authority, and, in

our judgment, is founded upon excellent reason. *O'Rear v Lazarus*, 8 Colo. 608, 9 P. 621, cited in note, 19 L. R. A. 818.

But if record is not silent no presumption can be indulged in.—Where the record is not silent on this subject, and where it affirmatively appears therein that the court did not have jurisdiction of the person, certainly no such presumption can be indulged in. *Clayton v Clayton*, 4 Colo. 410, cited in note, 57 L. R. A. 598; *Galpin v Page*, 85 U. S. (18 Wall.) 350, 21 L. Ed. 959; *Israel v Arthur*, 7 Colo. 5, 8, 1 P. 438, cited in notes, 19 L. R. A. 816, 57 L. R. A. 595, Ann. Cas. 1915B, 4, 31, 71 A. L. R. 287.

We are not prepared to accept, without qualification, the doctrine upon this subject stated in *Goudy v Hall*, 30 Ill. 116; the opinion in that case seems to hold that the finding in the record of due and legal service is only prima facie evidence of that fact, and may be attacked in a collateral proceeding. Interpreted or understood without condition, it modifies the beneficent rule that judicial records import absolute verity. *Israel v Arthur*, 7 Colo. 5, 8, 1 P. 438, cited in notes, 19 L. R. A. 816, 57 L. R. A. 595, Ann. Cas. 1915B, 4, 31, 71 A. L. R. 287.

In *Harris v Lester*, 80 Ill. 307, the court used the following language with reference to a similar finding of service by the court which tried the cause: "In all collateral proceedings, we entertain no doubt, such finding is sufficient evidence of service by publication as to defendants, nothing appearing in the record to the contrary, and to warrant the decree, as in cases of regular notice by publication." This may fairly be said to modify the position taken in *Goudy v Hall*, 30 Ill. 116, and is, we think, in accord with the weight of authority. Id.

2. The Affidavit.

a. In General.

An affidavit by authorized person is essential.—An affidavit by a person authorized by law to make the same, and containing the statements required by statute, is an essential prerequisite to give the court jurisdiction to proceed. *Trowbridge v Allen*, 48 Colo. 419, 110 P. 193, cited in note, Ann. Cas. 1913B, 30; *Empire Ranch, etc., Co. v Coldren*, 51 Colo. 115, 117 P. 1005, cited in note, 25 A. L. R. 1259; *Millage v Richards*, 52 Colo. 512, 514, 122 P. 788.

And it must comply with the statute.—Constructive service of summons, founded upon an affidavit which fails to comply with the statute is without effect. *Empire Ranch, etc., Co. v Gibson*, 22 Colo. App. 617, 126 P. 1103.

§ 45 of the Code of Civil Procedure construed in accordance with common sense. As said in *Leigh v Green*, 64 Neb. 533, 90

N. W. 255, "It was not intended to require perjury, and, as it requires affidavit to matters involving legal opinion and conclusions of law and fact, it must contemplate that such affidavit will be made upon the only basis on which such opinions and conclusions can be reached." *Jotter v. Marvin*, 67 Colo. 548, 551, 189 P. 19.

The chief test of the sufficiency of an affidavit required by law is whether it is so clear and certain that an indictment for perjury may be sustained on it if false. Affiant's knowledge of matters stated in his affidavit must of necessity frequently rest upon information derived from others, and where this is so it is generally sufficient to aver upon information and belief that such matters are true. In such cases belief is to be considered an absolute term, and perjury may be assigned on such affidavit, if false. *Jotter v. Marvin*, 67 Colo. 548, 551, 189 P. 19.

Whether under some conditions, as applied to an individual defendant, these several allegations may be stated together in the disjunctive or alternative for, was not decided in *Gibson v. Wagner*, 25 Colo. App. 129, 132, 136 P. 93, cited in note, 25 A. L. R. 1260, but it was said that the averment as here made applied to many defendants, both individual and corporate, taken together with the failure to give the postoffice addresses of any of said defendants, or to state that they were unknown, strongly suggests an effort to conceal all, rather than to furnish any, information by which notice of the suit to divest the title of defendants and vest it in the plaintiff, would possibly reach any of the defendants.

b. Must Give Address or State That It Is Unknown.

If defendant's whereabouts is unknown the affidavit must show that such whereabouts is unknown to affiant.—Where the whereabouts of some of the non-resident defendants is known, it is advisable for the purpose of the record to have personal service by the sheriff of the state where such defendants may reside. However, where neither the attorney nor the plaintiff, after a careful investigation, have been able to learn anything concerning some of the defendants, then under the old practice, the attorney prepared an affidavit stating that such defendants were non-residents. The plaintiff signed the affidavit without actually knowing whether the facts therein stated were true or not. In order to eliminate this evil there was incorporated in the 1927 Summons Act the provision authorizing service by publication when the defendant's whereabouts is to the plaintiff unknown and he cannot be found in the county where the action is pending. The constitutionality of this provision has been sustained in other states. The affidavit for publication should set forth in detail the

efforts made by the plaintiff and his attorney to discover the residence or address of those defendants whose address is unknown. See article by Mr. Ira L. Quiat, of the Denver Bar, *Dicta* VI, no. 1, pp. 9, 13.

c. Affidavits Held Sufficient.

An affidavit for the publication of the summons in a bill to quiet title stated that certain defendants named, "either reside out of the state or have departed therefrom, or concealed themselves to avoid process, and that their postoffice address is unknown to affiant." Held, a compliance with the statute. *Hanshue v. Marvin Inv. Co.*, 67 Colo. 189, 184 P. 289.

The affidavit for publication was made by a director, and set forth that the officers of the company "reside out of the state." The affidavit was held sufficient. *Jotter v. Marvin Inv. Co.*, 67 Colo. 555, 189 P. 22.

The affidavit states positively that none of the nineteen defendants, after diligent search, can be found within the state, and that affiant is informed and believes that none of them are within the state. It names ten, which it states positively reside out of the state, and nine, which it says either reside out of the state or have departed therefrom, or secreted themselves. It then states that the postoffice address of five of the ten is Hastings, Nebraska, and that the postoffice address of the other fourteen are unknown to affiant. We think it sufficiently appears from the affidavit that the nine defendants named therein were either non-residents or had departed from the state without any intention of returning, or had concealed themselves to avoid service of process, and that personal service could not be made upon them within the state of Colorado, and that this showing was a sufficient compliance with the requirements of the code to authorize the publication of summons. *Hanshue v. Marvin Inv. Co.*, 67 Colo. 189, 196, 184 P. 289.

3. Order.

A delay of five months between the return of the original summons by the sheriff and the making of the order of publication does not invalidate the order of publication nor render the service void. *Richardson v. Wortman*, 34 Colo. 374, 83 P. 381.

4. The Publication.

In this state a slight mistake in name of defendant is not fatal if the notice is such as will attract his attention.—The object of the publication of summons is to give notice to the defendant of a suit pending, and of its purpose. It must be evident to every person that a published notice, using the name by which the defendant is commonly known in the community, will as readily attract his attention as if his real name were used, particularly where the initials

are the same; and, that the use of the name as commonly known will much more readily and probably attract the attention of his acquaintances and friends by whom information might be communicated to him, than if the publication had been by his real name by which he was not commonly known. *Whitney v. Masemore*, 75 Kan. 522, 89 P. 914, 11 L. R. A. (N. S.) 676; *Webster v. Heginbotham*, 23 Colo. App. 229, 234, 129 P. 569, cited in notes, L. R. A. 1915B, 1151, Ann. Cas. 1915C, 100, 51 A. L. R. 755.

This is illustrated by the following facts: Lands were patented to John F. Monson. In an action to quiet an adverse title the defendant was described in the complaint, summons and notice of suit pending as J. Fred Munson. It was in evidence that Monson's middle name was Fred, and that his surname was commonly pronounced Munson. The adversary party gave no evidence that he had not received actual notice of the identify of the person named in the complaint, summons, and notice, with the person with whom he was negotiating for the land, or that he had examined the record, and was misled by the discrepancy in the names. A judgment by default upon such published service was approved, and the notice was held to affect all those who, after its filing, dealt with Monson for the land. But the court adds that the doctrine of the opinion is not to be extended beyond the facts disclosed by the record. *Webster v. Heginbotham*, 23 Colo. App. 229, 129 P. 569, cited in notes, L. R. A. 1915B, 1151, Ann. Cas. 1915C, 100, 51 A. L. R. 755.

Where on a bill to quiet title the decree goes by default, upon mere publication of the summons, in which Brooks is named as defendant, those claiming under Brooke are not affected unless there is evidence of the identify in fact of Brooks with Brooke. *Bloomer v. Cristler*, 22 Colo. App. 238, 123 P. 966, cited in notes, 52 L. R. A. (N. S.) 937, Ann. Cas. 1918A, 354.

But there are authorities which hold that defendant's name must be given in full and must be exact as to orthography.—We are well aware that respectable authorities hold that in substituted service by publication the name of the defendant must not only be exact as to orthography, but must contain the full Christian name. With these authorities, however, we are not in accord, and therefore will not follow them, but believe that under modern conditions the better rule is expressed by the supreme court of Kansas in *Ferguson v. Smith*, 10 Kan. 396, in which it was said: "The papers do not give the full Christian names of all the parties, but give the initial letters thereof only. This we think is sufficient." *Webster v. Heginbotham*, 23 Colo. App. 229, 235, 129 P. 569, cited in notes,

L. R. A. 1915B, 1151, Ann. Cas. 1915C, 100, 51 A. L. R. 755.

5. Mailing of Summons.

If summons is properly addressed but not received it will be presumed that postage was not prepaid.—Where it is shown that a copy of the summons in a cause brought against a non-resident defendant was properly addressed and mailed to the defendant, whose place of residence was well known, where she had resided for years, and was accustomed to receive her mail-matter regularly, but that the same was not received by her, it will be presumed, in the absence of proof to the contrary, that the sender omitted to prepay the postage. *Morton v. Morton*, 16 Colo. 358, 27 P. 718, cited in notes, 60 Am. St. Rep. 658, 49 L. R. A. (N. S.) 462, L. R. A. 1917B, 415, 452, Ann. Cas. 1917E, 1066, 1067, 1068.

VII. MANNER OF PROOF.

A. General Consideration.

The return serves no purpose except to show to the court that there has been service and to make a record thereof, so that the court's jurisdiction will appear forever. *Sawdey v. Pagosa Lbr. Co.*, 78 Colo. 185, 186, 240 P. 334. See also, *Morrissey v. Gray*, 160 Cal. 390, 117 P. 438; *Lupkin & Son v. Russell*, 108 Miss. 742, 67 So. 185; *Graves v. Macfarland*, 58 Neb. 802, 79 N. W. 707; *Spencer v. Rickard*, 69 W. Va. 322, 71 S. E. 711. The same has also been held in Kansas, Oklahoma, Pennsylvania, Missouri, Oregon, South Dakota and in the federal courts. *Ranch v. Werley*, 152 F. 509.

It is the service of summons that confers jurisdiction over the person of a defendant, not the return. *Sawdey v. Pagosa Lbr. Co.*, 78 Colo. 185, 240 P. 334.

The return of service is not aided by presumption. *Venner v. Denver Union Water Co.*, 15 Colo. App. 495, 505, 63 P. 1061, 122 Am. St. Rep. 1042, cited in note, 40 L. R. A. (N. S.) 842.

But an insufficient return should be amended.—It is the duty of a person serving a summons to amend his return, by leave of court, as soon as he knows that it is erroneous or insufficient. *Sawdey v. Pagosa Lbr. Co.*, 78 Colo. 185, 240 P. 334.

Insufficiency of return illustrated.—Where books of parent corporation and those of wholly owned and controlled subsidiary were kept separate, and service of summons was made on the officer or agent of the subsidiary, return purporting to show service on parent corporation would be quashed, on parent corporation's motion. *Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp.*, 31 F. Supp. 403.

B. Written Admissions or Waiver.

Service of summons by acknowledgment is sufficient and gives the court full jurisdiction. *Wilson v. Carroll*, 80 Colo. 234, 250 P. 555, cited in notes, 67 A. L. R. 829, 846.

And it is this voluntary return that constitutes valid service.—It is not alone the delivery of the summons to defendant, but her voluntary return thereof to plaintiff in this state with her written acknowledgment thereon which constitutes, in the language of the code, "valid and sufficient service." *Seeley v. Taylor*, 17 Colo. 70, 78, 28 P. 461, 723.

This return may be voluntary though accompanied by bitter reproaches.—That the writings on the summons, constituting an acceptance of service thereof were accompanied by bitter reproaches and severe

denunciations of plaintiff by defendant, does not change the fact that she received copies of the summons, and voluntarily and in writing acknowledged and returned the same to plaintiff in this state with full knowledge of the nature and purpose of the action which the plaintiff had brought against her. *Seeley v. Taylor*, 17 Colo. 70, 79, 28 P. 461, 723.

And language used may show defendant knew paper was a summons though she denies such knowledge.—And even if defendant said in one part of the indorsement that she did not know the meaning of the summons, it is still good where her whole language taken together clearly shows that she did know; and that she returned them to plaintiff that he might secure whatever earthly law might do for him. *Seeley v. Taylor*, 17 Colo. 70, 79, 28 P. 461, 723.

Rule 5. Service and Filing of Pleadings and Other Papers.

(a) **Service: When Required.** Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties affected thereby, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4. [Supplants Code Secs. 414, 419.]

(b) **Service:**

(1) **How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon the party shall be made by delivering a copy to him or by mailing it to him at his address as given in the pleadings, or if no pleading has been filed, or no address is given therein, then at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some member of the family over the age of 18 years then residing therein. Service by mail is complete upon mailing. [Supplants

Supreme Court Rule 12, part Code Sec. 51, and Code Secs. 410 to 413, inclusive and 415.]

Committee Note.

The Federal subdivision states that service is to be made on "some person of suitable age and discretion." The Code, in Sec. 40, fixed the age at 15. The committee preferred 18, and uses that age throughout the rules.

C (2) Resident Attorney. A resident attorney, on whom pleadings and other papers may be served, shall be associated as attorney of record with any foreign attorney practicing in any courts of this state. [New. From United States District Court Rules.]

(c) Same: Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

C (d) Filing and Serving. In all cases where these rules do not expressly require the filing and service of a paper, subsequent to the original complaint, and the filing of a paper alone is provided for, a copy of such paper so filed shall be served upon the adverse party either prior to such filing, or within 48 hours thereafter, and where the service alone of any paper is required it shall be filed either before service or within a reasonable time thereafter. [New.]

Committee Note.

The Federal Rules usually fix dates from the time of service, these rules usually fix them from the time of filing. See Rules 12 (a), (e), (i), 15 (a).

(e) Filing with Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

- I. In General
- II. Filing and Serving.

Cross Reference.

For a discussion of this rule see Address no. 3 in appx. D.

I. IN GENERAL.

Cross reference.—See note to Rule 68.

Comparison with Federal Rule 5(b).—"Federal Rule 5(b), on how service is made, leaves too much room for argument when it states that the paper may be left

with 'some person of suitable age and discretion.' A fifteen-year-old boy might possess age but not discretion. The Colorado Code fixed fifteen years, but the committee changed it to eighteen years, hoping that both age and discretion would thereby be secured, but in any event stopping a possible dispute as to construction." See article entitled, "The Federal Rules from the Standpoint of the Colorado Code" by Col. Philip S. Van Cise, Chairman of Rules Committee, Dicta XVII, no. 7, pp. 170, 173.

Sufficiency of service.—In insurance company's action for declaratory judgment determining its non-liability under automo-

bile liability policy, answer of insured's alleged employer, raising issue whether insured was independent contractor, should have been served on codefendants, who suffered damages because of accident in which insured automobile was involved, by delivering or mailing copy of such pleading to their attorney. *Ohio Cas. Ins. Co. v. Murphy*, 28 F. Supp. 252.

A contempt proceeding for noncompliance with court's order enforcing cease and desist order of the National Labor Relations Board, as a proceeding for "civil contempt," is a continuance of original proceeding for enforcement of the cease and desist order, and hence was correctly instituted by motion served on counsel appearing for parties in the record. *National Labor Relations Board v. Hopwood Retinning Co.*, 104 F. (2d) 302.

Where receiver appointed by state court for corporation moved to dismiss involuntary bankruptcy petition against the corporation, letter sent to the receiver's counsel, notifying him of hearing assigned on the motion, was insufficient under Federal Rule of Civil Procedure requiring service on attorney. *In re Hewitt Gro. Co.*, 33 F. Supp. 493.

Where order was entered by default denying motion to dismiss involuntary petition in bankruptcy, because moving party assumed that his counsel would be given independent notice of the hearing, though notice was given to the moving party personally, and motion to vacate the default ruling was promptly filed before further steps were taken in the bankruptcy proceeding, default ruling should be vacated and motion to dismiss heard on its merits. *Id.*

II. FILING AND SERVING.

Time fixed by date of filing.—"The (Federal) Rules fix most dates from the time of service. But this opens the door to disputes as to when service was actually made. Hence the committee decided that time should be fixed by the date of filing, about which there could be no argument. This resulted in many amendments which in several instances took a lot of time to study and correlate." See article entitled, "The Federal Rules from the Standpoint of the Colorado Code" by Col. Philip S. Van Cise, Chairman of Rules Committee, *Dicta XVII*, no. 7, pp. 170, 173.

Rule 6. Time.

(a) **Computation.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday. [Supplants Code Sec. 417.]

C (b) **Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the

result of excusable neglect; but it may not enlarge the period in which a writ of error may be sued out. [Supplants Code Sec. 417.]

Committee Note.

The words "the period for taking any action under Rule 59, except as stated in Subdivision (c) thereof, or" were stricken from the subdivision because the committee felt that Rule 59 was mandatory that an extension of time for a motion for new trial could only be granted if it were based upon affidavits, and there would be many occasions when this time should be extended.

(c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

Committee Note.

For terms of court, see Rule 77 (a).

C (d) Notice, Motion, Affidavits. Where the person causing the service to be made and the person who is to be served reside in the same county, a written motion, other than one which may be heard ex parte, and notice of the application to set the same for hearing, shall be served not later than 24 hours before the time specified in the notice, otherwise not later than 3 days before such time, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59 (c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time. [First sentence from Federal Rule 6 (d) and Code Sec. 408.]

Committee Note.

See Rule 56 (c) for motion for summary judgment.

C (e) Additional Time on Service by Mail. When a written motion and notice of the application to set the same for hearing is served by mail or when a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him, other than process under Rule 4, and the notice or paper is served upon him by mail, three days shall be added to the prescribed period. [Supplants Code Sec. 408.]

- I. Subdivision (a).
- II. Subdivision (b).
- III. Subdivision (c).
- IV. Subdivision (d).

Cross References.

For a discussion of the mechanics of computing time under Federal Rule 6 (a), for the meaning of "A Legal Holiday" and the meaning of "Any Applicable Statute," as the terms are used in the rule, see

1 Moore's Fed. Prac. 402-408, under the new Federal Rules. And see discussion of this rule in Address no. 3, appx. D.

I. SUBDIVISION (a).

Editor's note.—The following cases are set out merely as illustrations of the computation of time arising under Federal Rule 6 (a) which has the same wording as the instant subdivision.

When last day falls on Sunday.—Business practice and accepted legal principles,

apart from statute, permit an act to be done on the following Monday when the last day upon which it should have been done falls on Sunday, and this is the common-law rule. *Sherwood Bros. v. District of Columbia*, 113 F. (2d) 162.

Thus, where ninetieth day of statutory period for filing claim for refund of taxes fell on Sunday, claim deposited in mails Saturday afternoon, after office of Board of Tax Appeals had closed under its rules, and filed Monday morning, was not too late, since the statute should be construed in light of common-law rule requiring exclusion of Sunday. *Id.*

So also, under this subdivision, the 30-day period for taking an appeal from an interlocutory decree in equity entered on Friday, October 7, 1938, included Monday November 7, 1939, where thirtieth day was a Sunday. *Jordan v. Palo Verde Irr. Dist.*, 105 F. (2d) 601.

Applicability to appeals.—An appeal from an interlocutory decree entered October 7, 1938, in proceeding for composition of indebtedness of an irrigation district, if an appeal from an interlocutory decree in equity, was valid and timely, where notice of appeal was filed on November 7, 1938, within 30 days from entry of decree. *Jordan v. Palo Verde Irr. Dist.*, 105 F. (2d) 601.

II. SUBDIVISION (b).

Editor's note.—The cases set out below arose under Federal Rule 6 (b) and, since the instant subdivision is not precisely the same as the federal, they must be considered in view of that fact. See committee note, set out above, in regard to changes effected.

Effect of rule on extension of time for demanding jury trial.—The failure to make timely demand for a jury trial because of unfamiliarity with court rules for month or two after their adoption would be considered to be the result of "excusable neglect," so that the court could, in its discretion, allow plaintiff jury trial although court was not required to do so. *Hofmann v. Textile Mach. Works*, 27 F. Supp. 431.

Thus, where failure of plaintiff to make timely demand for jury trial was result of excusable neglect, so that court could allow trial by jury, but principal fact issue related to alleged mistake of fact as to validity of patent, made by plaintiff who sued for return of money paid as consideration for agreement involving settlement of patent litigation, jury trial would be denied in view of technical issues involved. *Id.*

And plaintiff's failure to demand jury trial not later than 10 days after service of last pleading, as provided by court rule,

would be excused, where demand was only 2 days late, and last pleading had not been filed by defendant until 4 days after it was served, due to fact that there were 3 succeeding holidays after pleading was served. *Rogers v. Montgomery Ward & Co.*, 26 F. Supp. 707.

Again, where action was commenced November 3, 1938, issue was joined by service of answer on December 31, 1938, plaintiff assumed right to amend as of course within 20 days and defendant without objection served its answer thereto February 2, 1939, plaintiff's motion for leave to file nunc pro tunc a demand for jury trial was granted notwithstanding rule required demand for jury trial within 10 days after service of last pleading directed to issue triable of right by jury and such last pleading was the answer served December 31, 1938. *Buggeln v. Standard Brands*, 27 S. Supp. 399.

Other instances involving enlargement of time.—Plaintiffs' motion for bill of particulars and to strike, mailed to defendant's attorneys at least 35 days after filing of answer and service thereof on plaintiffs' counsel, would be regarded by the District Court also as an application for an enlargement of time under procedural rule, in view of statements concerning delay in brief of plaintiffs' counsel, and as such the application would be granted and the court would entertain the motion. *O'Leary v. Liggett Drug Co.*, 1 F. R. D. 272.

Where notice of appeal was filed on January 27, 1939, and on March 20, 1939, appellant filed motion for extension of time on ground that its counsel has been engaged in other litigation and was unable to prepare transcript, and court on March 27, 1939, purported to extend time and on April 19, 1939, purported to further extend time to May 27, 1939, and the record was filed on May 9, 1939, failure to file the record within prescribed time was excusable and did not require dismissal of appeal. *Mutual Benefit Health, etc., Ass'n v. Snyder*, 109 F. (2d) 469.

III. SUBDIVISION (c).

Cross reference.—See notes to Rule 60 (b).

Editor's note.—Since this subdivision and Federal Rule 6 (c) are precisely alike, it is thought that the following constructions placed on the Federal Rule will be, in some measure, helpful to the Colorado practitioner.

Application of rule is limited to actions pending at expiration of term.—Under rule that expiration of term does not affect power of a court to do any act in any civil action which "has been pending" before it, use of present perfect tense in the quoted phrase limits application of rule to civil

actions which were pending at time of expiration of term, and a civil action is "pending" when it is still open to modification, appeal, or rehearing and until final judgment is rendered. *National Popsicle Corp. v Hughes*, 32 F. Supp. 397.

The District Court had jurisdiction to entertain for allowance of attorney's fees and expenses by party who had prosecuted litigation to successful conclusion, from which other persons similarly situated would benefit, notwithstanding presentation of petition after the end of the term at which main decree was entered, since the proceeding was supplemental to the original proceeding, and not a request for a modification of the original decree. *Sprague v Ticonic Nat. Bank*, 307 U. S. 161, 59 S. Ct. 777, 83 L. Ed. 1184.

And it does not extend to actions fully determined by final judgment.—The rule does not purport to cover civil actions which, although pending in the past, have been prior to expiration of the term, fully determined by final judgment and which, at expiration of term, were no longer subject to modification, appeal, or rehearing by virtue of statutory grant of power or principle of substantive law, and as to any

such action there is no power in the court, which the rule can operate to extend beyond the term. *National Popsicle Corp. v Hughes*, 32 F. Supp. 397.

The rule cannot be construed as meaning that a court has continuing jurisdiction over its final judgments, and, if period of termination is specified in Rules of Civil Procedure, such period governs, but otherwise the end of the term marks the termination of court's power to modify or vacate final judgments. *Id.*

Nor can it abrogate previously established principle that power of a court to modify or vacate its final decrees expires with the term, except in so far as the rule, when read with other rules, operates to extend power of court over its final judgments beyond the term for purpose of doing any act or taking any proceeding in reference to judgment on grounds, in manner, and within time authorized by the rules. *National Popsicle Corp. v Hughes*, 32 F. Supp. 397.

IV. SUBDIVISION (d).

See committee note under subdivision C (d).

CHAPTER II

PLEADINGS AND MOTIONS

Rule 7. Pleadings Allowed; Form of Motions.

(a) **Pleadings.** There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to any answer. [Supplants Code Secs. 2, 52, 53, 54 and 181.]

(b) **Motions and Other Papers.**

C (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion, or in a written notice of application to set the same for hearing. [Supplants Code Secs. 195, 406, 407, and part of Sec. 181.]

(2) The rules applicable to captions, signing and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) **Demurrers, Pleas, Etc., Abolished.** Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used. [Supplants Code Secs. 56, 57, 58, 79 and 80.]

C. (d) **Agreed Case, Procedure.** Parties to a dispute which might be the subject of a civil action may, without pleadings, file, in the court which would have had jurisdiction if an action had been brought, an agreed statement of facts. The same shall be supported by an affidavit that the controversy is real and that it is filed in good faith to determine the rights of the parties. The matters shall then be deemed an action at issue and all proceedings thereafter shall be as provided by these rules. [From Code Secs. 310, 311, and 312.]

Committee Note.

There is no Federal subdivision 7 (d).

- I. Subdivision (a).
- II. Subdivision (b).
- III. Subdivision (c).
- IV. Subdivision (d).

Cross Reference.

For a discussion of this rule see Address no. 4 in appx. D.

I. SUBDIVISION (a).

Purpose of this and the following rules.—Rules 7 to 14, inclusive, deal particularly with pleadings both of the plaintiff and the defendant, and it is not difficult to reach the conclusion that their purpose is to insure a fair trial upon the merits without unreasonable delay and to place upon counsel representing a party much responsibility.

ity. *Moore v. Illinois Cent. R. Co.*, 24 F. Supp. 731, 733.

Under this rule the pleadings allowed are a complaint and an answer and, under certain conditions not present in this action, a reply. *Baker v. Sisk*, 1 F. R. D. 232, 236.

Plaintiff has no duty to reply to defendant's answer.—Where defendant filed an answer and counterclaim, apart from the counterclaim, plaintiff had no duty under Federal Rules to file a further reply to the defenses alleged by defendant. *Aktiebolaget Stille-Werner v. Stille-Scanlan*, 1 F. R. D. 395.

Under this rule enumerating pleadings allowed in an action, where plaintiffs filed complaint and an amendment thereto and defendant filed an answer after which plaintiffs replied and defendant filed rejoinder, reply and rejoinder were improper and would be treated as superfluous without formal action. *Bender v. Connor*, 28 F. Supp. 903.

Neither should the pleadings go further on a counter-claim than the answer thereto without leave of court. *Coley v. Pierce*, 1 F. R. D. 77.

Thus, defendant's answer to plaintiff's answer to a counterclaim was stricken where it merely reiterated allegations of the counterclaim and proceeded to set forth evidence and arguments in support thereof. *Id.*

When defendant makes motion for judgment on pleadings his answer must contain counterclaim. — Defendant's motion for judgment on pleadings under Rule 12 (c) because of insufficient denial of one paragraph of answer must be denied, where answer contained no counterclaim, court did not require filing of reply, and facts are not sufficiently clear to warrant such judgment in view of averments in amended complaint. *Central Trust Co. v. Second Nat. Bank*, 1 F. R. D. 98.

II. SUBDIVISION (b).

"Notice of motion" serves the purpose of a rule to show cause. — Rules to show cause have not been properly a part of civil practice. Rule 7 (b) provides that all applications to the court for orders shall be by motion. The rules and forms then clearly indicate that motions are brought before the court by means of a "notice of motion" which serves the purpose of a rule to show cause and obviates the necessity for obtaining such a rule. *United States v. Rollnick*, 33 F. Supp. 863.

Motions made at a hearing need not be reduced to writing. — Motions made at a hearing are obviously such as are incidental to the hearing itself, such as motions to exclude evidence, or for a directed verdict,

or for a mistrial, etc. In other words, they are such motions as are recorded in the minutes of the trial or hearing, and it is for that reason that the motion need not be reduced to writing and notice thereof given. *Hammond-Knowlton v. Hartford-Connecticut Trust Co.*, 26 F. Supp. 292, 293.

An oral argument on a motion previously made is not a "hearing" within the rule. *Hammond-Knowlton v. Hartford-Connecticut Trust Co.*, 26 F. Supp. 292.

Plaintiff's motion for permission to file a reply would be granted, although it would not seem necessary for plaintiff to obtain such permission. *Leimer v. State Mut. Life Assur. Co.*, 1 F. R. D. 386.

Defendant's application for certain order considered as a motion. — Defendant's application for order requiring plaintiff to show cause why plaintiff should not file reply to new matter set up as affirmative defense in defendant's answer would be considered as a motion. *Bankers Bond, etc., Co. v. Witherow*, 1 F. R. D. 197.

A motion to dismiss a third party petition would be treated as a motion to vacate the order granting leave to file the third party petition and to strike the petition. *McPherrin v. Hartford Fire Ins. Co.*, 1 F. R. D. 88.

A third-party defendant's motion to dismiss third-party complaint, filed by defendant with court's leave, as setting forth different claim than that asserted in declaration, will be treated as motion to vacate order granting such leave. *Crim v. Lumbermen's Mut. Cas. Co.*, 26 F. Supp. 715.

III. SUBDIVISION (c).

Demurrer treated as motion to dismiss. — Under this rule defendant's demurrer to amended complaint would be considered as a motion to dismiss. *Murphy v. Puget Sound Mtg. Co.*, 31 F. Supp. 318.

In the interest of justice. — A statutory demurrer in accordance with state practice for insufficiency of statement of claim to set out cause of action in case heard, on such demurrer, after effective date of federal rules abolishing demurrers, but authorizing defense by motion averring failure to state claim on which relief may be granted (Rule 12 (b) (6)) will be construed as such motion in interest of justice. *Ashman v. Coleman*, 25 F. Supp. 388.

IV. SUBDIVISION (d).

Editor's note. — Inasmuch as this subdivision is almost identical with § 310 of the Code of Civil Procedure, the cases construing that section have been placed hereunder.

The provisions of chapter XXV of the Code of Civil Procedure applied to nisi prius courts only. That such was the understanding of the legislature is evident from the last section, which provided that judgments rendered in the proceeding authorized by the chapter, shall be subject to appeal. *People v Boughton*, 5 Colo. 487, 489, cited in notes, 7 L. R. A. 319, 50 L. R. A. (N. S.) 379.

But the Supreme Court could take jurisdiction in an agreed case. *People v Boughton*, 5 Colo. 487, cited in notes, 7 L. R. A. 319, 50 L. R. A. (N. S.) 379.

And enforce its adjudication by entry of judgment.—The parties having submitted themselves to the jurisdiction of the supreme court, it would not only determine their rights, but enforce its adjudication by the entry of an appropriate judgment. *People v Boughton*, 5 Colo. 487, cited in notes, 7 L. R. A. 319, 50 L. R. A. (N. S.) 379.

Relief sought must appear from statement.—Where parties waive process and pleading, and come before the court upon an agreed case, the nature of the relief sought must be expressed in the agreement. *Central City Water Co. v Kimber*, 1 Colo. 475.

In such case the court acquires jurisdiction of the parties and of the subject-matter, by force of the agreement, and if nothing is expressed as to the judgment or de-

cree to be rendered upon the facts stated, the court is not empowered to do any thing whatever in the premises. *Id.*

If parties may go before a court with a naked statement of facts, and demand information as to their rights, without more, our courts will become schools of instruction, with little time to attend to their proper and legitimate duties. *Id.*

Inadvertent omission of facts from statement may be relieved against.—A stipulation in a case by both parties, made for convenience and expedition, but by which counsel inadvertently admit facts not in accord with the premises, and injurious to their client, may be relieved against; but to strike out a portion of a stipulation on the suggestion of one party is error if such part be material. The entire stipulation should be canceled. *Welsh v Noyes*, 10 Colo. 133, 14 P. 317, cited in note, Ann. Cas. 1912C, 770.

Right to amend ad damnum in agreed statement.—See *Autrey v Bowen*, 7 Colo. App. 408, 43 P. 908, cited in note, 24 L. R. A. (N. S.) 1143.

Necessity for motion for new trial.—In the early case of *Clayton v Smith*, 1 Colo. 95, it was said that in a case heard on an agreed statement of facts, it is not necessary to move for a new trial in the court below.

Rule 8. General Rules of Pleading.

C (a) Claims for Relief. A pleading which sets forth a claim for relief whether an original claim, counter-claim, cross-claim, or a third-party claim, shall contain (1) if the court be of limited jurisdiction, a short and plain statement of the grounds upon which the court's jurisdiction depends, or, in proper cases, of the grounds for certification under Rule 13 C (1), (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded. [Supplants Code Secs. 19, 55, and 70.]

Committee Note.

(1) was amended because it was Federal and the change made because of the county court limitation of \$2,000.00.

(b) Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments of the adverse party. If he is without knowledge or information suf-

ficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11. [Supplants Code Sec. 62.]

(c) Affirmative Defenses and Mitigating Circumstances. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. Any mitigating circumstances to reduce the amount of damages shall be affirmatively pleaded. When a party has mistakenly designated a defense as a counter-claim or a counter-claim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Committee Note.

For libel and slander see old Code Secs. 74 and 75, left in statutes. [§§ 2 and 3, appx. B.]

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided. [Supplants Code Sec. 77.]

(e) Pleading to be Concise and Direct; Consistency.

C (1) Each averment of a pleading shall be simple, concise, and direct. When a pleader is without direct knowledge, allegations may be made upon information and belief. No technical forms of pleading or motions are required. Pleadings otherwise meeting the requirements of these rules shall not be considered objectionable for failure to state ultimate facts, as distinguished from conclusions of law.

Committee Note.

The second and fourth sentences were added to the Federal subdivision to clarify the meaning and bring it in line with the majority of the Federal decisions.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not

made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11. [Supplants Code Sec. 65.]

(f) **Construction of Pleadings.** All pleadings shall be so construed as to do substantial justice. [Supplants Code Sec. 83.]

Committee Note.

See Rules 1 C (a), 110 (a).

- I. General Consideration.
- II. The Particular Clauses.
 - A. Claims for Relief.
 - 1. Grounds for Relief.
 - 2. Demand for Judgment.
 - B. Defenses; Forms of Denials.
 - C. Affirmative Defenses and Mitigating Circumstances.
 - D. Effect of Failure to Deny.
 - E. Pleading to Be Concise and Direct; Consistency.
 - 1. Concise and Direct Pleading.
 - 2. Consistency.
 - F. Construction of Pleadings.

Cross Reference.

For discussion of this rule see Address no. 4 in appx. D.

I. GENERAL CONSIDERATION.

Purpose of rule.—This rule requiring pleading to set forth short, plain statement of claim showing that pleader is entitled to relief, and requiring pleading to be simple, concise and direct, was promulgated in furtherance of policy to simplify procedure and facilitate speedy determination of litigation. *McKenna v. United States Lines*, 26 F. Supp. 558.

The Rules of Civil Procedure have a desirable objective in seeking to reduce or to prevent a multiplicity of suits. *Fraser v. Geist*, 1 F. R. D. 267.

The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved, and a generalized summary of the case that affords fair notice is all that is required. *Securities, etc., Comm. v. Timetrust*, 28 F. Supp. 34.

In discussing the decisions concerning pleading under the New Federal Rules, in the article entitled, "Some Current Trends in the Construction of the Federal Rules," by Mr. James A. Pike, in the *George Washington Law Review*, vol. IX, pp. 26, 30, made the following observation, "... several decisions have given explicit recogni-

tion to the view that under the new rules the chief function of pleadings is the giving of notice."

Pleadings may be amended, even after judgment, to conform with the evidence. *Cabel v. United States*, 113 F. (2d) 998.

A complaint is the basis of an action. *United States v. Griffith Amusement Co.*, 1 F. R. D. 229.

Whether it states a cause of action is to be determined by its contents, and not by what the defendants may know. *United States v. Griffith Amusement Co.*, 1 F. R. D. 229.

Burden is on the court to tell from the complaint whether the action is at law or equity.—In determining whether a plaintiff is entitled to jury trial as of right, burden is placed on court to determine from within four corners of the complaint whether or not action is one at law or in equity. *Fraser v. Geist*, 1 F. R. D. 267.

In determining whether a plaintiff is entitled to jury trial as of right, it is not the form of complaint alone, or even the plaintiff's view of the nature of his complaint, that is determinative whether an action is in its essence, one at law or in equity. *Id.*

Deficiencies of a complaint cannot be supplied by an affidavit.—The new Federal Rules of Civil Procedure, even construed most liberally, do not permit a plaintiff to supply deficiencies of a complaint by an affidavit. *Landau v. Wolverine Hotel Co.*, 33 F. Supp. 705.

Plaintiff may not be required to disclose information from complaint when it is sufficient.—Where complaint conforms to this rule other methods provided by the rules for obtaining additional particulars from plaintiff to enable defendant to prepare its pleading or to prepare for trial should be employed instead of moving the court to require plaintiff to attempt to disclose information sought in the complaint itself. *Lost Trail v. Allied Mills*, 26 F. Supp. 98.

Compliance with this rule does not expose plaintiff to a motion under Rule 12 (e).—Rule 8, subdivisions (a) and (e) require

the complaint to be short and the allegations to be simple, concise, and direct. It is evident that the framers of these rules did not intend that compliance with Rule 8 should expose a plaintiff to a motion under Rule 12 (e). *Brinley v Lewis*, 27 F. Supp. 313, 314.

Copies of agreements and letters should not be made a part of complaint; a simple statement of substance of letters being sufficient. *Shultz v Manufacturers, etc., Trust Co.*, 1 F. R. D. 53.

II. THE PARTICULAR CLAUSES.

A. Claims for Relief.

1. Grounds for Relief.

Cross reference.—See Form nos. 2 to 12 in appx. A.

Intention of rule.—The rule requiring a short and plain statement of claim in pleadings was intended to achieve simplicity and clarity of pleading. *Capdevielle v American Commercial Alcohol Corp.*, 1 F. R. D. 365.

Plaintiff should state facts upon which the cause of action depend.—A plaintiff, in the interest of clarity and good pleading, should state the grounds upon which her various causes of action depend. Not only is such a statement necessary in order to present defendant with a complaint to which he can readily prepare an answer, but also a proper definition of the issues will greatly facilitate future proceedings in the case, such as examinations before trial. *Baird v Dassau*, 1 F. R. D. 275, 277; *Zimmerman v National Dairy Products Corp.*, 30 F. Supp. 438.

The forms of complaint given under this rule are merely to indicate the simplicity and brevity of statement which the rules contemplate and alleged copying thereof in effect will not bar dismissal for failure to state sufficient facts. *Washburn v Moorman*, 25 F. Supp. 546.

But facts described as "evidentiary" need not be stated.—In all these provisions [Rules 8 (a), 8 (e) (1), 12 (b) (6)] the word "facts" is rather conspicuously absent, and there can be very little doubt, whatever the prior practice may have been, there is no longer any necessity to state such facts as have been described as "evidentiary" as distinguished from "ultimate", nor is it good practice. *Simonin's Sons v American Can Co.*, 30 F. Supp. 901, 902; *Sierocinski v Du Pont de Nemours & Co.*, 103 F. (2d) 843.

The practice of setting up in pleading allegations of many details for proof on trial will not be approved by court, notwithstanding meaning is plain. *Shultz v Manufacturers, etc., Trust Co.*, 1 F. R. D. 53.

Setting out such facts will not make entire pleading subject to motion to strike.—The fact that defendants violated this rule as to simplicity in setting up counterclaim and cross action, and set forth much evidentiary matter in cross complaint, did not make the entire pleading subject to motion to strike under Rule 12 (f) where allegations necessary to authorize relief were present. *Myers v Beckman*, 1 F. R. D. 99.

A count in contract or quasi contract is within this rule, and is subject to motion to strike for failure to comply with rule requiring short and plain statement of the claim. *Michelson v Shell Union Oil Corp.*, 26 F. Supp. 594.

A motion to dismiss complaint on ground that it failed to state a claim against the moving defendants and that court had no jurisdiction of the subject matter would not be granted if complaint stated any valid claims against those defendants, whether in law or in equity. *Chappel v First Trust Co.*, 30 F. Supp. 763.

Case illustrating compliance with the rule.—A complaint alleging that as result of a conspiracy a large portion of property securing bond issue was transferred to another corporation at an inadequate price, and that president of other corporation was guiding spirit of the conspiracy, stated a cause of action in equity against other corporation and president on basis of conspiracy between parties holding a fiduciary relationship with bondholder, notwithstanding absence of trust relationship between other corporation, its president, and bondholder. *Chappel v First Trust Co.*, 30 F. Supp. 763.

Under this rule, mere general charge of negligence without specification in petition in negligence action is sufficient. *Hardin v Interstate Motor Freight System*, 26 F. Supp. 97.

In action for injuries sustained by pedestrian who was struck by automobile, allegation that use of automobile by its driver was with knowledge and consent of the owner was a "short and plain statement of the claim" showing that the pleader was entitled to relief within requirement of this rule; other allegations being sufficient. *D'Allessandro v Bechtol*, 104 F. (2d) 845.

In action against moving picture company for violation of right of privacy, complaint alleging that company used plaintiff's name for advertising purposes, and in advertising and articles identified character in moving picture as portraying plaintiff, and that the articles and picture were scandalous and defamatory matter and made plaintiff an object of contempt and ridicule, was sufficient under this rule.

Moog v Warner Bros. Pictures, 29 F. Supp. 479.

Statement of amended claim alleging that defendant was guilty of negligence in manufacturing and distributing a dynamite cap in such a fashion that it was unable to withstand the crimping which defendant manufacturer knew it would be subjected to and distributing a cap so constructed that it would explode upon being crimped, without warning, sufficiently set forth a specific act of negligence of defendant. Sierocinski v Du Pont de Nemours & Co., 103 F (2d) 843.

In corporation receiver's action to recover damages for corporation officer's misappropriation of money paid over to defendant bank, complaint alleging that such officer executed two checks and draft on corporation's funds deposited in another bank and delivered them to defendant in payment of his private obligation, without corporation's authority, knowledge, ratification or approval, and that defendant accepted and cashed them when it knew or should have known that it was aiding officer to misappropriate corporation's funds, stated a cause of action. La Vecchia v First Nat. Bank, 112 F. (2d) 145.

In action on employment contract, complaint stating date of contract, terms thereof, and amount of compensation to be paid plaintiff, that plaintiff performed services to be rendered under contract, and that there was \$7,500 due under contract for which judgment was demanded, stated a cause of action, notwithstanding failure to allege that plaintiff made sales or otherwise show that commissions were earned. Neumann v Faultless Clothing Co., 27 F. Supp. 810.

In action arising out of automobile's collision with approaching truck, complaint alleging failure to keep proper lookout, to observe conditions of road and traffic, and to take reasonable precaution to avoid collision, justified submission of evidence that automobile skidded across the highway and that truck driver saw the situation in ample time to have avoided collision, under a charge on the last clear chance doctrine. Swift & Co. v Young, 107 F. (2d) 170.

Cases illustrating non-compliance.—A complaint, which set forth a claim which was a composite of breach of contract, misrepresentation and deceit, and negligence, should be recast to comply with the rule requiring a short and plain statement of the claim. Capdevielle v American Commercial Alcohol Corp., 1 F. R. D. 365.

A complaint, containing two causes of action for breach of contract against two corporations, or in the alternative against an individual if the corporations were not liable, and third cause of action directed

solely against individual defendant, was dismissed, where complaint contained immaterial and irrelevant matter, and was not short, plain statement of claim required by this rule. *Id.*

A counterclaim was in violation of this rule where, omitting exhibits thereto, it contained 31 pages of typewritten matter and, with exhibits, 45 pages, and was argumentative, verbose, prolix, and contained much evidentiary matter. Chambers v Cameron, 29 F. Supp. 742.

A complaint containing 39 paragraphs and an original answer containing 40 paragraphs did not comply with the requirements of this rule requiring a short and succinct statement of points relied on in each pleading. Purcell v Summers, 34 F. Supp. 421.

Where plaintiff based his cause of action on an agreement with defendant in accordance with defendant's "announcement," and thereafter he denied the existence of the "announcement," his pleading violated this rule. Pelelas v Caterpillar Tractor Co., 113 F. (2d) 629.

In removed stockholders' secondary action, allegations that certain matters set forth in complaint were unknown to plaintiffs or known to defendants and could be ascertained by plaintiffs only in the action were immaterial and unnecessary and did not comply with this rule. Jablov v Agnew, 30 F. Supp. 718.

2. Demand for Judgment.

Judgment is no part of cause of action.—"Rule 54 (c) makes it clear that the demand for judgment is no part of the claimants' cause of action." 1 Moore's Fed. Prac. 557.

Plaintiff need not pick and stick to one theory of law or fact.—"At the Proceedings of the Institute on Federal Rules, Dean Charles E. Clark stated, with reference to this rule that: 'As a matter of fact, all that should be expected of either party or his attorney, is that he tell what he knows about the case, the accident or the breach, or whatever happens, and that he shall not be required to pick and stick to one theory of law or one theory of fact, only to find when he gets to trial that he has chosen the wrong one.'" Kraus v General Motors Corp., 27 F. Supp. 537, 540.

Nor need he plead every fact essential to his right to recover the amount which he claims. Sparks v England, 113 F. (2d) 579.

In action against executors for specific performance of contract allegedly executed by decedent for creation of a trust fund income from which was to be given to plaintiff for life, wherein plaintiff in the alternative sought lump-sum payment in lieu of specific performance as damages

for failure to perform the contract, only relief available to plaintiff was equitable in nature and action was one in equity, and hence plaintiff was not entitled to jury trial as of right. *Fraser v. Geist*, 1 F. R. D. 267.

B. Defenses; Forms of Denials.

Strict compliance with rule is necessary.—Where affidavit of defense asserted lack of knowledge of and denied matters of public record and general knowledge, court would require strict compliance with this rule requiring that if a party is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state. *Squire v. Levan*, 32 F. Supp. 437.

Court not bound to accept obviously untrue statements in pleadings.—The general rule that the court is not bound to accept statements in pleadings which are, to the common knowledge of all intelligent persons, untrue, applies to this rule. *Nieman v. Long*, 31 F. Supp. 30.

Thus, a court will not permit its process to be trifled with and its intelligence affronted by the offer of pleadings which any reasoning person knows cannot possibly be true. *Id.*

Illustrations of statements showing that defendant is without sufficient knowledge.—A statement in defendant's answer that defendant after reasonable investigation was unable to ascertain whether the facts were true was the equivalent of allegation, required by this rule in order for answer to have effect of a denial, that party is without knowledge or information sufficient to form a belief. *Nieman v. Long*, 31 F. Supp. 30.

In action against liability insurer for amount of plaintiff's judgment against insured for injuries sustained in automobile accident, answer alleging that insurer was without knowledge or information sufficient to form a belief as to allegation in complaint that insured had been in automobile accident prior to issuance of policy was sufficient denial under this rule that prior accident actually took place. *Merchants Indemnity Corp. v. Peterson*, 113 F. (2d) 4.

Denials on ground that party was without any knowledge with respect to matters averred would be regarded as complying with court rule relative to denials based upon absence of knowledge or information sufficient to form a belief as to truth of an averment. *Caterpillar Tractor Co. v. International Harvester Co.*, 106 F. (2d) 769.

Under Civil Procedure Rule, defendant's averment which failed either to admit or deny certain allegations of complaint which seemingly were within sole knowledge of defendant, and stated that defendant was

without knowledge or information sufficient to form a belief as to truth of plaintiff's allegations had effect of a denial and would not be stricken. *Nordman v. Johnson City*, 1 F. R. D. 51.

In action by receiver of insolvent national bank to collect a stock assessment, denials in answer that defendant had knowledge concerning certain matters of public record and therefore denied averment, and, if material demanded proof, were insufficient to raise any issue of fact. *Nieman v. Bethlehem Nat. Bank*, 32 F. Supp. 436.

C. Affirmative Defenses and Mitigating Circumstances.

Amendment to rule.—Section 75 [§ 3, appx. B] of the Code, the statute on libel and slander, provides that the defendant in his answer may allege any mitigating circumstances to reduce the amount of the damages. This the Colorado Committee believed to be substantive law, so it amended Rule 8 (c) on affirmative defenses, and added a sentence, "Any mitigating circumstances to reduce the amount of damage shall be affirmatively pleaded." See article entitled, "The Federal Rules from the Standpoint of the Colorado Code" by Col. Philip S. Van Cise, Chairman of Rules Committee, *Dicta XVII*, no. 7, pp. 170, 171.

When the rule applies.—The rule requiring a party in pleading to a preceding pleading to set forth affirmatively an accord and satisfaction, a release, and any other matter constituting an avoidance or affirmative defense, applies only if there is a necessity for filing a pleading setting up any of the defenses therein recited and which necessarily raises disputed questions of fact or law. *Miller v. Hoffman*, 1 F. R. D. 290.

It works no change in the substantive law.—This rule requiring a party pleading to a preceding pleading to set forth affirmatively contributory negligence and any other matter constituting an avoidance or affirmative defense purports to work no change in the substantive law. *MacDonald v. Central Vermont Ry.*, 31 F. Supp. 298.

The question of who must allege and prove contributory negligence is procedure rule.—"The Federal Rules of Civil Procedure seem to indicate that this question of who must allege and prove contributory negligence or its absence is a rule of procedure inasmuch as Rule 8 (c) declares that 'In pleading to a preceding pleading, a party shall set forth affirmatively . . . contributory negligence . . . and any other matter constituting an avoidance or affirmative defense.'" See article entitled, "Effect of *Erie Railroad v. Tompkins* and Rule 8 (c) of the Federal Rules of Civil Procedure upon Burden of Proof of Contributory Negligence" by Mr. John H. Uhl, in 37 *Michigan Law Review* 1249.

For a comparison of cases and discussion of the question of pleading contributory negligence, see article entitled, "Burden of Pleading Contributory Negligence Under the Federal Rules of Civil Procedure," in 34 Illinois Law Review 106.

The defendants may not in a motion to dismiss raise the issue of the statute of limitations. *Baker v. Sisk*, 1 F. R. D. 232, 236.

Where complaint alleged that plaintiff became mentally unbalanced as result of defendant's acts and was insane when the action accrued, and affidavits showed that plaintiff was subsequently committed to an institution as an incompetent person, bar by statute of limitations should be urged by way of affirmative defense, not by motion to dismiss, and should not be determined before trial. *Munzer v. Swedish American Line*, 30 F. Supp. 789.

Where defendant, in answer, pleaded statute of limitations as an affirmative defense, defendant's motion for judgment on pleadings was properly for judgment, and not to strike out complaint, since bar of statute of limitation is a defense available only when set up by answer unless cause of action is one which did not exist at common law and has been created by statute, which fixes a time within which action must be brought as an essential element of right to sue. *Patsavouras v. Garfield*, 34 F. Supp. 406.

The plea of the statute of limitations is an optional plea by defendant and an affirmative defense, and plaintiff need not set out affirmatively that the subject matter sued upon is within the statute. *Continental Illinois Nat. Bank, etc., Co. v. Ehrhart*, 1 F. R. D. 199.

Plaintiff has no duty to anticipate the defenses to his claim.—This rule providing that contributory negligence and assumption of risk shall be alleged as an affirmative defense, facts going to those issues were not required to be alleged by plaintiff in personal injury action, and plaintiff would not be compelled to anticipate the defense by detailing such facts in a bill of particulars. *Lasicki v. Socony Vacuum Oil Co.*, 1 F. R. D. 384.

Validity of defense of laches determined upon merits of the case.—Motion to strike affirmative defense of laches, set up pursuant to provisions of this rule, would not be stricken, and validity of defense would be determined upon final disposition of case upon its merits. *Nordman v. Johnson City*, 1 F. R. D. 51.

Contributory negligence, not having been affirmatively plead as a defense in negligence case, was not an issue. *Bridges v. Dahl*, 108 F. (2d) 228.

In railroad employee's action for injuries sustained when counterweight on crane fell

and injured him, where railroad did not plead contributory negligence or assumed risk as a defense, no inference of either on employee's part was found in his pleadings, and no issue was made on those questions, the District Court erred in submitting to jury issue of contributory negligence and assumed risk and in charging jury that the fellow servant rule applied. *Carpenter v. Baltimore, etc., R. Co.*, 109 F. (2d) 375.

In action by receiver of bank and by individual for a judgment against defendant under her written guarantee of the payment of corporate bonds, motion for order requiring plaintiffs to state in separate counts the alleged causes of action would be granted, since it was possible that one or more affirmative defenses prescribed by court rule might appear to be appropriate in the answer as to one plaintiff but perhaps not to the other. *Bicknell v. Lloyd-Smith*, 25 F. Supp. 657.

D. Effect of Failure to Deny.

Under this rule, averments of pleas stood as admitted when not denied after reversal of judgment sustaining demurrers to the pleas. *South Florida Securities v. Seward*, 103 F. (2d) 872.

An answer, by failing to deny allegations of complaint, admitted such allegations. *Sun-Maid Raisin Growers Ass'n v. Neustadter Bros.*, 115 F. (2d) 126.

Pure question of law presented where respondent admitted crucial averments of petition.—Where the answer of respondent in substance admitted the crucial averments of the petition, by the device of styling them as immaterial and not requiring an answer, a pure question of law was presented for the determination of the reviewing court. *Publicker v. Shallcross*, 106 F. (2d) 949.

Defendant concedes in effect that denials were properly stricken.—Where on motion by plaintiff part of an answer denying certain allegations on information and belief was stricken, and subsequently the parties stipulated that no claim would be made on the denial, or on the order striking it, and none was made, defendant in effect conceded that the denial was properly stricken. *Sun-Maid Raisin Growers Ass'n v. Neustadter Bros.*, 115 F. (2d) 126.

E. Pleading to Be Concise and Direct; Consistency.

1. Concise and Direct Pleading.

Cross reference.—See Rule 8 (a) (2) and note thereto.

Amendment to rule.—Federal Rule 8, "General Rules of Pleading," has been very much construed by the federal courts. Its subdivision (e) (1) has resulted in con-

siderable conflict of decision and doubt as to whether the rules permit pleading on information and belief and whether ultimate facts or conclusions of law can be set up either in the complaint or in the answer. This subdivision now reads: "Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required." To get away from the present uncertainty of decision, the committee has changed the section. See article entitled, "The Federal Rules from the Standpoint of the Colorado Code" by Col. Philip S. Van Cise, Chairman of Rules Committee, Dicta, XVII, no. 7, pp. 170, 174.

The rules should be reasonably and not technically construed. *Caterpillar Tractor Co. v. International Harvester Co.*, 106 F. (2d) 769.

The letter and spirit of the rules require simple, concise, and direct denials, admissions, and averments in pleadings. *Strahle-Johnson Supply Co. v. Douglas Co.*, 1 F. R. D. 279.

But sufficient facts should be alleged to enable court to determine whether cause of action is stated.—Under court rules complaint must be concise, direct, and consistent, but complaint must contain sufficient allegations of fact to enable court to determine whether a cause of action is stated. *United States v. Griffith Amusement Co.*, 1 F. R. D. 229.

In action on employment contract, complaint stating date of contract, terms thereof, and amount of compensation to be paid plaintiff, that plaintiff performed services to be rendered under contract, and that there was \$7,500 due under contract for which judgment was demanded, stated a cause of action, notwithstanding failure to allege that plaintiff made sales or otherwise show that commissions were earned. *Neumann v. Faultless Clothing Co.*, 27 F. Supp. 810.

This does not mean "evidentiary" facts.—In all these provisions [Rules 8 (a), 8 (e) (1), 12 (b) (6)] the word "facts" is rather conspicuously absent, and there can be very little doubt, whatever the prior practice may have been, there is no longer any necessity to state such facts as have been described as "evidentiary" as distinguished from "ultimate", nor is it good practice. *Simonin's Sons v. American Can Co.*, 30 F. Supp. 901, 902; *Cater Const. Co. v. Nischwitz*, 111 F. (2d) 971.

A complaint containing much evidentiary and unnecessary matter was ordered to be simplified to comply with the rules. *Dellefield v. Blockdel Realty Co.*, 1 F. R. D. 42.

The court should not be called on to cull out material allegations from immaterial

allegations in a complaint. *Gilbert v. General Motors Corp.*, 1 F. R. D. 101.

Thus, a motion to strike certain designated portions from an amended complaint under Rule 12 (i) was granted in so far as the paragraphs contained immaterial allegations, unnecessary evidentiary matter, and repetitious allegations. *Id.*

The complaint in an action on an implied contract must allege facts simply and concisely in lucid fashion, supporting the conclusion of implied contract. *Washburn v. Moorman*, 25 F. Supp. 546.

A complaint alleging that defendant became indebted to plaintiff on an implied contract for the exclusive use of the photograph and name of plaintiff's steer "Big Jim" in advertising of defendant's animal food and products was subject to dismissal for failure to allege facts supporting the conclusion of "implied contract" to pay. *Id.*

Where causes of action set forth in same complaint should be set out in different counts.—Though causes of action of a plaintiff individually and as administratrix of the goods, chattels, rights, and credits which were of a deceased person could be set forth in the same complaint, plaintiff was required under this rule to set them out in different counts. *Dellefield v. Blockdel Realty Co.*, 1 F. R. D. 42.

2. Consistency.

In general.—The case of *Catanzaritti v. Bianco*, 25 F. Supp. 457, decided November 28, 1938, by Watson, D. J., may serve to elucidate the rule. In that case, it is said that: "Under the present practice there is no objection to an action which proceeds on inconsistent theories entitling the plaintiff to different remedies, depending on which theory is established. A party may set forth two or more statements of a claim alternately or hypothetically and may state as many separate claims as he has regardless of consistency and whether based on legal or on equitable grounds or on both (Federal Rule 8 (e)), and relief in the alternative or of several different types may be demanded." *Kraus v. General Motors Corp.*, 27 F. Supp. 537, 540; *Kuenzel v. Universal Carloading, etc., Co.*, 29 F. Supp. 407. *Taiyo Trading Co. v. Northam Trading Corp.*, 1 F. R. D. 382.

The federal rules permit party to state his case as extensively as he wishes, and he is not confined to one theory, if more than one will apply. *Crim v. Lumbermen's Mut. Cas. Co.*, 26 F. Supp. 715; *Munzer v. Swedish American Line*, 30 F. Supp. 789.

Thus claims for damages for breach of contract and fraud may be joined in one action though inconsistent. *Cary v. Hardy*, 1 F. R. D. 355.

Likewise a complaint is not defective merely because it joins causes of action in tort and in contract. *Munzer v Swedish American Line*, 30 F. Supp. 789.

And when one of the claims is established the other will be dismissed.—In action by corporation against its former officers, directors, and certain of its former stockholders to recover damages incurred by corporation as a result of sale of control of corporation to a group which proceeded to rob it of most of its assets, where bill pleaded conspiracy to defraud and negligence, and the cause of action based on negligence was sufficiently pleaded and established by the evidence, the cause charging conspiracy to defraud would be dismissed as surplusage. *Insuranshares Corp. v Northern Fiscal Corp.*, 35 F. Supp. 22.

A complaint in order to present an alternative claim against multiple defendants must contain a clear statement that there is some liability to the plaintiff, and a showing that plaintiff is unable to state upon which of the defendants the liability should fall. *Taiyo Trading Co. v Northam Trading Corp.*, 1 F. R. D. 382.

F. Construction of Pleadings.

Editor's note.—Section 83 of the Code of Civil Procedure and this rule seem to have the same meaning so that cases construing that section have been included in the note below.

Pleadings are to be liberally construed. *Neumann v Faultless Clothing Co.*, 27 F. Supp. 810.

On motion to dismiss, trial court's duty was to construe the pleadings so as to effectuate substantial justice. *Simmons v Peavy-Welsh Lbr. Co.*, 113 F. (2d) 812.

The court was required to construe the pleadings in action against insurer so as to do substantial justice, and would do so in insured's favor. *Herman v Mutual Life Ins. Co.*, 108 F. (2d) 678.

Technical rules will not be permitted to render a pleading defective where the attempt of the pleader to make the pleading more accurate and complete is frustrated at the instance of the objecting party. *Boltz*

v Bonner, 95 Colo. 350, 351, 35 P. (2d) 1015, cited in note, 95 A. L. R. 392.

Where an alleged defect in a complaint is a mere matter of interpretation, defendant cannot interpret plaintiff out of court. *Mountain States Tel., etc., Co. v Sanger*, 87 Colo. 369, 287 P. 866.

Objection for insufficient facts is overruled if pleading can be upheld by liberal construction.—While the objection for insufficient facts is not waived by answer, but may be made at any time, making it for the first time at the trial is not encouraged by the courts and when so made will be overruled if by fair implication or most liberal construction the pleading can be held to state a cause of action. *Musgrove v Brown*, 93 Colo. 559, 27 P. (2d) 590.

Relief granted, if consistent with the pleadings liberally construed, will not be disturbed.—A judgment will not be disturbed on the ground that it is not warranted by the pleadings where the cause has been remanded merely to permit the introduction of evidence on the undetermined issues, and the facts established by the evidence entitle the party to the relief granted, which was consistent with the pleadings liberally construed. *Schiffer v Adams*, 13 Colo. 572, 573, 22 P. 964, cited in note, 24 Am. St. Rep. 173, citing *Marriott v Clise*, 12 Colo. 561, 21 P. 909; *White v Lyons*, 42 Cal. 279.

Judicial notice is proper aid in construing pleading.—The complaint and summons were entitled in the county of Teller. The complainant alleged a contract to be performed "in the city of Victor," not specifying in what county. Held, on motion to change the venue, the court might take judicial notice that the city of Victor is situate in the county of Teller and construed the complaint accordingly. *Gould v Mathes*, 55 Colo. 384, 135 P. 780.

Notwithstanding pleadings were filed in conformity with state practice before effective date of new Rules of Civil Procedure, the new rules would govern on motion for judgment on the pleadings, where their application was feasible and would not work injustice. *Squire v Levan*, 32 F. Supp. 437.

Rule 9. Pleading Special Matters.

C (a) (1) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge, and on such issue the party relying on such capacity, authority, or legal existence, shall establish same on the trial.

Committee Note.

The last clause, beginning with the words "and on such issue" was added to the Federal subdivision because of *Home Insurance Co. v. Taylor*, 94 Colo. 446.

C (2) Identification of Unknown Party. When a party is designated in the caption as one "whose true name is unknown" the pleader shall allege such matters as are within his knowledge to identify such unknown party and his connection with the claim set forth. [From Code Sec. 50 (b).]

C (3) Interest of Unknown Parties. When parties are designated in the caption as "all unknown persons who claim any interest in the subject matter of this action" the pleader shall describe the interests of such persons, and how derived, so far as his knowledge extends. [From Code Sec. 50 (d).]

Committee Note.

See Rule 54 C (g).

C (4) Description of Interest. Where unknown parties claim some interest through some one or more of the named defendants, it shall be a sufficient description of their interests and of how derived to state that the interests of the unknown parties are derived through some one or more of the named defendants. [New.]

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

C (c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall establish on the trial the facts showing such performance or occurrence. [Supplants Code Sec. 72.]

Committee Note.

The last clause, commencing with the words "and when so made" was added to the Federal subdivision to avoid shifting of the burden of proof. See *Home Insurance Co. v. Taylor*, 94 Colo. 446.

(d) **Official Document or Act.** In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

C (e) Judgment. In pleading a judgment or decision of a court, judicial or quasi judicial tribunal, or of a board or officer within the United States or within a territory or insular possession subject to the dominion of the United States, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts. [Supplants Code Sec. 71.]

(f) **Time and Place.** For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) **Special Damage.** When items of special damage are claimed, they shall be specifically stated.

C (h) Pleading Statute. In pleading a statute of Colorado or of the United States, the same need not be set forth at length, but it shall be sufficient to refer to such statute by the appropriate designation in the official or recognized compilation thereof, or otherwise identify the same, and the court shall thereupon take judicial knowledge thereof. [From Code Sec. 73.]

Committee Note.

There is no Federal subdivision 9 (h).

- I. Capacity.
 - A. General Consideration.
 - B. Identification of Unknown Party.
 - C. Interest of Unknown Parties.
 - D. Description of Interest.
- II. Fraud, Mistake, Condition of the Mind.
- III. Conditions Precedent.
- IV. Special Damage.
- V. Pleading Statute.

Civil Procedure from which this subdivision was derived.

It seems that unknown persons may, under this provision be made parties to a suit to quiet the title to lands, and may be concluded by the decree therein. Brackett v McClure, 24 Colo. App. 524, 135 P. 1110.

C. Interest of Unknown Parties.

Editor's note.—There is no federal subdivision 9 C (a) (3). The provision referred to below is § 50 (d) of the Code of Civil Procedure from which this subdivision was derived.

This provision requires the plaintiff to describe the interest of the unknown persons and how derived so far as the plaintiff's knowledge may extend. This is a jurisdictional requirement. In an action to quiet a tax title, what is sufficient compliance with this requirement? Some lawyers insert a paragraph in the complaint and allege that the unknown persons claim some interest through, by or under some of the known defendants. It is very doubtful if such general allegation is sufficient. The object in such suit is to remove any question affecting the marketability of a title. The lawyers should set forth that if

Cross Reference.

For a discussion of this rule see Address no. 4 in appx. D.

I. CAPACITY.

A. General Consideration.

See committee note under subdivision C (a) (1).

B. Identification of Unknown Party.

Editor's note.—There is no federal subdivision 9 C (a) (2). The case noted here is a construction of § 50 (b) of the Code of

the certain defendant, naming him, is dead, then his heirs, legatees, assignees, etc., claim some right, title and interest in and to the property because the known defendant in his lifetime claimed some right, title and interest in and to the property having been named grantee in a certain deed giving the date, book and page thereof (or describing the interest of the known defendant whatever it may be.) This is a technical requirement and should be fully complied with. Our courts have construed actions in which substituted service was attempted very strictly. Article by Mr. Ira L. Quiat of the Denver Bar, *Dicta VI*, no. 1, pp. 9, 11.

D. Description of Interest.

There is no federal subdivision 9 (a) (4).—Ed. note.

II. FRAUD, MISTAKE, CONDITION OF THE MIND.

Origin of rule.—"This rule very probably was adopted from the rules of the Supreme Court of England, Order XIX, Rule 22, which provides that whenever it is material to allege malice, etc., it shall be sufficient to allege same as a fact without setting out the circumstances from which it is to be inferred." *Love v. Commercial Cas. Ins. Co.*, 26 F. Supp. 481.

"It was construed in the case of *Sargeant v. Cardiff Junction Dry Dock Co.* (1926) W. N. 263, in which Justice Astbury declined a bill of particulars with reference to how certain knowledge alleged came to exist, whether it was by means of documents or verbally. After discussing the rule, he declined the bill of particulars." *Id.*

Declaration that letter was maliciously written was a sufficient charge of malice.—In libel action, charge in declaration that letter was maliciously written concerning plaintiff was a sufficient charge of malice, without alleging further facts showing malice, under court rule authorizing general averment of malice and other conditions of defendant's mind. *Love v. Commercial Cas. Ins. Co.*, 26 F. Supp. 481.

In suit for conspiracy and fraud, it is necessary that there be greater detail in allegation of facts than in many other suits, and mere allegations that defendants "conspired" or committed "fraudulent acts" are insufficient. *Shultz v. Manufacturers, etc., Trust Co.*, 1 F. R. D. 53.

Thus, in action on jewelers' block policy wherein insurer alleged as a defense that warranties by insured in written proposal for insurance were false, insurer would be required, in response to insured's motion for bill of particulars, to state with particularity the circumstances constituting fraud. *Prutinsky v. Commercial Union Assur. Co.*, 1 F. R. D. 440.

And in action by broker against corporation which leased from landlord represented by broker, complaint which alleged that corporation falsely represented to landlord that broker was not involved in the lease transaction and thereby prevented broker from collecting commissions, but which failed to allege fraud, required by this rule, was insufficient. *Zimmerman v. National Dairy Products Corp.*, 30 F. Supp. 438.

Also an annuity policy would not be rescinded for fraud or fraudulent representations with respect to dividend payments to be made thereunder in absence of assertion that agent acted in anything but the best of faith in submitting columnar analysis. *Herman v. Mutual Life Ins. Co.*, 108 F. (2d) 678.

Plaintiff was not entitled to bill of particulars under this rule where defendant's defenses dealing with fraud were fully particularized and plaintiff was seeking evidence, rather than ultimate facts, which was not permissible under the rule. *Brown v. Fire Ass'n*, 1 F. R. D. 450; *Prutinsky v. Commercial Union Assur. Co.*, 1 F. R. D. 440.

Defendant's motion for bill of particulars was granted as to allegations of complaint that certain acts and representations were false and fraudulent, where circumstances constituting fraud were not stated with particularity as required by court rule. *McCarthy v. Schumacher*, 1 F. R. D. 8.

As against a motion to strike, a paragraph of an amended complaint alleging fraud was proper where other parts of complaint showed acts alleged to constitute fraud. *Gilbert v. General Motors Corp.*, 1 F. R. D. 101.

III. CONDITIONS PRECEDENT.

Cross reference.—For a discussion of subdivision C (c), see Address no. 2 in appx. D.

Editor's note.—Since this subdivision seems to be similar to § 72 of the Code of Civil Procedure the cases construing that section have been included in this note.

This rule does not require any allegations that procedural requirements have been fulfilled.—The conditions precedent, referred to in rule which provides that in pleading the performance or occurrence of conditions precedent it is sufficient to aver generally that all conditions precedent have been performed, are the conditions going to create liability or those which construct a legal capacity to sue, and rule does not require any allegation that procedural requirements have been fulfilled. *Snyder v. Le Roy Dyal Co.*, 1 F. R. D. 362.

Complaint failing to allege performance by plaintiff is fatally defective.—A com-

plaint based upon a contract executory as to the plaintiff which is silent upon the question of plaintiff's performance, and contains no averments which, if true, would excuse performance, is fatally defective. See *Mulford v. Central Life Assur. Soc.*, 25 Colo. App. 527, 529, 139 P. 1044; *Armer v. Fisk*, 1 Colo. 148; *Jones v. Perot*, 19 Colo. 141, 34 P. 728, cited in notes, 133 Am. St. Rep. 125, 34 A. L. R. 363; *Board of Public Works v. Hayden*, 13 Colo. App. 36, 56 P. 201, cited in notes, 20 L. R. A. (N. S.) 802, 46 A. L. R. 270; *Galligan v. Bua*, 77 Colo. 386, 236 P. 1016.

Although it is not defective for failure to state plaintiff "duly" performed all conditions.—In an action on a hail insurance policy where the allegations of the complaint substantially complied with this provision it is held that it was not defective because it failed to state that plaintiff "duly" performed all of the conditions of the contract. *Great American Ins. Co. v. Scott*, 89 Colo. 99, 299 P. 1051.

Complaint on bond may adopt general averment.—A complaint on a bond which prescribes conditions to be performed by the obligee in order to fix the liability of the obligor, may effectually adopt the general averment of conditions performed. *United States Fidelity, etc., Co. v. Newton*, 50 Colo. 379, 115 P. 897.

Plaintiff under the allegation of performance of an insurance contract could prove waiver of policy requirements by the company. *Southern Surety Co. v. Farrell*, 79 Colo. 53, 244 P. 475.

Defendant must expressly plead non-performance of conditions precedent.—Where an averment of performance of conditions precedent is allowed in the complaint, the rule is that if a defendant relies upon non-performance, he must specially allege the condition or conditions, on the non-performance of which he relies, and negative their performance. *National Surety Co. v. Queen City Land, etc., Co.*, 63 Colo. 105, 108, 164 P. 722, quoting *Penn Mut. Life Ins. Co. v. Ornauer*, 39 Colo. 498, 90 P. 846, 848. To the same effect are: *Helvetia Swiss Fire Ins. Company v. Allis Co.*, 11 Colo. App. 264, 53 P. 242, cited in notes, 81 Am. St. Rep. 287; 4 L. R. A. (N. S.) 689, Ann. Cas. 1916A, 594, 51 A. L. R. 389; *Branham v. Johnson*, 62 Ind. 259; *Parks v. Holmes*, 22 Ill. 522; *Preston v. Roberts*, 75 Ky. (12 Bush) 570; *Kahnweiler v. Phenix Ins. Co.*, 67 F. 483; 14 C. C. A. 485; *Hamilton v. Liverpool, etc., Ins. Co.*, 136 U. S. 242, 10 S. Ct., 945, 34 L. Ed. 419; *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 11 S. Ct. 103, 34 L. Ed. 708; *Breard v. Mechanics', etc.,*

Ins. Co., 29 La. Ann. 764; *Continental Ins. Co. v. Chase*, 89 Tex. 212, 34 S. W. 93; *Evarts v. United States Mut. Acci. Ass'n*, 16 N. Y. S. 27.

And it is error to refuse filing of answer denying performance.—In an action by a contractor against the board of public works for writ of mandamus to compel the board to allow him an estimate as provided in the contract, where the petition alleged performance of the contract on the part of the petitioner, an answer denying the allegations of performance in the petition created a material issue, and it was error to refuse to permit it to be filed. *Board of Public Works v. Hayden*, 13 Colo. App. 36, 56 P. 201, cited in notes, 20 L. R. A. (N. S.) 802, 46 A. L. R. 270.

IV. SPECIAL DAMAGE.

Where defendant filed counterclaim for damages in suit to cancel oil lease he should have pleaded damages specially.—In suit to cancel oil lease where defendants filed a counterclaim and sought specific performance of lessor's alleged oral agreement to execute a new lease or, in alternative, damages, defendants should have stated, as facts, the elements of their alleged damages, rather than making a general allegation of damages in alternative prayer for relief, in view of intent of court rule concerning pleading of special matters such as special damages. *Gray v. Schoonmaker*, 30 F. Supp. 1019.

Also one seeking special damages for failure to make stock transfer should so allege.—If purchaser suing to compel transfer of shares of stock on books of corporation had suffered special damages as result of failure to make transfer, purchaser should have alleged such damages. *Radio Electronic Television Corp. v. Bartniew Distributing Corp.*, 32 F. Supp. 431.

In action for assault, motion to strike paragraph which alleged that defendant accompanied the assault with use of vile language would be denied although language alone would not be actionable, where language was alleged in aggravation of assault, which aggravation was alleged generally in another paragraph of the complaint, and matter would give defendant more definite idea of nature of case to be presented. *Brinley v. Lewis*, 27 F. Supp. 313.

V. PLEADING STATUTE.

See committee note under subdivision C (h).

Rule 10. Form of Pleadings.

C (a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, if known to the person signing it, and a designation as in Rule 7 (a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties. A party whose name is not known shall be designated by any name and the words "whose true name is unknown". In an action in rem unknown parties shall be designated as "all unknown persons who claim any interest in the subject matter of this action." [Supplants Code Sec. 82 and parts of Sec. 50.]

(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth. [Supplants Code Sec. 65, part 76.]

C (c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading, or in any motion. An exhibit to a pleading is a part thereof for all purposes. [Supplants Supreme Court Rule 2.]

- I. Caption; Names of Parties.
- II. Paragraph; Separate Statements.
- III. Adoption by Reference; Exhibits.

Cross Reference.

For a discussion of this rule see Address no. 4 in appx. D.

I. CAPTION; NAMES OF PARTIES.

Amendment to rule.—Federal Rule 10 (a) states how parties shall be named, but makes no provisions for parties whose names are unknown or for unknown parties. The committee therefore added these sentences: "A party whose name is not known shall be designated by any name and the words 'whose true name is unknown.' In an action in rem unknown parties shall be designated as 'all unknown persons who claim any interest in the subject matter of this action.'" See article entitled, "The Federal Rules from the Standpoint of the Colorado Code" by Col. Philip S. Van Cise, Chairman of Rules Committee, Dicta XVII, no. 7, pp. 170, 174.

Sufficient naming of parties.—In proceeding by bakery against various individuals

and labor organizations, a petition which was uncertain as to identity of some of individuals and names of unions but was amended to supply some of the names and answer and other pleadings of respondents gave correct names of such defendants and their relations to the labor organizations referred to by complainant, was sufficient to permit court to dispose of real issues in case on application for preliminary injunction. *Fehr Baking Co. v. Bakers' Union*, 20 F. Supp. 691.

II. PARAGRAPHS; SEPARATE STATEMENTS.

This rule refers to averments of the complaint, or defenses pleaded in the answer, not to denials. *National Millwork Corp. v. Preferred Mut. Fire Ins. Co.*, 28 F. Supp. 952.

Failure to state claims separately is not a ground for dismissal.—Although failure to state claims separately is not made a ground for dismissal, the fact should be considered by counsel in drafting an amended complaint. *Ford Motor Co. v. McFarland*, 29 F. Supp. 303.

Nor is separation of causes of action necessary where charge is clear.—A plaintiff

is not required to separately state and number his causes of action under the court rules where the charge was clear without separate statement. *Parts Mfg. Corp. v. Weinberg*, 1 F. R. D. 329.

Cases illustrating the rule.—On motions to dismiss amended bill containing several causes of action for want of jurisdiction, court should at least require plaintiffs to state and number such causes separately in second amended bill, where it grants them leave to plead over. *American Fomon Co. v. United Dyewood Corp.*, 1 F. R. D. 171.

In action charging acts of misconduct on the part of a corporation's directors, where various claims made against certain defendants and various transactions set forth were in reality parts of one alleged conspiracy, there was no necessity of a separate statement as to those defendants. *Sapery v. United American Metals Corp.*, 1 F. R. D. 106.

In *Conner v. Southern Ry. Co.*, 1 F. R. D. 410, a motion to strike the second count of the complaint on the ground that there was a commingling of statutory grounds and common law grounds was granted.

Where defendant alleged that "for a counterclaim herein defendant repeats and realleges all of the allegations contained in this amended answer and counterclaim and further alleges," defendant would be required to state particular allegations which it deemed to be incorporated into counterclaim and to extent that such allegations were paragraphs which themselves incorporated other parts of answer, defendant would be required to also designate what was purported to be incorporated into such paragraphs. *Aktiebolaget Stille-Werner v. Stille-Scanlan*, 1 F. R. D. 395.

The plaintiff on motion of defendant would be required to put all averments of his claim in numbered paragraphs. *Schoenberg v. Decorative Cabinet Corp.*, 27 F. Supp. 802.

In action for rescission of transactions claimed to be fraudulent arising out of a conspiracy entered into between defendants, each element or ground does not constitute a separate claim, as regards motion to separately state and number. *Grauman v. City Co.*, 31 F. Supp. 172.

In action charging acts of misconduct on the part of a corporation's directors,

where transactions set forth in certain paragraphs of complaint dealt with matters apparently unrelated to certain defendants except for a conclusion set forth with respect to one of them, the matters set forth in those paragraphs were ordered to be set forth in separate counts as to those defendants. *Sapery v. United American Metals Corp.*, 1 F. R. D. 106.

III. ADOPTION BY REFERENCE; EXHIBITS.

Editor's note.—Inasmuch as this subdivision and Rule 2 of the former Supreme Court Rules are similar the cases construing that rule are included in this note.

This rule was intended to prevent the necessity of repeating the parts relevant to a later count and it was expected that pleaders would refer only to the relevant parts by the words "as in the first cause of action stated" or their equivalent, as was the custom at common law. *Fulton Inv. Co. v. Farmers Reservoir, etc., Co.*, 76 Colo. 472, 476, 231 P. 61.

The pleader has no right to adopt wholesale all the allegations of a previous cause of action. *Fulton Inv. Co. v. Farmers Reservoir, etc., Co.*, 76 Colo. 472, 231 P. 61.

This rule permits a document to be made a part of a pleading by attaching it as an exhibit. This means that so attaching it amounts to the same thing as if it were set forth in the body of the pleading, as was the practice before the rule. *Sparks v. Eldred*, 78 Colo. 55, 56, 239 P. 730.

Copy of written instrument pleaded is notice to opposite party of its existence.—Where former employee, who sought by class action to compel former employer to account for dividends paid to employer by insurer under group policy, incorporated in his pleading an application referring to an agreement between employer and employee in accordance with an "announcement" of the employer, plaintiff would be deemed, by virtue of this rule providing that a copy of a written instrument pleaded is part of the pleading for all purposes, to have averred the existence of the "announcement," and his averment of lack of knowledge of the "announcement" was of no force. *Peelias v. Caterpillar Tractor Co.*, 113 F. (2d) 629.

Rule 11. Signing of Pleadings.

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address and that of the party shall be stated. A party who is not represented by an attorney shall sign his pleadings and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been filed. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. [Supplants part of Code Sec. 66 and all of Secs. 67 and 68.]

Committee Note.

The words "and that of the party" were inserted in the first sentence to comply with the writ of error procedure in Rule 111 (e).

Verification or affidavit is required in depositions to perpetuate testimony, Rule 27 C (a) (1), injunctions, Rule 65, certiorari, Rule 106 (4), contempt, Rule 107 (c), motion for service by mail, Rule 4 (g); motion for service by publication, Rule 4 (h); and motion for order authorizing sale under power, Rule 120 (a).

Cross reference.—For a discussion of this rule see Address no. 4 in appx. D.

Editor's note.—For cases construing that part of § 66 of the Code of Civil Procedure (supplanted in part by this rule) concerning itself with sham answers, see *Cochrane v Parker*, 5 Colo. App. 527, 530, 39 P. 361, cited in notes, 113 Am. St. Rep. 640, 641, 652. See also, *Glenn v Brush*, 3 Colo. 26, cited in notes, 37 Am. St. Rep. 32, Ann. Cas. 1913D, 854; *Patrick v McManus*, 14 Colo. 65, 68, 23 P. 90, 20 Am. St. Rep. 253, cited in notes, 65 Am. St. Rep. 382, 113 Am. St. Rep. 639, 640, 641, 651, 652; *Sylvester v Case Threshing Mach. Co.*, 21 Colo. App. 464, 466, 122 P. 62; *Johnson v Tabor*, 4 Colo. App. 183, 185, 35 P. 199; *Rhodes v Hutchins*, 10 Colo. 258, 260, 15 P. 329; *Hertz Drive-Ur-Self System v Doak*, 94 Colo. 200, 29 P. (2d) 625; *Eastenes v Adams*, 93 Colo. 258, 25 P. (2d) 741.

For cases construing verification of pleadings as required by § 67 of the Code of Civil Procedure which is supplanted by this rule, see *Perras v Denver, etc., R. Co.*, 5 Colo. App. 21, 23, 36 P. 637, cited in notes, 20 L. R. A. (N. S.) 8, Ann. Cas. 1918D, 440; *Rice v Van Why*, 49 Colo. 7, 14, 111 P. 599, cited in note, 68 A. L. R. 1439; *Speer v Craig*, 16 Colo. 478, 27 P. 891, cited in notes, Ann. Cas. 1914D, 1089,

Ann. Cas. 1918D, 440; *Tulloch v Belleville Pump, etc., Works*, 17 Colo. 579, 582, 31 P. 229, cited in notes, Ann. Cas. 1913A, 214, 7 A. L. R. 17; *Nichols v Jones*, 14 Colo. 61, 23 P. 89, cited in notes, Ann. Cas. 1918D, 440, 7 A. L. R. 41; *Johnson v Johnson*, 78 Colo. 187, 240 P. 944, cited in note, 71 A. L. R. 727; *Prince Hall Grand Lodge v Hiram Grand Lodge*, 86 Colo. 330, 346, 282 P. 193; *Hill Brick, etc., Co. v Gibson*, 43 Colo. 104, 95 P. 293; *Martin v Hazzard Powder Co.*, 2 Colo. 596, cited in notes, 11 Am. Dec. 785, 60 Am. St. Rep. 438, 113 Am. St. Rep. 877, 67 L. R. A. 42, 44, 1. R. A. 1916C, 1183, Ann. Cas. 1912A, 1243.

Purpose of this rule.—The purpose of the signature of "at least one attorney of record in his individual name" to pleading, required by federal court rule, is to hold the attorney of record who signs to strict accountability as described in rule of court. *United States v American Surety Co.*, 25 F. Supp. 225.

Failure to insert attorney's addresses would not warrant a dismissal.—Failure to insert attorney's addresses in connection with their signature to complaint, might warrant striking of the pleading, but would not justify dismissal of the case. *Bareco Oil Co. v Alexander*, 33 F. Supp. 32.

Sufficient signing by attorney.—Under federal court rule requiring every pleading to be signed by "at least one attorney of record in his individual name," typewritten signature of firm name "By ——— A member of the firm," wherein the blank was filled in with a firm member's personal signature was sufficient without other signature by such member. *United States v. American Surety Co.*, 25 F. Supp. 225.

Under new Rules of Civil Procedure, verification of pleadings, motions, and pa-

pers is exception, not rule, as they need only be signed, so that presence or absence of verification is of no significance in itself, unless statute requires verification. *Hummel v. Wells Petroleum Co.*, 111 F. (2d) 883.

That complaint was not verified was immaterial under this rule where prayer for preliminary injunction was not pressed, under Rule 65, although plaintiff upon requesting such interlocutory relief would be compelled to adduce sworn proof. *Thermex Co. v. Lawson*, 25 F. Supp. 414.

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

C (a) Responsive Pleadings; When Presented. A defendant shall file his answer within 20 days after the service of the summons on him, or if a copy of the complaint be not served with the summons, or if the summons be served without the state, or by publication, within 30 days after the service thereof on him. In actions under subdivisions (1) to (4), inclusive, of Rule 106, the court, ex parte, before process issues, may shorten the time for answer, and thereafter may shorten any of the periods fixed in these rules. A party served with a pleading stating a cross-claim against him shall file an answer thereto within 20 days after the service on him. The plaintiff shall file his reply to a counterclaim in the answer within 20 days after the service of the answer. If a reply is ordered by the court it shall be filed within 20 days after the entry of the order, unless the order otherwise directs. The filing of any motion provided for in this rule alters the time fixed by these rules for filing any required responsive pleading, as follows, unless a different time is fixed by the order of the court: (1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading may be filed within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement, or for a bill of particulars, or for a statement in separate counts or defenses, the responsive pleading may be filed within 10 days after the service of the more definite statement or bill of particulars or amended complaint. In either case, the time for filing the responsive pleading shall be not less than remains of the time which would have been allowed under these rules if the motion had not been made. [Supplants Code Secs. 36 and 66.]

(b) Defenses; How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one

is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or with any other motion permitted under Rule 12. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. [Supplants part of Supreme Court Rule 4 and Code Secs. 56, 60 and 189.]

Committee Note.

The defenses of statute of limitations and statute of fraud cannot be raised by motion under this subdivision. For affirmative defenses see Rule 8 (c). Under the former rule in Colorado the statute of limitations could be raised by special demurrer when the bar appeared on the face of the complaint. *Yost v. Irwin*, 53 Colo. 269, 271, 125 P. 526, cited in notes, Ann. Cas. 1914C, 850, 115 A. L. R. 763.

The words "or with any other motion permitted under Rule 12" were added to the Federal Rule to overcome decisions holding that the filing of a motion under 12 (c), 12 (e) or 12 (f) with a motion based on defenses (1) to (5) in this subdivision waives those defenses; and to insure that the filing of all motions permitted under Rule 12 at the same time would not waive those defenses.

The filing of a motion containing any of the defenses (1) to (5), although overruled, preserves the point for consideration on review. This directly changes Supreme Court Rule 4.

(c) **Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

(d) **Preliminary Hearings.** The defenses specifically enumerated (1)-(6) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mention in subdivision (c) of this rule, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

Committee Note.

See Rule 39 C (d) for determination of issues of law.

C (e) **Motion for Separate Statement, or for More Definite Statement or Bill of Particulars.** Before responding to a pleading or, if no responsive pleading is permitted by these rules, within 20 days after the service of the pleading upon him, a party may file a motion for a statement in separate counts or defenses, or for a more definite statement or bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or, if no responsive pleading is permitted, to prepare for trial. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems

just. A bill of particulars becomes a part of the pleading which it supplements. [Supplants part of Code Sec. 66, all of Sec. 69.]

(f) **Motion to Strike.** Upon motion filed by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion filed by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order any redundant, immaterial, impertinent or scandalous matter stricken from any pleading. The objection that a responsive pleading or separate defense therein fails to state a legal defense may be raised by motion filed under this subdivision. [Supplants part of Code Sec. 66, all of Sec. 78.]

Committee Note.

The last sentence was added to the Federal subdivision definitely to provide for attacking an insufficient defense either in an answer or reply.

(g) **Consolidation of Motions.** A party who makes a motion under this rule may join with it or include therein the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except that prior to making any other motions under this rule he may make a motion in which are joined all the defenses numbered (1) to (5) in subdivision (b) of this rule which he cares to assert.

(h) **Waiver of Defenses.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received. [Supplants Code Sec. 61.]

Committee Note to Rule.

Motions for cost bonds are not excluded by this rule. For summary judgment see Rule 56.

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| I. Responsive Pleading; When Presented. | G. Failure to State a Claim upon Which Relief Can Be Granted. |
| II. Defenses; How Presented. | H. Defenses Not Waived by Joinder. |
| A. General Consideration. | III. Motion for Judgment on the Pleadings. |
| B. Lack of Jurisdiction over Subject Matter. | IV. Preliminary Hearings. |
| C. Lack of Jurisdiction over Person. | V. Motion for More Definite Statement or Bill of Particulars. |
| D. Improper Venue. | A. General Consideration. |
| E. Insufficiency of Process. | B. Purpose of Motion. |
| F. Insufficiency of Service of Process. | |

- C. When Motion Made.
- D. When Granted or Denied.
 - 1. In General.
 - 2. Illustrations.
- E. Defects Complained of and Details Desired.
- F. When Order of Court Not Obeyed.

- VI. Motion to Strike.
- VII. Consolidation of Motions.
- VIII. Waiver of Defenses.
 - A. General Consideration.
 - B. Defenses and Objections.
 - C. Jurisdiction of Subject Matter.

Cross Reference.

For a discussion of this rule, see Address no. 4, appx. D.

I. RESPONSIVE PLEADING; WHEN PRESENTED.

Plaintiff given twenty days to amend complaint which stated no grounds for relief.—Under Rule 15 (a) authorizing District Court to grant leave to amend pleadings when justice so requires, a plaintiff whose amended complaint was dismissed for lack of jurisdiction of subject matter and failure to state claims on which relief could be granted was given 20 days to amend. *Holland v. Majestic Radio, etc., Corp.*, 27 F. Supp. 990.

Where service of summons was sought on defendants within state, District Court was without discretion to shorten time for answer of defendants to 10 days instead of 20 days after service of summons as provided by this rule. *Food Machinery Corp. v. Guignard*, 26 F. Supp. 1002.

II. DEFENSES; HOW PRESENTED.

A. General Consideration.

Cross reference.—For answer presenting defenses under this subdivision, see Form 16 in appx. A.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. *Glazier v. Van Sant*, 33 F. Supp. 113.

This rule is not applicable to motion to stay proceedings pending final determination of like action involving substantially same issues and parties in another court, since motion to stay proceedings is not a "defense" within meaning of the rule. *Green v. Gravatt*, 35 F. Supp. 491.

Nor is it applicable to a motion for security for costs.—A motion for security for costs is not a defense and is not affected and hence not prohibited by this subdivision. *Wheeler v. Lientz*, 25 F. Supp. 939.

Defense of a multiplicity of suits should be raised by answer. *Sproul v. Gambone*, 34 F. Supp. 441.

A motion, not drawn with reference to this rule, to dismiss complaint or, in alternative, to strike out causes of action pleaded or certain paragraphs of complaint or make complaint more definite and certain, may be denied for such reason, but court may take motion under advisement and make disposition thereof in accordance with ostensible importance of litigation and serious nature of issues which must be disposed of sooner or later. *Loughman v. Pitz*, 29 F. Supp. 882.

As to the conflict in the availability of the "speaking motion" and as to the substitute remedies which are available, see article entitled, "Some Current Trends in the Construction of the Federal Rules" by Mr. James A. Pike in the *George Washington Law Rev.*, vol. IX, pp. 26, 37.

In action on fire insurance policy, paragraph of answer, alleging that plaintiff's agent falsely stated on applying for insurance that plaintiff had no other insurance with intent to deceive defendant, stated proper defense on its face, so that motion to strike it because permission for other insurance was indorsed on policy must be denied. *Abruzzino v. National Fire Ins. Co.*, 26 F. Supp. 934.

B. Lack of Jurisdiction Over Subject Matter.

Editor's note.—In construing § 56 of the Code of Civil Procedure, which this subdivision supplants, the court said that in testing the jurisdictional limit of county courts the body of the complaint must be looked to to determine the amount in controversy and not the ad damnum clause. If the allegations of the complaint showed that the amount that could have been recovered was within the jurisdiction of the court, the fact that plaintiffs damage was alleged in a greater amount would not defeat the jurisdiction. *Sams Automatic Car Coupler Co. v. League*, 25 Colo. 129, 54 P. 642, cited in notes, 6 L. R. A. (N. S.) 77, 81, 83. See *Sun Oil Co. v. Pfeiffer*, 1 F. R. D. 119, for a similar holding by the court in construing the Federal Rule on jurisdictional amount.

Motion to dismiss for lack of jurisdiction may not be considered on plaintiff's answers to defendant's interrogatories as they are no part of the pleadings. *Dunleer Co. v. Minter Homes Corp.*, 33 F. Supp. 242.

Lack of jurisdiction does not warrant seeking judgment on the pleading because of such absence.—Under this rule allowing defense of court's lack of jurisdiction over subject matter to be, at option of pleader, presented by motion or pleaded, defendant who pleaded lack of jurisdiction

could not subsequently by motion seek judgment on the pleading because of such lack of jurisdiction. *Gantz v. National Gas Co.*, 29 F. Supp. 41.

Special appearance to contest jurisdiction of subject matter did not constitute a general appearance.—Where defendant appeared specially and moved to dismiss complaint on ground that court did not have jurisdiction over subject matter or parties, raising question of jurisdiction of subject matter did not constitute a "general appearance." *Toulmin v. James Mfg. Co.*, 27 F. Supp. 512. See *Carter v. Powell*, 104 F. (2d) 428, 432, as to the result of appearing specially to contest jurisdiction over the person.

Joining this motion with motion to dismiss for want of equity did not waive special appearance.—Joining motion to dismiss for lack of jurisdiction with motion to dismiss for want of equity, and because of failure to join indispensable parties defendant, did not waive special appearance. *American-Mexican Claims Bureau v. Morgenthau*, 26 F. Supp. 904.

Motion allowed even though suit instituted before rule became effective.—Trial court did not improperly permit filing of motion to dismiss petition which was fatally defective and which revealed lack of jurisdiction in trial court, pursuant to authority of this rule, notwithstanding suit was instituted before rule became effective. *International Trading Corp. v. Edison*, 109 F. (2d) 825.

Where motion to dismiss for lack of jurisdiction was treated as motion for summary judgment.—Where motion to dismiss complaint on ground of lack of jurisdiction of subject matter and defendants' persons and of failure to state claim was in effect a motion for summary judgment under Rule 56, it would be treated as motion for summary judgment and would be denied where plaintiffs' affidavits set forth facts tending to show right to recover. *Nielson v. Farley*, 26 F. Supp. 948.

C. Lack of Jurisdiction over Person.

A special appearance to contest jurisdiction over person constituted a general appearance.—Under this rule, a defendant appearing specially, not to a summons under the rules, but to a show cause order and only to contest personal jurisdiction over him, no matter how carefully he makes that intention clear, must be held to have appeared generally, so as to support an in personam judgment on the merits against him. *Carter v. Powell*, 104 F. (2d) 428, 432. See *Toulmin v. James Mfg. Co.*, 27 F. Supp. 512, as to result of appearing specially to contest jurisdiction over subject matter.

Where motion to dismiss for lack of jurisdiction was treated as motion for summary judgment.—Where motion to dismiss complaint on ground of lack of jurisdiction of subject matter and defendants' persons and of failure to state claim was in effect a motion for summary judgment under Rule 56, it would be treated as motion for summary judgment and would be denied where plaintiffs' affidavits set forth facts tending to show rights to recover. *Nielson v. Farley*, 26 F. Supp. 948.

Where motion attacking jurisdiction over persons should have been consolidated with other motions.—Motions to require plaintiff to pay costs of prior action and make cost bond or show that attorneys had no interest in recovery or joined in pauper's oath and to strike certain paragraphs from complaint, as well as previous motion attacking court's jurisdiction over persons sued, should have been consolidated and court might have denied all of later motions. *Ayers v. Conser*, 26 F. Supp. 95.

D. Improper Venue.

Cross reference.—For rule on the place of trial, see Rule 98.

An objection to venue may be raised by motion to dismiss, or improper venue may be pleaded in answer. *Duval v. Bathrick*, 31 F. Supp. 510. *Toulmin v. James Mfg. Co.*, 27 F. Supp. 512.

A reference was made to a special master to hear facts on a motion as to venue in *Stone v. Southern Pac. Co.*, 32 F. Supp. 819.

E. Insufficiency of Process.

See Form 15, appx. A.

A defense, that order to show cause was insufficient process, made for the first time in briefs in circuit court of appeals, was too late. *Carter v. Powell*, 104 F. (2d) 428.

F. Insufficiency of Service of Process.

Motion to dismiss for misjoinder of parties combined with motion challenging service, for which special appearance was made, did not waive objections to court's jurisdiction, as being tantamount to an "appearance." *Glazier v. Van Sant*, 33 F. Supp. 113.

G. Failure to State a Claim upon Which Relief Can Be Granted.

Such motion tests the sufficiency of the complaint. *Eberle v. Sinclair Prairie Oil Co.*, 35 F. Supp. 296.

On question whether a motion under procedural rule authorizing the defense of failure to state a claim on which relief can be granted to be made by motion could be used to test the legal sufficiency of an affirmative defense contained in plaintiff's reply to defendant's counterclaim, defend-

ant in respect to the motion stood in a position analogous to that of a plaintiff, and he was entitled to be accorded in respect thereto the same rights as are accorded a plaintiff in respect to defenses contained in an answer. *Schenley Distillers Corp. v. Renken*, 34 F. Supp. 678.

But does not properly raise question of misjoinder of parties. *Taiyo Trading Co. v. Northam Trading Corp.*, 1 F. R. D. 382.

Nor is it a substitute for an answer.—“Motion to dismiss” provided for under the new Civil Procedure Rules is not designed to reach a case in which plaintiff would not be entitled to any relief after the matters of defense had been presented, the motion not being a substitute for an answer. *Baker v. Sisk*, 1 F. R. D. 232.

Whether pleading filed by defendant was a motion to dismiss or was an answer was required to be determined by the contents of the pleading and not by the definition given it by the defendant since meaning given to a pleading does not change nature of the pleading. *Id.*

Thus, a pleading filed by defendant which was designated as a motion to dismiss, and raised defense of statute of limitations was an “answer” and not a “motion to dismiss,” as respects right of plaintiff subsequently to dismiss action without prejudice. *Id.*

Such motion may not be aided by affidavits.—*Sherover v. Wanamaker*, 29 F. Supp. 650. But see *Alabama Independent Service Station Ass’n v. Shell Petroleum Corp.*, 28 F. Supp. 386.

For it is limited to the pleading.—*Sherover v. Wanamaker*, 29 F. Supp. 650.

Thus, in no other pleading has the plaintiff made an effort to “state a claim.” When a motion to dismiss is presented to the court, the question for the court to determine is whether or not the plaintiff has stated a claim upon which relief may be granted. *Eberle v. Sinclair Prairie Oil Co.*, 35 F. Supp. 296, 299.

And it has the effect of admitting the existence and validity of the complaint as stated, but challenges the right of the plaintiff to relief thereunder. *Eberle v. Sinclair Prairie Oil Co.*, 35 F. Supp. 296, 299; *Leimer v. State Mut. Life Assur. Co.*, 108 F. (2d) 302; *Smith v. Blackwell*, 34 F. Supp. 989.

This is further supported by Rule 8 (c) requiring that affirmative defense be pleaded and Rule 56 (b) authorizing party against whom claim is asserted to move for summary judgment in his favor with or without supporting affidavits. *Eberle v. Sinclair Prairie Oil Co.*, 35 F. Supp. 296.

A motion to dismiss a complaint for failure to state a claim should be decided on the complaint alone, or, if a bill of particulars has been served, on the complaint as supplemented by the bill of particulars. *Mahoney v. Bethlehem Engineering Corp.*, 27 F. Supp. 865.

Such complaint will not be dismissed unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of claim, in view of means afforded defendant by federal rules to obtain speedy disposition of claim without foundation or substance. *Eberle v. Sinclair Prairie Oil Co.*, 35 F. Supp. 296.

If it is conceivable that under the allegations of complaint plaintiff can, upon trial, establish a case which would entitle him to relief prayed for, a motion to dismiss for insufficiency of statement ought not to be granted. *Sparks v. England*, 113 F. (2d) 579.

As it is necessary only to allege sufficient facts to apprise the opposing party of the nature of the claim which will be proved, and technicalities in pleading are no longer observed. *Van Dyke v. Broadhurst*, 28 F. Supp. 737.

The motion will be construed in the manner most favorable to the plaintiff.—On motion to dismiss amended complaint for insufficiency of statement, sole question presented was whether amended complaint construed in light most favorable to plaintiff and with all doubts resolved in favor of its sufficiency, stated claim upon which relief could be granted. *Leimer v. State Mut. Life Assur. Co.*, 108 F. (2d) 302.

Facts described as evidentiary need not be stated.—In all these provisions, Rules 8 (a), 8 (e) (1), 12 (b) (6), the word “facts” is rather conspicuously absent, and there can be very little doubt, whatever the prior practice may have been, there is no longer any necessity to state such facts as have been described as “evidentiary” as distinguished from “ultimate,” nor is it good practice. *Simonin’s Sons v. American Can Co.*, 30 F. Supp. 901, 902.

“Speaking motions” should be permitted.—In article entitled, “Speaking Motions Under New Federal Rules 12 (b) (6)” by Mr. George C. Roeming in the *George Washington Law Rev.*, vol. IX, pp. 174, 185, by way of conclusion states, “Rule 12 (b) (6), considered in the light of Rule 56 (b), as well as Rules 6 (d), 7 (c) and 43 (e), should be held to permit ‘speaking motions,’ because there is no provision against the use of affidavits to continue to allow affidavits where there is a defense of lack of jurisdiction over the person or subject matter, etc., under Rule 12 (b) (1)-(5), and refuse to consider them where there is a defense to state a claim upon which relief

can be granted, under Rule 12 (b) (6), is likely to make for troublesome cases in which it will be hard to decide whether the defense presented by affidavits is jurisdiction or relates to the merits."

A demurrer filed before effective date of rules treated as motion to dismiss.—A special demurrer filed before effective date of rules which abolished demurrers [Rule 7 (c)] but which provided for raising same question by motion to dismiss for failure to state claim on which relief could be granted would be treated as motion to dismiss on such ground. *Gay v. Moore*, 26 F. Supp. 749; *Howard v. United States*, 28 F. Supp. 985; *Sullivan v. United States*, 26 F. Supp. 876.

Motion to dismiss may be directed to bill of particulars.—Since a "bill of particulars" under Rule 12 (e) is in effect an amendment of pleading which it supplements, a motion to dismiss for failure to state a claim upon which relief can be granted may be directed to the complaint as supplemented by the bill of particulars. *Reilly v. Wolcott*, 1 F. R. D. 103.

Motion to dismiss treated as motion for summary judgment.—Where motion to dismiss complaint on ground of lack of jurisdiction of subject matter and defendants' persons and of failure to state claim was in effect a motion for summary judgment under Rule 56, it would be treated as motion for summary judgment and would be denied where plaintiffs' affidavits set forth facts tending to show right to recover. *Nielson v. Farley*, 26 F. Supp. 948.

Motion was denied where defendant made the motion after answering the complaint. *Kadylak v. O'Brien*, 32 F. Supp. 281.

Where court could not assert defense on its own motion.—Where complaint was not subject to dismissal on points specified in defendants' motion, although under rule, defense of failure to state a claim on which relief could be granted might be asserted by motion at option of pleader, the court, under the circumstances, could not assert the defense on its own motion, in view of fact that such procedure would deprive plaintiffs of their right to amend, if amendment were found feasible. *Roloff v. Perdue*, 31 F. Supp. 739.

A counterclaim not stating a claim upon which relief can be granted must be dismissed. *American Agricultural Chemical Co. v. Barnes Co.*, 28 F. Supp. 73.

Case dismissed for want of prosecution.—Where case was regularly assigned for hearing on the calendar for certain date and defendants moved on such date to dismiss the petition for want of prosecution, petition would be dismissed under Civil Procedure Rule. *Southeastern Compress, etc., Co. v. Page*, 1 F. R. D. 363.

Illustrations.—In death action against corporation, pleadings with plaintiff's admission of proceedings in her previous death action in state court against other tortfeasors, held to show absence of fact issue as to plaintiff's right to recover against defendant and defendant's right to judgment as matter of law because of judgment dismissing previous action pursuant to compromise and settlement agreement, so as to require that defendant's motion to dismiss be overruled and its motion for summary judgment sustained. *Eberle v. Sinclair Prairie Oil Co.*, 35 F. Supp. 296.

Where stockholder of power company, suing in representative capacity to set aside a judgment against light company on ground of fraud, asserted that the power company had a beneficial interest in 500 shares of stock in the light company registered on the books of that company in the name of three trustees but in bill of particulars stated that she was unable to state whether she based her allegation of beneficial ownership upon an instrument in writing and did not state terms or conditions upon which beneficial interest of the power company in the 500 shares was based, the allegations regarding stockholder's interest in the light company was sufficient to withstand motion to dismiss complaint. *Sheehan v. Municipal Light, etc., Co.*, 1 F. R. D. 256.

Complaint alleging that beneficiary was entitled to one-half of the proceeds of life policies which insurer wrongfully withheld and claimed to hold in trust in accordance with non-negotiable certificate of indebtedness issued to beneficiary under arrangement which was unlawful, fraudulent, and a result of insurer's scheme to constitute itself trustee of proceeds of the policies, was not subject to dismissal for insufficiency of statement. *Leimer v. State Mut. Life Assur. Co.*, 108 F. (2d) 302.

Complaint setting out employment as insurance agent under agreement based on pamphlet representing that beginning with third year salary would be paid in addition to commissions, and that at end of five years salary would be doubled, and alleging service thereunder for nearly seven years and breach thereof by defendant, stated cause of action as against contention that representations were qualified by reference to another pamphlet for "official particulars relative to benefits and conditions," where such reference was immediately preceded by story of successful agent and statement that the story was to illustrate the practical workings of company's agreement and was not a guarantee in any sense of the word. *Kaydan v. New York Life Ins. Co.*, 110 F. (2d) 998.

Defendant's motion to dismiss complaint, in personal injury action, would be sustained as to any count, which failed to state

a claim on which relief could be granted, and overruled as to any count, which stated a claim on which relief could be granted. *Francis v. Humphrey*, 25 F. Supp. 1.

H. Defenses Not Waived by Joinder.

Consistency in matters of pleading is essential neither to ultimate justice nor expedition in its consummation. *Devine v. Griffenhagen*, 31 F. Supp. 624, 625.

The theory of this rule is that the quick presentation of defenses or objections should be encouraged. *Johnson v. Schlitz Brewing Co.*, 28 F. Supp. 650, 652.

It permits a defendant to present in his answer every defense that he possesses. *Young v. Aetna Life Ins. Co.*, 32 F. Supp. 389.

A defendant which moved to dismiss the complaint after filing of answer but before trial, and which had incorporated a similar motion in the answer did not waive its right to the motion. *Id.*

Thus a motion under 12 (b) (1) to (5) might be joined with a motion to dismiss under 12 (b) (6) without hazard of waiver. *Johnson v. Schlitz Brewing Co.*, 28 F. Supp. 650.

And may be joined with motion for bill of particulars under 12 (e) without hazard of waiver. *Devine v. Griffenhagen*, 31 F. Supp. 624. See committee note to this subdivision indicating variation therein from Federal Rule 12 (b) and supporting the above decision.—Ed. note.

But in *Johnson v. Schlitz Brewing Co.*, 28 F. Supp. 650, it was held that joining a motion under 12 (b) (1-5) with a motion under 12 (e) could not be done without hazard of waiver. However, this holding is considered too technical in *Devine v. Griffenhagen*, 31 F. Supp. 624. For Rule 12 (g) and (h) indicates clearly that for purposes of permissive joinders and waivers all the motions provided for in Rule 12 are treated alike; not only that but it is required that all defenses and objections available at the time "shall" be joined under penalty of waiver except that at the pleader's option he may move under (b) (1-5) without joining other motions, such as a motion for a bill of particulars, without hazard of waiver.

It would seem that a motion for a bill of particulars necessarily embodied an objection [within the meaning of 12 (b)] that the opposing pleading was "not averred with sufficient definiteness or particularity to enable him (the moving party) properly to prepare his responsive pleading or to prepare for trial," [within the meaning of 12 (e)]. And the objection that a party must at any one moment be in court or out is at variance with the express provision of 12 (b) that a defendant may move to dismiss for

"failure to state a claim" without waiving jurisdictional objections. *Devine v. Griffenhagen*, 31 F. Supp. 624.

The limitation upon a waiver expressly provided for in the sentence quoted from Rule 12 (b) was intended to be extended by Rule 12 (h) wherein it was expressly provided that "A party waives all defenses and objection which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply***" with certain exceptions not now material. This broad statement of waiver was intended to be definitive; effective for the recognition of waivers resulting from failure seasonably to raise the objection by motion, answer or reply, and equally effective for the exclusion of waivers theretofore deemed to result from the filing of a mere general appearance or of a motion looking to the merits. *Id.*

This provision is applicable to the courts jurisdiction of subject matter or the person. —This provision appears to be applicable, in terms, as well to objections to the court's jurisdiction, whether of the person or of the subject matter as to others. *Schlaefter v. Schlaefter*, 112 F. (2d) 177, 181.

But it is not intended to permit retroactive outster of jurisdiction already established. —Where, under law prevailing at time of filing of pleading which combined the functions of a return to rule, a motion to dismiss and an answer, the filing of such a pleading operated as a voluntary appearance giving court jurisdiction, new Rules of Civil Procedure which subsequently became effective, and which provided that no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion, could not be given retroactive effect so as to oust jurisdiction of court. See Rule 82. *Schlaefter v. Schlaefter*, 112 F. (2d) 177.

Illustrations.—A defendant which had raised the question of jurisdiction was not prejudiced by participation in the trial and defense of matter on the merits, but could even have pleaded lack of jurisdiction in its answer with its defenses to the merits and preserved its right to raise the question of jurisdiction on appeal in event of an adverse ruling. *Vilter Mfg. Co. v. Rolaff*, 110 F. (2d) 491.

Defendant did not lose right to press motion to quash return of service of summons by simultaneously filing motion for more particular statement. *Devine v. Griffenhagen*, 31 F. Supp. 624.

Defendants' motion to dismiss amended complaint for failure to state claim on which relief could be granted is proper and will not be stricken on ground that their prior motion, denied by court, to dismiss asserted same or similar grounds, where such motion went only to jurisdictional question of

amount in controversy under allegations of amended complaint and not to sufficiency of claim stated therein. *Martin v. Moery*, 1 F. R. D. 127.

III. MOTION FOR JUDGMENT ON THE PLEADINGS.

Cross reference.—See Rule 56 for summary judgment.

On a motion for judgment on the pleadings, judgment is proper only when no issue of fact is raised by the pleadings. *Kadylak v. O'Brien*, 32 F. Supp. 281; *Chandler v. Cutler-Hammer*, 31 F. Supp. 451.

Thus, where it appeared probable from amended complaint and affidavit attached to motion for judgment on the pleadings that upon trial material issues would be presented, motion for judgment on the pleadings would be denied. *Ulen Contracting Corp. v. Tri-County Elec. Cooperative*, 1 F. R. D. 284.

A certain defendant was not entitled to judgment on the pleadings, even though one part of the complaint alleging negligence contradicted another part, in view of paragraph of complaint charging that while an aeroplane was under the control of a co-defendant and defendant, his student, it was so negligently and carelessly operated that it was permitted to descend and strike a 13-year old boy and kill him. *Kadylak v. O'Brien*, 32 F. Supp. 281.

And the right thereto is clear. *Ulen Contracting Corp. v. Tri-County Elec. Cooperative*, 1 F. R. D. 284.

The purpose of such motion is to save time and expense.—The purpose of permitting judgment on the pleadings is to save time and expense in cases wherein the ultimate facts are not in dispute. *Ulen Contracting Corp. v. Tri-County Elec. Cooperative*, 1 F. R. D. 284.

It admits the truth of all well-pleaded facts.—A motion for judgment on the pleadings admits the truth of all well-pleaded facts in the pleadings of the opposing party together with all fair inferences to be drawn therefrom. *Ulen Contracting Corp. v. Tri-County Elec. Cooperative*, 1 F. R. D. 284.

So there can be no recourse to facts and documents aliunde the pleadings. *United States v. Long Island Drug Co.*, 29 F. Supp. 737, 739.

Where amended complaint was filed by leave of court, subsequent to motion by defendant for judgment on the pleadings, motion would be disposed of on the amended pleadings. *Ulen Contracting Corp. v. Tri-County Elec. Cooperative*, 1 F. R. D. 284.

Illustrations showing proper application of this subdivision.—Where defendant, in

answer, pleaded statute of limitations as an affirmative defense, defendant's motion for judgment on pleadings was properly for judgment, and not to strike out complaint, since bar of statute of limitations is a defense available only when set up by answer unless cause of action is one which did not exist at common law and has been created by statute, which fixes a time within which action must be brought as an essential element of right to sue. *Patsavouras v. Garfield*, 34 F. Supp. 406.

Where complaint failed to state claim upon which relief could be granted, and defendant failed to move for dismissal of complaint at the proper time, defendant could thereafter make a motion for judgment on the pleadings. *Duarte v. Christie Scow Corp.*, 27 F. Supp. 894.

A defendant did not lose his right to object to a complaint by filing an answer thereto, but could move for judgment on the pleadings. *Kadylak v. O'Brien*, 32 F. Supp. 281.

Plaintiff's motion which was denominated "Motion for judgment on the pleadings" but by which plaintiff sought a ruling on the legal sufficiency of special defenses, would lie, even though it would have been more accurately entitled as "Objections that the special defenses fail to state each a legal defense." *Dysart v. Remington Rand*, 31 F. Supp. 296.

Cases in which the motion for judgment was denied.—Under Rules of Civil Procedure, a motion for judgment on pleadings was not appropriate method of raising question regarding legal sufficiency of special defenses in view of fact that first defense was a general denial, since, even if special defenses were insufficient, plaintiff would not be entitled to judgment. *Dysart v. Remington Rand*, 31 F. Supp. 296.

A stipulation of facts which was executed only for use at trial could not be considered on motion for judgment on the pleadings. *Guggenheim v. Rasquin*, 28 F. Supp. 322.

IV. PRELIMINARY HEARINGS.

Intention of rule.—The Civil Procedure Rule relating to preliminary hearing for determination of certain defenses is intended to permit the court in passing on such defenses to take a larger scope of vision than that merely stated in the pleading. *Kaus v. Huston*, 35 F. Supp. 327.

This subdivision allows a motion to be determined before trial unless deferred by the court until the trial in the exercise of discretion. *Equitable Life Assur. Soc. v. Saftlas*, 35 F. Supp. 62; *Hawn v. American S. S. Co.*, 26 F. Supp. 428; *Schenley Distillers Corp. v. Renken*, 34 F. Supp. 678.

A motion, filed after answer, to dismiss action for insufficiency of complaint, to which answer made same objection, may be considered before trial, if it appears fitting to court that some of questions raised in motion should be determined before trial. *Equitable Life Assur. Soc. v Saftlas*, 35 F. Supp. 62.

Where question before court on motion for judgment was whether insured's signing of request to change beneficiary and handing request and policy to new beneficiary was sufficient evidence of an executed intent to authorize court to determine that change of beneficiary was accomplished although policy provision relating to change were not followed, court upon determination that question could not be determined satisfactorily except upon evidence would order hearing and determination of the motion to be deferred until trial, as authorized by Civil Procedure Rule. *Equitable Life Assur. Soc. v Kit*, 26 F. Supp. 880.

The determination of motion challenging sufficiency of complaint in action for invasion of right of privacy on ground that it failed to state a claim upon which relief could be granted was deferred until trial, where, because of difficulty in determining situation from pleadings, it appeared that substantial justice would be done if determination was deferred. *Banks v King Features Syndicate*, 30 F. Supp. 352.

Where motions to dismiss complaint or to quash return of service of summons raised the defense that the action was not brought under statute authorizing joinder of absent defendants in suits to enforce liens, but complaint showed that such defense should be heard and determined upon the trial, motions would be denied and hearing and determination would be deferred until trial. *Welty v Clute*, 1 F. R. D. 107.

However, this rule does not make it mandatory to deny motions for dismissal made after the answer is filed as this would deprive the rule of any operative force in many instances. *Equitable Life Assur. Soc. v Saftlas*, 35 F. Supp. 62.

This subdivision indicates proper practice for presenting defense in law.—The Civil Procedure Rule that defense of failure to state claim on which relief can be granted shall be determined before trial on either party's application, unless court orders that determination thereof be deferred until trial, indicates proper practice for presenting defense in law and affords party opportunity to challenge sufficiency of last prior pleading in motion addressed to that issue. *Winkler v New York Evening Journal*, 32 F. Supp. 810.

V. MOTION FOR MORE DEFINITE STATEMENT OR BILL OF PARTICULARS.

A. General Consideration.

This subdivision should be construed in the light of Rules 8, 26 and 33.—The Civil Procedure Rule relating to motion for bill of particulars must be construed in light of other rules stating requirements of a pleading, permitting the taking of depositions, and relating to submission of interrogatories. *Brockway Glass Co. v Hartford-Empire Co.*, 1 F. R. D. 242.

The principal object of a bill of particulars is to enable a litigant to plead intelligently. *Leimer v State Mut. Life Assur. Co.*, 1 F. R. D. 386.

Bills of particulars or more definite statements are no longer necessary to prevent surprise at the trial, nor to limit or define the issues. *Pearson v Hershey Creamery Co.*, 30 F. Supp. 82.

Distinction between more definite statement and bill of particulars avoided.—See *Massachusetts Bonding, etc., Co. v Harrisburg Trust Co.*, 27 F. Supp. 987. See also, notes under Analysis line V, B.

Neither matters of evidence.—Matters of evidence need not be stated in a bill of particulars. *Tatum v Acadian Production Corp.*, 35 F. Supp. 40; *Louisiana Farmers' Protective Union v Great Atlantic, etc., Tea Co.*, 31 F. Supp. 483.

Nor matters peculiarly within knowledge of moving party need be furnished.—Matters peculiarly within knowledge of moving party need not be furnished in response to motion for a bill of particulars. *Knupfer v Albertson & Co.*, 1 F. R. D. 257.

A bill of particulars does not supersede the bill of complaint but limits it and makes its allegations more definite and certain. *Abel v Munro*, 27 F. Supp. 346.

A bill of particulars becomes a part of the pleading which it supplements. *McKenna v United States Lines*, 26 F. Supp. 558; *Jelke Co. v Eastern Baking Co.*, 29 F. Supp. 333.

Information furnished in response to motion for more definite statement or for bill of particulars becomes a part of the pleadings. *Adams v Hendel*, 28 F. Supp. 317.

Verification.—The fact that bill of particulars was verified by plaintiff's attorney and not by plaintiff was not fatal. *Reilly v Wolcott*, 1 F. R. D. 103.

A defendant by filing motion for bill of particulars does not enter a "general appearance." *Johnson v Schlitz Brewing Co.*, 33 F. Supp. 176; withdrawing statement in *Johnson v Schlitz Brewing Co.*, 28 F. Supp.

650, wherein it was said "It seems plain to me that a defendant who assumes to take to himself the privileges of Rule 12 (e) thereby acknowledges himself as being in court and enters a general appearance."

Defendants who have filed a motion for bill of particulars can move to dismiss for insufficiency of complaint to state a cause of action. Louisiana Farmers' Protective Union v Great Atlantic, etc., Tea Co., 31 F. Supp. 483.

In view of the means which the Rules of Civil Procedure afford a defendant to obtain a speedy disposition of a claim which is without foundation or substance, by either securing a more definite statement or a bill of particulars under Rule 12 (e) and thereafter applying for judgment on the pleadings under Rule 12 (h) (1), or by moving for a summary judgment under Rule 56, there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim. Leimer v State Mut. Life Assur. Co., 108 F. (2d) 302, 306.

Motion to strike considered as motion for bill of particulars.—In action by buyer against sellers for damages as result of alleged misrepresentations and false warranties in connection with sale of stallion, sellers' motion to strike in so far as it applied to that part of complaint seeking to recover for damage sustained by reason of loss of business as horse breeder in neighborhood and vicinity, and for damage sustained because of payment made to owners of mares brought by neighbors to be bred by stallion, would be considered also as a motion for a bill of particulars, and as such court would sustain the motion. Stork v Townsend, 1 F. R. D. 390.

B. Purpose of Motion.

The purpose of this subdivision is to expedite and simplify proceedings, and it should be interpreted so as to work substantial justice. Du Pont De Nemours & Co. v DuPont Textile Mills, 26 F. Supp. 236.

But its purpose is not to permit either party to put the other to such expense as to make the seeking of justice a profitless thing. Louisiana Farmers' Protective Union v Great Atlantic, etc., Tea Co., 31 F. Supp. 483, citing Du Pont De Nemours & Co. v Dupont Textile Mills, 26 F. Supp. 236.

Its purpose is to enable party properly to prepare his responsive pleading.—United States v Schine Chain Theatres, 1 F. R. D. 205; Anheuser-Busch v Dubois Brewing Co., 1 F. R. D. 406, 407; Knufler v Albertson & Co. 1 F. R. D. 257.

And to prepare generally for trial.—Louisiana Farmers' Protective Union v Great At-

lantic, etc., Tea Co., 31 F. Supp. 483; United States v Schine Chain Theatres, 1 F. R. D. 205. As to meaning of "prepare for trial," see analysis line V, D, 1.

Under new Rules of Civil Procedure, functions of bill of particulars are in general the same as under old practice, except that in view of the greatly expanded machinery of discovery, it will very rarely be needed to enable a defendant to prepare his case for trial. Fried v Warner Bros. Circuit Management Corp., 26 F. Supp. 603.

It being designed to avoid any distinction between motion for more definite statement or for bill of particulars.—McKenna v United States Lines, 26 F. Supp. 558. See United States v Griffith Amusement Co., 1 F. R. D. 229.

According to 1 Moore's Fed. Prac., p. 654, this subdivision was designed to avoid any distinction between a motion for a more definite statement or for a bill of particulars and this seems to be borne out by the sentence in the rule, which reads: "The motion shall point out the defects complained of and the details desired." Tully v Howard, 27 F. Supp. 6.

Motion for a more definite statement or for bill of particulars, when based on either claim, is for accomplishment of same purpose. Sharp v Pennsylvania-Reading Seashore Lines, 1 F. R. D. 16.

C. When Motion Made.

Motion is appropriate only before joinder of issue.—Under procedural rule authorizing a party to move for a bill of particulars to enable him properly to prepare his responsive pleading or to prepare for trial, such a motion is appropriate only before joinder of issue, and it is premature to afford to a party opportunity to secure by such a motion data that may be needed in preparation for trial but not required to enable him to plead. Trounstone v Bauer, etc., Co., 1 F. R. D. 363.

Defendants' motion to simplify issues by requiring plaintiff to elect whether action was based on contract or fraud was in effect a motion for bill of particulars or a more definite statement, and hence came too late after filing of defendants' answers. Cary v Hardy, 1 F. R. D. 355.

It must be made within twenty days after service of pleadings.—Under this rule, motion for more definite statement or for bill of particulars must be made within 20 days after service of pleadings to which it is addressed. McKenna v United States Lines, 26 F. Supp. 558.

But where motion for bill of particulars was timely filed under procedure antedating new rules and motion was filed within 12 days after new rules became effective, motion was timely though not made within

20 days of service of defendant's answer as required by new rule. *Teller v Montgomery Ward & Co.*, 27 F. Supp. 938.

Enlargement of time.—Plaintiff's motion for bill of particulars and to strike, mailed to defendant's attorneys at least 35 days after filing of answer and service thereof on plaintiffs' counsel, would be regarded by the court also as an application for an enlargement of time under Rule 6 (b) in view of statements concerning delay in brief of plaintiffs' counsel, and as such the application would be granted and the court would entertain the motion. *O'Leary v Liggett Drug Co.*, 1 F. R. D. 272.

D. When Granted or Denied.

1. In General.

Motion should be granted only when complaint is so insufficient that an answer cannot be prepared in response thereto. *United States v Hess*, 1 F. R. D. 282. See *Louisiana Farmers' Protective Union v Great Atlantic, etc., Tea Co.*, 31 F. Supp. 483; *Welty v Clute*, 1 F. R. D. 107; *Abruzzino v National Fire Ins. Co.*, 26 F. Supp. 934; *Engler v General Elec. Co.*, 32 F. Supp. 913; *Pirnie v Andrews*, 1 F. R. D. 252.

The proper method of obtaining a more definite statement of facts not averred with sufficient definiteness or particularity, in original complaint, to enable defendant to properly prepare his responsive pleadings, is by motion for a more definite statement or for bill of particulars. *United States v Crescent Amusement Co.*, 31 F. Supp. 730.

Corporations sued were entitled to bill of particulars which was necessary for proper preparation of answers. *Sheehan v Municipal Light, etc., Co.*, 1 F. R. D. 70.

A defendant's motion for bill of particulars would be denied as to matters equally within the knowledge of both parties and not necessary for formulation of a responsive pleading, but would be granted as to matters not within knowledge of defendant and so necessary for formulation of a responsive pleading. *Kraft Corrugated Containers v Trumbull Asphalt Co.*, 31 F. Supp. 314. See *Louisiana Farmers' Protective Union v Great Atlantic, etc., Tea Co.*, 31 F. Supp. 483.

A motion for bill of particulars cannot be defeated on ground that the information which defendants seek is within their knowledge. *United States v Griffith Amusement Co.*, 1 F. R. D. 229.

Or the defendant cannot prepare for trial.—*Pearson v Hershey Creamery Co.*, 30 F. Supp. 82; *American La France-Foamite Corp. v American Oil Co.*, 25 F. Supp. 386; *McElwain v Wickwire Spencer Steel Co.*, 1 F. R. D. 177; *Lasicki v Socony Vacuum Oil Co.*, 1 F. R. D. 384.

The words "prepare for trial" have received a restricted interpretation on theory that the new procedure rules were designed to provide a speedy disposition of a case on its merits and contemplate that the pleadings shall be kept short and plain. *Lasicki v Socony Vacuum Oil Co.*, 1 F. R. D. 384.

The words "prepare for trial" relate only to matters necessary to be known to a party to put his pleading in such shape that all issues might understandingly be met, and the two provisions of rule must be read with substantially equal effect; bill of particulars not being intended to take the old meaning and have the old use of former bill of particulars. *United States v Schine Chain Theatres*, 1 F. R. D. 205.

The words "prepare for trial" are comprehended in the words to "prepare a responsive pleading." *Brown v Fire Ass'n*, 1 F. R. D. 450, wherein it was said that Mr. Holtzoff, connected with the department of justice, in editing the decisions by the various federal judges throughout the country, in his work on *New Federal Procedure and the Courts*, 1940, pp. 35-40, expresses the view that the words "to prepare for trial" as embodied in Rule 12 (e) should be deleted from the rule in order to eliminate any doubt on this point. See also, *Courteau v Interlake S. S. Co.*, 1 F. R. D. 429.

Where a party is fully advised of the meaning of averments of a pleading, he is in a position to "prepare for trial." *Brockway Glass Co. v Hartford-Empire Co.*, 1 F. R. D. 242.

In view of the broad provisions for discovery under the procedural rules (Rules 26 et seq.), a motion for a more definite statement or for a bill of particulars should be granted only where the complaint is stated in such general terms that the defendant cannot understand the general nature of the charges made so as generally to prepare for trial. *Zoller v Smith*, 1 F. R. D. 182. See *Louisiana Farmers' Protective Union v Great Atlantic, etc., Tea Co.*, 31 F. Supp. 483; *Moog v Warner Bros. Pictures*, 29 F. Supp. 479; *Smith v Employers Fire Ins. Co.*, 1 F. R. D. 251.

The information obtainable under Rules 33 to 37 inclusive is far more complete than that obtainable under the broadest construction of this rule. Therefore, motions under this rule are properly presented only where the complaint is so vague or ambiguous or contains such broad generalizations that the defendant cannot frame an answer thereto or understand the nature and extent of the charges so as generally to prepare for trial. *Brinley v Lewis*, 27 F. Supp. 313, 314.

The civil procedure rule authorizing motion for a bill of particulars should not be applied so as to unduly expand the pleadings, since discovery is the proper method

for obtaining information falling outside the category of ultimate facts. *Wisconsin Alumni Research Foundation v. Vitamin Technologists*, 1 F. R. D. 8. See *Lasicki v. Socony Vacuum Oil Co.*, 1 F. R. D. 384.

And its use limited to prevention of hardship and injustice.—Use of the provisions of the procedural rules for discovery (Rules 26 et seq.), should be encouraged and the use of a motion for a more definite statement should be limited to clear cases where the motion is necessary to prevent hardship and injustice to the defendant. *Zoller v. Smith*, 1 F. R. D. 182.

Bill of particulars would be allowed where issues were complicated by plaintiff's attempted oversimplification of its cause of action and where it would be unfair and probably result in confusion if defendant were forced to conduct his discovery proceedings upon the basis of such issues as might be framed by an answer to the complaint. *Bunge North American Grain Corp. v. Connecticut Fire Ins. Co.*, 1 F. R. D. 394.

It must clearly appear not only that the moving party is entitled to the information requested on the authority of prior cases. *Brinley v. Lewis*, 27 F. Supp. 313, 314.

Matters of evidence which a party will presumably introduce as establishing his case should not be elicited by a motion for a bill of particulars. *Modern Food Process Co. v. Chester Packing, etc., Co.*, 29 F. Supp. 405.

But also that the motion is made in good faith and not for the purpose of delay.—*Brinley v. Lewis*, 27 F. Supp. 313.

Proof before trial may be obtained through interrogatories but never through a bill of particulars. *Jessup, etc., Paper Co. v. West Virginia Pulp, etc., Co.*, 25 F. Supp. 598, wherein it was said that this subdivision should not be construed so as to destroy the fundamental distinction between pleading and proof.

A motion for bill of particulars, to enable defendants to answer the complaint, would not be granted with respect to particulars which were obviously evidentiary. *United States v. Crescent Amusement Co.*, 31 F. Supp. 730. See *United States v. Columbia Gas, etc., Corp.*, 1 F. R. D. 358.

It was not intended that compliance with Rule 8 would subject the plaintiff to a motion under this subdivision.—*Zoller v. Smith*, 1 F. R. D. 182.

Where complaint conforms to Rule 8 (a) other methods provided by rules for obtaining additional particulars from plaintiff to enable defendant to prepare its pleading or to prepare for trial should be employed instead of moving the court to require plaintiff to attempt to disclose information

sought in the complaint itself. *Lost Trail v. Allied Mills*, 26 F. Supp. 98.

Motion may be allowed in part and denied in part.—See *McElwain v. Wickwire Spencer Steel Co.*, 1 F. R. D. 177; *Murphy v. Du Pont De Nemours & Co.*, 26 F. Supp. 999; *Rosenblum v. Dingfelder*, 1 F. R. D. 179; *Kohloff v. Ford Motor Co.*, 27 F. Supp. 803.

It is not incumbent on court to grant motion unless a proper case has been made out.—A party may move for a more definite statement or for a bill of particulars which is not averred with sufficient particularity to enable him properly to prepare his responsive pleading with sufficient definiteness, or to prepare for trial, but it is not incumbent on court to grant relief sought unless a proper case has been made out. *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 F. Supp. 389.

The granting or refusal resting in the sound discretion of the court.—The granting or refusal of a motion for a bill of particulars rests in the sound discretion of the court. *Louisiana Farmers' Protective Union v. Great Atlantic, etc., Tea. Co.*, 31 F. Supp. 483. Prior to the adoption of these rules it was held that a motion to require a complaint to be made more specific or definite was addressed to the sound legal discretion of the trial court. See *Hall v. Cudahy*, 46 Colo. 324, 326, 104 P. 415. See also, *Louden Irrigating Canal, etc., Co. v. Neville*, 75 Colo. 536, 227 P. 562; *Mulligan v. Smith*, 32 Colo. 404, 408, 76 P. 1063, cited in notes, 117 Am. St. Rep. 521, Ann. Cas. 1916E, 249, 4 A. L. R. 1088, 46 A. L. R. 202, 214, 52 A. L. R. 198.

Defendant's motion for more definite statement of facts in bill of complaint presents matter resting in trial court's sound discretion, and denial of motion does not constitute error. *Hummel v. Wells Petroleum Co.*, 111 F. (2d) 883.

In applying this subdivision the court must take into consideration nature and complexity of the suit. *United States v. Schine Chain Theatres*, 1 F. R. D. 205.

2. Illustrations.

Motions granted.—In action to recover treble damages for conspiracy to eliminate competition, motion for a more definite statement regarding what conspirators enticed employees of certain corporation "out of which of said plaintiff's service into which conspirator's or conspirators' service, stating in each instance who acted in making said enticement, when, and what employee or employees were enticed," was granted. *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 F. Supp. 389.

In action for relief under the Fair Labor Standards Act, the plaintiff in response to defendant's motion for more definite state-

ment would be required to amend and supplement his complaint so as to definitely set out who paid plaintiff the weekly wage detailed in his complaint, and who discharged him from his employment. *David v. Boylan's Private Police*, 34 F. Supp. 555.

In action on insurance policy for damages to shipments of grain, where plaintiff made more than 300 shipments during the three months' period involved and policy contained conditions with respect to time for filing claims and bringing suit, insurer was entitled to a bill of particulars clarifying complaint by showing the individual claims constituting the cause of action. *Bunge North American Grain Corp. v. Connecticut Fire Ins. Co.*, 1 F. R. D. 394.

In action wherein plaintiff alleged a secret agreement between defendants and others, defendants were entitled on motion for a more definite statement or a bill of particulars, to a more particular statement as to whether the promise or contract was in writing, with whom it was made, and other details but not as to damages or as to the nature of the agreement in view of its alleged secret nature. *Johnson v. Schlitz Brewing Co.*, 1 F. R. D. 335.

In action by national bank receiver against former directors for an accounting for losses, a defendant was entitled to know date when each loan was authorized or ratified to enable him to determine whether he was present and participated in such authorization or ratification. *Downey v. Banker*, 1 F. R. D. 123.

In action for injuries sustained in automobile collision, where plaintiff also sought recovery for death of husband and daughter upon whom plaintiff depended for support, and plaintiff alleged that the automobiles, by and through the negligence of defendants, were caused to collide violently, injuring plaintiff severely, etc., defendants were entitled to have granted their motion to make the complaint more definite and certain, which motion inquired as to manner in which defendants were negligent and age of daughter when she was killed. *Schmidt v. Going*, 25 F. Supp. 412.

In action by employee of purchaser against manufacturer for injuries caused by premature explosion of dynamite cap, where statement of claim did not contain specific averments of fact forming basis for general allegation of negligence, and did not inform manufacturer of specific issues which it would be required to meet, employee was required to make statement of claim more definite. *Sierocinski v. Du Pont De Nemours & Co.*, 25 F. Supp. 706.

Motion for bill of particulars prior to issue joined would be granted notwithstanding contention that plaintiff did not possess sufficient knowledge to furnish the bill

of particulars, since plaintiff could examine witnesses and defendant's officers before trial and so obtain the necessary information. *Graham v. New York, etc., S. S. Co.*, 25 F. Supp. 224.

In action on jeweler's block policy, wherein insurer alleged as a defense that insured warranted that an inventory would be kept in such manner that exact amount of loss could be accurately determined, but that insured failed so to do, insured was entitled to be informed by bill of particulars in what respect insurer would claim that insured failed to keep such inventory. *Prutinsky v. Commercial Union Assur. Co.*, 1 F. R. D. 440.

In action for an accounting and recovery of royalties allegedly due under an assignment of license agreement, defendant, in response to its motion for a bill of particulars, was entitled to particulars as to what products covered by license agreement plaintiff claimed that defendant made or sold. *Knupfer v. Albertson & Co.*, 1 F. R. D. 257.

In action by receiver of bank and by individual for a judgment against defendant under her written guarantee of the payment of corporate bonds, defendant's motion for an order requiring plaintiffs to furnish a more definite statement of their complaint or a bill of particulars would be granted as to the items whether the bank had been dissolved and as to details respecting the demands on defendant for payment. *Bicknell v. Lloyd-Smith*, 25 F. Supp. 657.

In damage action for canceling a dealer's agency contract, defendant automobile manufacturer held required to state in a bill of particulars in what respect plaintiff allegedly failed to live up to its contract. *Bushwick-Decatur Motors v. Ford Motor Co.*, 1 F. R. D. 19.

In action on fire insurance policy, plaintiff was entitled to more definite statement of defense set up in paragraph of answer averring increase of fire hazard by means within plaintiff's control, thereby causing or contributing to fire. *Abruzzino v. National Fire Ins. Co.*, 26 F. Supp. 934.

A complaint which seemed capable of varied interpretations was subject to motion for more definite statement or for bill of particulars. *Herman v. Mutual Life Ins. Co.*, 108 F. (2d) 678, 127 A. L. R. 1458.

In creditors' proceeding to force debtor corporation into involuntary bankruptcy, debtor's motion for bill of particulars and motion to have certain allegations stricken from creditors' petition as irrelevant and immaterial were warranted under this subdivision. *Tatum v. Acadian Production Corp.*, 35 F. Supp. 40.

In equity suit where defendants counterclaimed against validity of plaintiff's patent on the grounds of prior publication, public sale, and public use, requests by plaintiff for identification of the alleged prior publications, public sale, and public use were properly made on motion for bill of particulars rather than by interrogatories under Rule 33. *Sure-Fit Products Co. v Mid-Vogue Corp.*, 28 F. Supp. 489.

Motions denied.—Where complaint in action to recover compensation for services in making an audit and survey of more than 200 stores and plants of defendant was sufficiently definite for purpose of framing an answer and to permit defendant to prepare in a general way for trial, and complaint would consist of several hundred pages of detailed allegations should defendant's motion for a more definite statement, or for bill of particulars be granted, the motion would be denied. *Pearson v Hershey Creamery Co.*, 30 F. Supp. 82.

Where, in judgment debtor's action to set aside an allegedly fraudulent conveyance of real estate, grantee-defendant filed an answer that judgment debtor was indebted to grantee in substantial amount, that conveyance was in satisfaction of indebtedness and that since the conveyance, grantee had made substantial improvements, judgment creditor's motion for a bill of particulars regarding what constituted the "substantial amounts" of the indebtedness and the "substantial improvements" was denied, since such pretrial information as it might require could be obtained under rules relating to depositions and discovery. *Alropa Corp. v Heyn*, 30 F. Supp. 668.

Where complaint in action for death of motorist in accident allegedly resulting from unrevealed defective condition of automobile was as detailed as complaint suggested in official form for a complaint for negligence, and information desired by defendant could readily be obtained under procedural rules providing for discovery (Rules 26 et seq.), defendant's motion for a more definite statement of claim was denied. *Zoller v Smith*, 1 F. R. D. 182.

Defendants' motion for a more definite statement and for a bill of particulars was denied, where requests were for proof of the allegations of the bill, and not for amplification of allegations of ultimate facts. *United States v Columbia Gas, etc., Corp.*, 1 F. R. D. 358.

Where matters mentioned in motion for more definite statement and bill of particulars must have been covered, or should have been covered, in lengthy direct examination or cross-examination of plaintiff on examination before trial and could be obtained more satisfactorily through examination than through making of written statements, that part of the motion involving

such matters was denied. *Welty v Clute*, 1 F. R. D. 107.

Motion for bill of particulars with respect to matters of which defendant was already informed, or which were included in requests in prior paragraphs or which did not seem to be necessary to enable defendant to answer complaint, would be denied. *Texas, etc., Ry. Co. v Elgin, etc., Ry. Co.*, 1 F. R. D. 136.

In action on jewelers' block policy, defense alleging that upon an examination after filing of proof of loss one of insured refused to answer pertinent questions which were material and necessary did not need amplification by bill of particulars. *Prutinsky v Commercial Union Assur. Co.*, 1 F. R. D. 440.

Motion to make complaint more definite and certain would be denied where complaint appraised defendants of claim for relief to which they were required to answer even though complaint contained superfluous pleading. *Kraus v General Motors Corp.*, 27 F. Supp. 537.

A motion for more definite statement as to matter which was not in issue would be denied. *United States v Schine Chain Theatres*, 1 F. R. D. 205.

In action by receiver of bank and by individual for a judgment against defendant under her written guarantee of the payment of corporate bonds, defendant's motion for an order requiring plaintiffs to furnish a more definite statement of their complaint or a bill of particulars would not be granted as to the items concerning the identity of the one to whom the corporation sold and delivered its bonds and the consideration received by it, the identity of the seller of the bonds to the bank, the date of the purchase, and the consideration paid, the same as to the individual, and whether the bank and individual knew of the guaranty at the time of the purchase of the bonds. *Bicknell v Lloyd-Smith*, 25 F. Supp. 657.

Motion for a more definite statement and bill of particulars concerning places where plaintiff manufactures and places where plaintiff sells each of its products, including those specifically mentioned and those not mentioned, was denied. *Du Pont De Nemours & Co. v DuPont Textile Mills*, 26 F. Supp. 236.

Motion for a more definite statement and bill of particulars showing how plaintiff computed the jurisdictional amount was not the proper way to raise the question of jurisdiction. *Id.*

Where petition alleged that plaintiff was the owner and proprietor of a registered label and that it had been infringed by the defendant, a bill of particulars showing derivation of ownership in the plaintiff

would not be required. *Bobrecker v Denebeim*, 25 F. Supp. 208.

In personal injury action, plaintiff's allegations as to the extent of physical and financial damage sustained by him were sufficiently particular to enable defendant to frame its answer and to prepare for trial, as against defendant's motion for a bill of particulars. *Lasicki v Socony Oil Co.*, 1 F. R. D. 384.

Plaintiff's applications for bills of particulars were denied, where averments of answer were clear, and particularly where plaintiff could obtain all information she sought under several methods for discovery provided by the Rules of Civil Procedure. *Leimer v State Mut. Life Assur. Co.*, 1 F. R. D. 386.

Where complaint stated facts relied upon as a cause of action for injunction with sufficient particularity to enable defendants to answer, and defendants could not obtain anything from a bill of particulars which was not fully available to them through discovery procedure, motion for bill of particulars was denied. *Fried v Warner Bros. Circuit Management Corp.*, 26 F. Supp. 603.

Paragraphs of motion for more definite statement were denied where more definite statement was sought, not because defendants needed information to prepare answers or prepare for trial, but to pave way for motion attacking legal sufficiency of expanded complaint. *Gumbart v Waterbury Club Holding Corp.*, 27 F. Supp. 228.

In action on fire policies, plaintiff was not entitled to a bill of particulars as respects the merely permissive defenses of failure to perform policy conditions and of making of fraudulent or false statements. *National Millwork Corp. v Preferred Mut. Fire Ins. Co.*, 28 F. Supp. 952.

E. Defects Complained of and Details Desired.

The provision requiring motion to point out defects complained of and details desired must be liberally construed. *McKenna v United States Lines*, 26 F. Supp. 558.

Substantial compliance.—Motion for bill of particulars which stated that plaintiff had not averred certain matters with sufficient definiteness and particularly to enable defendant to prepare for trial properly, and which contained 48 requests for specific information, substantially complied with this rule. *McKenna v United States Lines*, 26 F. Supp. 558.

Denial of motion.—A motion for a bill of particulars which demanded certain information regarding certain paragraphs of complaint, but did not point out defects of complaint, nor state that information required was necessary to enable defendants to prop-

erly prepare their responsive pleadings, would be denied. *Tager v Goodstein*, 29 F. Supp. 42.

Designation by court of details which party should furnish.—Where motion for more definite statement of defendant's counterclaim was defective because it failed to set forth details which plaintiff desired to have furnished, the court was authorized to dismiss the motion, but in view of fact that the case had been delayed by prior motion for judgment, the court, in order to avoid delay, designated the details which defendant should furnish, without intending its action to be considered as a precedent. *Van Dyke v Broadhurst*, 29 F. Supp. 525.

A motion for verified bill of particulars of matters alleged in complaint should state the defects complained of. *Rosenblum v Dingfelder*, 1 F. R. D. 179.

F. When Order of Court Not Obeyed.

Motion to strike held appropriate procedure.—Under provision that if order of court granting motion for further particulars is not obeyed within time fixed by court, court may strike pleadings to which motion was directed, or make such order as it deems just, motion for nonsuit of plaintiff for failure to obey order for specifications, in that specifications filed were incomplete, uncertain, indefinite, and included unresponsive material, was denied on ground that motion to strike was the more appropriate procedure. *Mulloney v Federal Reserve Bank*, 1 F. R. D. 153.

And motion to nonsuit plaintiff for failure to file specifications within time fixed by court was denied on ground that motion to strike was the more appropriate procedure. *Id.*

Motion to dismiss.—Where plaintiffs had not filed bill of particulars within time allowed by order sustaining defendants' motion for bill, and filed no briefs or pleas with respect to defendants' subsequent motion to dismiss and did not otherwise act with respect to such motion, the motion to dismiss was sustained. *Botkins v Sorter*, 29 F. Supp. 991.

VI. MOTION TO STRIKE

Editor's note.—In construing § 66 of Code of Civil Procedure which this subdivision in part supplants, the court said that it could on its own motion, amend by striking out. *Eltzroth v Murphy*, 75 Colo. 5, 7, 223 P. 760.

Where a complaint contained redundant matter, advantage could not be taken thereof on motion to require the complaint to be made more specific, but the proper remedy was by motion to strike. *Commonwealth Co. v Nunn*, 17 Colo. App. 117, 118, 67 P. 342.

It was not error to refuse to strike out pleas which were merely cumulative, and which tendered the same issue tendered by an objectionable plea subsequently filed. *Glenn v. Brush*, 3 Colo. 26, cited in notes, 37 Am. St. Rep. 32, Ann. Cas. 1913D, 854.

Nor was it error to strike out allegations that were simply a recital of the motives of defendant in doing the acts complained of by plaintiff, and which added nothing to the cause of action stated. *Equitable Securities Co. v. Montrose, etc., Canal Co.*, 20 Colo. App. 465, 79 P. 747.

Except possibly by inference, the federal rules make no provision for attacking an answer for insufficiency in law (our old demurrer practice). Hence the committee added to this rule which is captioned "Motion to Strike," these words: "The objection that an answer or separate defense therein fails to state a legal defense may be raised by motion filed under this subdivision." See article entitled, "The Federal Rules from the Standpoint of the Colorado Code" by Col. Philip S. Van Cise, of the Rules Committee, in *Dicta XVII*, no. 7, pp. 170, 174.

Meaning of "irrelevant" and "immaterial."—Where a special defense states matter which in law constitutes no defense, having reference to the issues in controversy, it is "irrelevant," "immaterial," and not "responsive" to the issues of the controversy and should be stricken on proper motion under this rule. *Schenley Distillers Corp. v. Renken*, 34 F. Supp. 678.

Meaning and determination of "impertinence."—"Impertinence," within procedural rule permitting striking from a pleading any redundant, immaterial, impertinent, or scandalous matter, consists of any allegation not responsive and not relevant to the issues involved which could not be put in issue or be given in evidence between the parties. To determine whether matter is impertinent one must first determine the scope of the issues in controversy, and then under the rule determine whether the matter injected in the pleadings is relevant or material thereto. *Schenley Distillers Corp. v. Renken*, 34 F. Supp. 678.

Material must be prejudicial to moving party before motion to strike will be granted.—Under court rule concerning motions to strike redundant and immaterial matter from pleading, matter will not be stricken merely because it is immaterial or impertinent if it will not be prejudicial to party wishing it stricken out, but it will be stricken on motion where it would result in prejudice to the other party. *Meek v. Miller*, 1 F. R. D. 162.

Thus, in action for injuries from automobile collision, plaintiff's motion to strike paragraph of defendant's answer containing

allegations that defendant's claims arising out of collision were paid by plaintiff's insurer and that plaintiff thereby admitted responsibility for accident would be granted, since matter set forth in paragraph would not be admissible in evidence, and plaintiff might be prejudiced by permitting contested allegation to remain in pleadings. *Id.*

The mere presence of redundant matter, not affecting the substance, is not in itself sufficient ground for granting a motion to strike such matter from the complaint, and where no harm will result from immaterial matter not affecting the substance, the court should hesitate to disturb a pleading. *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 F. Supp. 389.

Such a motion is not favored, and will be granted only when the allegations have no possible relation to the controversy. *Radtke Patents Corp. v. Tagliabue Mfg. Co.*, 31 F. Supp. 226, citing *Hansen Packing Co. v. Armour & Co.*, 16 F. Supp. 784, 787.

This is true even though the matter is shown to be false by the moving affidavits, as the motion to strike should not be granted if the court is in any doubt that it cannot avail as a defense, or if under any contingency it may raise an issue. *Radtke Patents Corp. v. Tagliabue Mfg. Co.*, 31 F. Supp. 226, citing *Hespe v. Corning Glass Works*, 9 F. Supp. 725, 728.

Also motion will not be granted if it results in rendering complaint meaningless. —A motion to strike out allegedly immaterial matter in complaint would be denied where the result of the granting of the motion would be to render the complaint meaningless and amount to a dismissal of the complaint. *Mahoney v. Bethlehem Engineering Corp.*, 27 F. Supp. 865.

Motion to strike out fourth paragraph of complaint, without which complaint would be meaningless, on ground that documents submitted did not show agreement and that oral terms were not properly furnished in bill of particulars did not come within rule providing that any redundant, immaterial, impertinent, or scandalous matter may be stricken from a pleading. *Reilly v. Wolcott*, 1 F. R. D. 103.

The time when motions to strike will be heard is discretionary with court. —The time when motions making certain defenses and motions to strike from a pleading any redundant, immaterial, impertinent, or scandalous matter may be heard and determined is discretionary with the District Court. *Schenley Distillers Corp. v. Renken*, 34 F. Supp. 678.

Plaintiffs' motion for bill of particulars and to strike, mailed to defendant's attorneys at least 35 days after filing of answer and service thereof on plaintiffs' counsel,

would be regarded by the District Court also as an application for an enlargement of time under procedural rule in view of statements concerning delay in brief of plaintiffs' counsel, and as such the application would be granted and the court would entertain the motion. *O'Leary v Liggett Drug Co.*, 1 F. R. D. 272.

Objection to sufficiency of statement of claim should be made by motion to strike rather than by rule to show cause. *Rosenberg v Hano & Co.*, 26 F. Supp. 160; *Abruzzo v National Fire Ins. Co.*, 26 F. Supp. 934; *United States v Hoover*, 28 F. Supp. 556. But see *Dysart v Remington Rand*, 31 F. Supp. 296.

A motion to dismiss and to strike an affirmative defense contained in plaintiff's reply to defendant's counterclaim because defense failed to state a legal defense and because it was immaterial, irrelevant, and legally insufficient was permissible to test the legal sufficiency of the defense under procedural rule permitting the defense of failure to state a claim on which relief can be granted to be made by motion and permitting the striking from a pleading of any redundant, immaterial, impertinent, or scandalous matter. *Schenley Distillers Corp. v Renken*, 34 F. Supp. 678.

Illustrations.—Where the last thirteen sections of defendant's answer were immaterial, but plaintiff seemed to be concerned only with the last three sections, which appeared to be the most immaterial, and plaintiff's motion to strike portions of the answer was filed too late, the court ordered, upon its own initiative, that the last three sections be stricken. *Strahle-Johnson Supply Co. v Douglas Co.*, 1 F. R. D. 279.

In judgment creditor's action to set aside an allegedly fraudulent conveyance of real estate, creditor's motion to strike from answer as immaterial, and impertinent allegation that defendant-grantee was an indorser of one of notes on which creditor entered judgment against the judgment debtor was denied, since court could not determine whether fact was material to issue. *Alropa Corp. v Heyn*, 30 F. Supp. 668.

In creditors' proceeding to force debtor corporation into involuntary bankruptcy, debtor's motion for bill of particulars and motion to have certain allegations stricken from creditors' petition as irrelevant and immaterial were warranted under Rules of Civil Procedure concerning motions for bill of particulars and motions to strike. *Tatum v Acadian Production Corp.*, 35 F. Supp. 40.

Defendant by its denial of allegations in certain paragraphs of the complaint raised an issue, and plaintiff was not entitled to an order striking out defendant's answer,

granting summary judgment, granting judgment on the pleadings, or striking out defendant's answer as sham and frivolous. *Phoenix Hdw. Co. v Paragon Paint, etc., Corp.*, 1 F. R. D. 116.

Where two parts of plaintiff's motion to strike addressed to defendants' counterclaim, considered together, amounted to an effort to eliminate the counterclaim and cross action entirely and in fact to a motion to dismiss the cross action, and defendants had a right to counterclaim, such motion should be overruled. *Myers v Beckman*, 1 F. R. D. 99.

Several pages of complaint alleging in considerable detail specific acts of negligence relied on by plaintiff would not be stricken under the rule, where allegations complained of did not clearly appear to be redundant, immaterial, impertinent, or scandalous, and the action involved multiple and complex issues. *Courteau v Interlake S. S. Co.*, 1 F. R. D. 429.

VII. CONSOLIDATION OF MOTIONS.

Corrective motions may be made if done before ruling on defective motion.—The Civil Procedure Rule requiring all defenses and objections permitted prior to filing of responsive pleading to be included in one motion was not intended to preclude a party who has given insufficient notice of his motion, from making a corrective motion, before any ruling has been had on his defective motion, designed merely to cure a technical defect in previous motion made on same grounds, and to bring previous motion properly before the court. *Mutual Life Ins. Co. v Egeline*, 30 F. Supp. 738.

A motion to dismiss action for insufficiency of complaint after denial of motion to dismiss on jurisdictional grounds does not violate rule requiring consolidation of motions, though defense raised by second motion was available at time of prior motion, in view of provision in such rule that motions concerning jurisdiction may be made before other motions. *Equitable Life Assur. Soc. v Saftlas*, 35 F. Supp. 62.

As to whether "special appearance" is preserved in the preliminary motion under this rule, see article entitled, "Some Current Trends in the Construction of the Federal Rules" by Mr. James A. Pike in the *George Washington Law Rev.*, vol. IX, pp. 26, 33.

VIII. WAIVER OF DEFENSES.

A. General Consideration.

Motions for security for costs may be made under this rule.—Motions for security for costs are not "objections" within court rule providing that a party waives all objections not presented by motion as "herein-

before provided," and that rule does not eliminate such motions, even though motions "hereinbefore provided" do not include motions for security for costs. *Wheeler v. Lientz*, 25 F. Supp. 939. See the committee note of this subdivision for provision as to motions for costs bonds.

Applied in Person v. United States, 112 F. (2d) 1; *Vilter Mfg. Co. v. Rolaff*, 110 F. (2d) 491; *Nakdimen v. Baker*, 111 F. (2d) 778; *Murphy v. Puget Sound Mtg. Co.*, 31 F. Supp. 318; *Pierce v. Submarine Signal Co.*, 25 F. Supp. 862; *Duarte v. Christie Scow Corp.*, 27 F. Supp. 894; *Mills v. Lowndes*, 26 F. Supp. 792; *Eberle v. Sinclair Prairie Oil Co.*, 35 F. Supp. 296; *Cooney v. Legg*, 34 F. Supp. 531.

Cited in *Doyle v. Loring*, 107 F. (2d) 337; *Piest v. Tide Water Oil Co.*, 27 F. Supp. 1021.

B. Defenses and Objections.

The defense that no cause of action or the objection that no defense has been stated may be made as late as the trial. *Dysart v. Remington Rand*, 31 F. Supp. 296.

The court may pass on sufficiency of defense before the trial.—The court has discretion regarding whether it will pass on objection that special defenses fail to state each a legal defense in advance of trial. *Dysart v. Remington Rand*, 31 F. Supp. 296.

Thus, where ruling on objection that the special defenses fail to state each a legal defense might greatly simplify and shorten trial, court would pass upon such objection in advance of trial. *Id.*

Plaintiff's attack against a defense for legal insufficiency is by way of "objection."—In view of court rule that no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion, a plaintiff, like a defendant, may attack the opposing pleading on the score of its legal insufficiency but the language of the rule suggests that when the defendant attacks the complaint for its legal insufficiency, his attack is by way of "defense" and that when a plaintiff attacks a special defense for its legal insufficiency, his attack is by way of "objection." *Dysart v. Remington Rand*, 31 F. Supp. 296.

No justification for dismissing complaint unless it appears certain that no relief could be had.—In view of the means which the Rules of Civil Procedure afford a defendant to obtain a speedy disposition of a claim which is without foundation or substance, by either securing a more definite statement or a bill of particulars under Rule 12 (e) and thereafter applying for judgment on the pleadings under Rule 12 (h) (1), or by moving for a summary judgment under Rule 56, there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim. *Leimer v. State Mut. Life Assur. Co.*, 108 F. (2d) 302, 306.

Under this rule the court had jurisdiction to rule on motion to dismiss contained in motion for judgment on the pleadings. *Missouri v. Fidelity, etc., Co.*, 107 F. (2d) 343.

Where after effective date of Rules of Civil Procedure abolishing demurrer amended complaint was filed to which defendant demurred on ground that it failed to state cause of action and plaintiff's motion to strike demurrer was sustained but his request for default judgment was denied and defendant was granted five days to plead within which defendant filed motion for judgment on the pleadings on ground that amended complaint did not state facts on which relief could be granted, denial of plaintiff's motion to set aside order denying request for default was not error. *Missouri v. Fidelity, etc., Co.*, 107 F. (2d) 343.

C. Jurisdiction of Subject Matter.

Motion to dismiss for lack of jurisdiction may be made at any time.—A motion to dismiss a complaint on ground that the amount actually in controversy did not involve the minimum jurisdictional amount could be made at any time, and before the answer to the complaint was served as provided in this rule. *Corcoran v. Royal Develop. Co.*, 35 F. Supp. 400.

The objection to jurisdiction on ground that action was not brought in proper district was "waived," where defendant defaulted. *Zwerling v. New York, etc., S. S. Co.*, 33 F. Supp. 721.

Rule 13. Counterclaim and Cross-Claim.**Committee Note.**

See Rule 110 (d).

(a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. [Supplants Code Sec. 63.]

Committee Note.

This applies to replevin actions. See Rule 104 (m).

(b) **Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) **Counterclaim Exceeding Opposing Claim.** A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) [Stricken as Federal.]

(e) **Counterclaim Maturing or Acquired After Pleading.** A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) **Omitted Counterclaim.** When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) **Cross-Claim Against Co-Party.** A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

Committee Note.

See Rule 110 (d).

(h) **Additional Parties May be Brought in.** When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained. [Supplants Code Sec. 16.]

C (i) Separate Judgments. Judgment on a counterclaim or cross-claim may be rendered even if the claims of the opposing party have been dismissed or otherwise disposed of.

C (j) Claims Against Assignee. Except as otherwise provided by law as to negotiable instruments, any claim, counterclaim, or cross-claim which could have been asserted against an assignor at the time of or before notice of an assignment, may be asserted against his assignee, to the extent that such claim, counterclaim, or cross-claim does not exceed recovery upon the claim of the assignee. [From Code Secs. 4 and 64.]

Committee Note.

There is no Federal subdivision 13 (j).

C (k) Claims Against Personal Representative. The death of a person shall not prejudice the rights of a third person to assert a claim, cross-claim or counter-claim surviving death against the personal representative of the deceased in the time and manner provided by law. [From Code Sec. 64.]

Committee Note.

There is no Federal subdivision 13 (k).

C (l) County Court Claim in Excess of \$2,000.00 Certified to District Court. Where any counterclaim or cross-claim or third-party claim is filed in an action in the county court, and due to its limited jurisdiction, the county court does not have the power to grant the relief sought by the counterclaim or cross-claim or third-party claim, the county court shall suspend all proceedings in the entire action and certify the same and transmit all papers therein to the district court of the same county, and the action shall thereupon proceed as if originally instituted in the said district court. In any action so certified, when any responsive pleading is required or permitted or a motion is allowed under these rules, such pleading or motion shall be filed within the time fixed by these rules or within 10 days after the filing of the transcript of the record in the district court, whichever period is longer, or when certification is refused, within such time as the court may order. [New.]

Committee Note.

There is no Federal subdivision 13 (l).

I. General Consideration.

II. The Particular Subdivisions.

- A. Compulsory Counterclaims.
- B. Permissive Counterclaims.
- C. Counterclaim Exceeding Opposing Claim.
- D. Counterclaim Maturing or Acquired After Pleading.
- E. Omitted Counterclaim.
- F. Cross-Claim Against Co-Party.
- G. Additional Parties May Be Brought In.
- H. Separate Judgments.
- I. Claims Against Assignee.
- J. Claims Against Personal Representative.
- K. County Court Claim in Excess of \$2,000.00 Certified to District Court.

Cross Reference.

For a discussion of this rule, see Address no. 4, appx. D.

I. GENERAL CONSIDERATION.

In general.—It will be noted that under this rule counterclaims are divided into two classes, compulsory counterclaims and permissive counterclaims. A party must set forth by counterclaim a claim arising out of the same transaction. A party may set forth by counterclaim any claim not arising out of the same transaction. In other words, this rule provides that a defendant may set forth by way of counterclaim any sort of legal claim which he has against the plaintiff, contract, quasi-contract, tort, or what-not. See article entitled, "Trials and New Trials Under the New Federal Rules" by Mr. William H. Wicker, XV Tenn. Law Rev., no. 6, pp. 570, 571.

The trend of new Rules of Civil Procedure is to discourage separate actions tending toward multiplicity of suits, and, wherever possible, to permit combining in one litigation for determination the rights of all parties in one subject matter, or arising out of one transaction. Schram v Lucking, 31 F. Supp. 749.

The new Rules 13, 15 (a), 18 (a) seek to require in a civil action what has always been aimed at in an equity suit, that all claims growing out of a single transaction be brought in and settled in the one case. Jones v St. Paul Fire, etc., Ins. Co., 108 F. (2d) 123, 125.

A counterclaim against individual partners could be asserted in an action upon a partnership claim, in view of liberality of this rule relating to counterclaims, in the interest of avoiding multiplicity of suits. Abraham v Selig, 29 F. Supp. 52.

Counterclaim that could be ruled on when case was tried would not be dismissed.—Plaintiff's motion to dismiss counterclaim was overruled, where it appeared that plaintiff would not be burdened by presence of such demand, and that counterclaim was wholly a question of law and could be ruled on when case was tried. Leimer v State Mut. Life Assur. Co., 1 F. R. D. 386.

The fact that judgment could not be obtained on counterclaim would not warrant dismissal.—The mere fact that defendant by its counterclaim prays for a relief for which it cannot legally obtain a judgment against plaintiff does not warrant a dismissal of the counterclaim where other forms of relief prayed may not be subject to such an objection. United States v Humboldt Lovelock Irr. Light, etc., Co., 1 F. R. D. 334.

In action in tort to recover for alleged libel, this rule permitted counterclaim in assumpsit for goods sold and delivered. Kuenzel v Universal Carloading, etc., Co., 29 F. Supp. 407; In re Drumm, 29 F. Supp. 411.

II. THE PARTICULAR SUBDIVISIONS.

A. Compulsory Counterclaims.

Certain counterclaims are compulsory.—The Rules of Civil Procedure favor the determination of all pending issues between parties at one time, and make the assertion of certain counterclaims compulsory. United States v Heard, 32 F. Supp. 39.

Thus, one arising out of the same transaction as the subject of suit is compulsory.—A counterclaim which arises out of a transaction which is the subject matter of the original action is a "compulsory counterclaim." Abraham v Selig, 29 F. Supp. 52.

But not those growing out of separate transactions.—This rule relating to com-

pulsory counterclaim it not applied to causes growing out of separate transactions. Williams v Robinson, 1 F. R. D. 211.

Meaning and scope of "transaction" and "occurrence."—Under Civil Procedural Rule requiring pleading as counterclaim of any claim arising out of transaction or occurrence that is subject matter of opposing party's claim, the word "transaction" is broad enough to include an occurrence, and the words "transaction" and "occurrence" as used include the facts out of which a cause of action may arise and probably mean whatever may be done by one person which affects another's rights and out of which a cause of action may arise. Williams v Robinson, 1 F. R. D. 211.

Filing a counterclaim is necessary when the same evidence will support or refute the opposing claim.—In determining whether it is necessary under the Civil Procedure Rule to file a counterclaim, or to be barred subsequently from asserting it, the test to be applied is whether the same evidence will support or refute the opposing claim. Williams v Robinson, 1 F. R. D. 211.

Where defendant's wife filed suit for maintenance and defendant filed answer with cross-complaint seeking absolute divorce on ground of adultery, naming plaintiff in libel suit as correspondent, plaintiff, suing defendant for libel, was not obliged, under this rule, to assert claim for libel in counterclaim, since use of defamatory language constituted no portion of facts or circumstances alleged and relied on by defendant in his cross-complaint in wife's maintenance suit and there was no common point between the causes of action. Id.

Both the plaintiff and defendant may file a counterclaim.—Rule 18 which was adopted contemporaneously with this rule indicates that it was the intent of the framers of the new rules to give the pleaders, that is, both the plaintiff and the defendant, the right to file a counterclaim, for, in that rule, it states: "(a) The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims." Bethlehem Fabricators v John Bowen Co., 1 F. R. D. 274, 275.

This rule does not apply only to defendants for the rule uses the words "pleadings" and "pleader" rather than "answer" and "defendant." Id.

The Rule of Civil Procedure as to compulsory counterclaims applies to plaintiffs, as well as defendants, and hence permits subcontractor, suing contractor on subcontract, to include counterclaim against sureties on contractor's performance bond in reply to defendant's counterclaim. Id.

Counterclaim defective because it did not assist claim against opposing party.—In action by trustees to replevy from third person horses which debtor had delivered to third person after having transferred horses by bill of sale to trustees to secure payment of indebtedness and note given by debtor to company whose officers trustees were, counterclaim charging that trustees were guilty of conspiracy to force debtor to default in payment of note, in order to acquire his property, was fatally defective for violating this rule requiring that a counterclaim seek relief against opposing parties. since trustees in their individual capacity, as officers of company, were not "opposing parties." *Chambers v. Cameron*, 29 F. Supp. 742.

Filing legal counterclaim in equity suit did not waive jury trial.—Beneficiaries who set up a counterclaim for amount of accrued benefits under life policy in insurer's suit to cancel and rescind policy, as they were required to do by Procedural Rule, did not waive a jury trial. *Union Central Life Ins. Co. v. Burger*, 27 F. Supp. 554.

However equity issues must be disposed of first.—Where beneficiaries set up a counterclaim for amount of accrued benefits under life policy in insurer's suit to cancel and rescind policy, as they were required to do by Procedural Rule, equity issue was required to be disposed of first, and, if trial of that issue did not determine all issues, beneficiaries could proceed with their law action on their counterclaim. *Union Central Life Ins. Co. v. Burger*, 27 F. Supp. 554.

B. Permissive Counterclaims.

The object of this rule providing that pleading may state as a counterclaim any claim against an opposing party not arising out of transaction or occurrence that is the subject matter of the opposing party's claim was to permit all controversies and points of difference between the parties to be brought out and disposed of in one trial. *Warren v. Indian Refining Co.*, 30 F. Supp. 281.

Under it the plaintiff may file a counterclaim to a counterclaim.—Under the Rule of Civil Procedure that pleading may state as counterclaim any claim against an opposing party not arising out of transaction or occurrence that is the subject matter of the opposing party's claim, a plaintiff may file a counterclaim to a counterclaim. *Warren v. Indian Refining Co.*, 30 F. Supp. 281.

In action on bond given in an injunction suit in a state court wherein defendants filed a counterclaim asserting damages against plaintiff on commission agency agreement, plaintiff was entitled to file counterclaim admitting execution of agreement but charging that defendants after execution thereof entered into combinations to restrain trade in violation of state anti-trust law to damage

of plaintiff who was endeavoring to operate under terms of commission agency contract. *Id.*

Court's discretion to deny leave to file counterclaim is limited to cases arising under Rule 13 (e) and (f).—The exercise of discretion to deny leave to file permissive counterclaim under this subdivision is limited to cases where counterclaim matured or was acquired by pleader after serving his pleading, (Rule 13 (e)) and, where pleader fails to set up counterclaim through oversight, inadvertence, or excusable neglect, (Rule 13 (f)) pleader must have leave of court to set up the counterclaim either by supplemental pleading or amendment. *Michigan Tool Co. v. Drummond*, 33 F. Supp. 540.

C. Counterclaim Exceeding Opposing Claim.

In general.—Under this rule relating to counterclaims, a "counterclaim" asserted against any opposing party may or may not diminish or defeat the recovery sought by the opposing party and may claim relief different in kind from that sought by the opposing party. *Abraham v. Selig*, 29 F. Supp. 52.

This rule places no procedural limitations on the type of claim which might be interposed as a counterclaim. *Abraham v. Selig*, 29 F. Supp. 52.

D. Counterclaim Maturing or Acquired After Pleading.

Under this rule a counterclaim must have matured, and if it has not it states no cause of action. *Goodyear Tire, etc., Co. v. Marbon Corp.*, 32 F. Supp. 279.

Pleading a claim for damages arising from the wrongful bringing of an action, before the final determination of such action, is premature and unauthorized by this rule. *Id.*

For limitation on court's discretion to deny leave to file counterclaim see *Michigan Tool Co. v. Drummond*, 33 F. Supp. 540. See analysis line II, B.

E. Omitted Counterclaim.

For limitation on court's discretion to deny leave to file counterclaim, see *Michigan Tool Co. v. Drummond*, 33 F. Supp. 540. See analysis line II, B.

F. Cross-Claim Against Co-Party.

Cross reference.—See Form 16, appx. A.

Intention of rule.—This rule relating to counterclaim and cross-claim was intended to make filing of any proper cross-claim compulsory, and to bar cross-claim after an action should proceed to judgment without intervention or counterclaim. *Grodsky v. Sipe*, 30 F. Supp. 656.

It affords an opportunity of determining the case with minimum of procedural steps. —Under Civil Procedure Rules, cross-claims between defendants, when properly sued together, afford a means of determining entire controversy with a minimum of procedural steps. (*American*) *Lumbermen's Mut. Cas. Co. v. Timms*, 108 F. (2d) 497.

G. Additional Parties May Be Brought In.

Cross reference.—For provision on the necessary joinder of parties, see Rule 19.

Editor's note.—In construing § 16 of the Code of Civil Procedure, which is supplanted by this subdivision, the court held that the law encourages the determination of all controversies in one action by bringing in either necessary or proper parties. *Pollard v. Lathrop*, 12 Colo. 171, 20 P. 251; *Haldane v. Potter*, 94 Colo. 558, 562, 31 P. (2d) 709.

Public policy, reason, as well as equity, required that all matters pertaining to the transaction should have been adjudicated at the same time. *Strang v. Murphy*, 1 Colo. App. 357, 361, 29 P. 298.

And with equal discrimination, the law disapproves of bringing in parties whose presence was neither necessary nor proper. *Russell v. Cripple Creek State Bank*, 71 Colo. 238, 206 P. 160; *Haldane v. Potter*, 94 Colo. 558, 562, 31 P. (2d) 709; *Howard v. Fisher*, 86 Colo. 493, 522, 283 P. 1042. See *Tolland Co. v. First State Bank*, 95 Colo. 321, 35 P. (2d) 867.

That section was but a declaration of the general rule that all who were interested in the subject-matter of an action should be made parties thereto, so that complete justice might have been done and the rights of all parties in the subject-matter of controversy finally determined. *Denison v. Jerome*, 43 Colo. 456, 461, 96 P. 166; *Buckhorn Plaster Co. v. Consolidated Plaster Co.*, 47 Colo. 516, 526, 108 P. 27, cited in notes, *Ann. Cas.* 1912A, 1027, 1028, 36 A. L. R. 424.

It was an everyday matter on trial to admit a new plaintiff when he appeared to have an interest in the case, and that section required it. *Dickson v. Retallic*, 80 Colo. 78, 79, 249 P. 2. See §§ 17, 18, 81 and 84.

Jurisdiction of the subject-matter was conferred by law (*Davis v. Davis*, 70 Colo. 37, 38, 197 P. 241, cited in notes, 29 A. L. R. 1382, 39 A. L. R. 617, 639, 42 A. L. R. 1392), and existed even before the suit was begun. It was not affected by the omission of a party. *Conroy v. Cover*, 80 Colo. 434, 438, 252 P. 883.

The court was required to order an indispensable party to be brought in. See *Day v. McPhee*, 41 Colo. 467, 486, 93 P. 670, cited in notes, L. R. A. 1918D, 1193, 77 A. L. R.

462. *Conroy v. Cover*, 80 Colo. 434, 441, 252 P. 883, rehearing.

Conceding, that, for the purpose of a complete determination of all the rights involved, they should have been made parties defendant, by virtue of that section, the failure to do so could not have been considered there, because appellants, by answering over, after demurrer, on the ground of defect of parties, waived the right to raise the question on appeal. *Zang v. Wyant*, 25 Colo. 551, 566, 56 P. 565, 71 Am. St. Rep. 145, cited in notes, 75 Am. St. Rep. 51, 77 Am. St. Rep. 912, 78 Am. St. Rep. 462, 82 Am. St. Rep. 814, 88 Am. St. Rep. 190, 93 Am. St. Rep. 760, 105 Am. St. Rep. 381, 129 Am. St. Rep. 390, 53 L. R. A. 516, 537, 543, 19 L. R. A. (N. S.) 429, 24 L. R. A. (N. S.) 629, 40 L. R. A. (N. S.) 38 L. R. A. 1918C, 695, 41 A. L. R. 565, 65 A. L. R. 765, 82 A. L. R. 1285.

It was suggested by counsel for plaintiffs that the question of a defect of parties was waived by the defendants in joining issue and going to trial. The rule invoked was not applicable where the court could not proceed to judgment without the presence of others who were not parties to the proceedings. *McLean v. Farmers' High Line Canal, etc., Co.*, 44 Colo. 184, 193, 98 P. 16, citing *Denison v. Jerome*, 43 Colo. 456, 96 P. 166.

"This subdivision should not be confused with impleader, which is governed by Rule 14. Thus if A sues X and Y on a claim, this rule does not authorize X to bring in Z, because Z is or may be liable to him or to plaintiff A. That situation is governed by Rule 14. On the other hand if X pleads a counterclaim against A, either compulsory or permissive, or pleads a cross-claim against Y, then this subdivision applies, and if the presence of additional parties is required for the granting of complete relief in the determination of the counterclaim or the cross-claim, the court should order them to be brought in, 'if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.'" 1 *Moore's Fed. Prac.* 730.

H. Separate Judgments.

Editor's note.—Federal Rule 13 (i) provides: "If the court orders separate trials as provided in Rule 42 (b), judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of." The difference in terminology between this rule and the Federal Rule should be considered when reading the federal cases.

An action that involves a claim and a counterclaim, may be tried separately and separate judgments entered, in view of this rule and rules 42 (b) and 56 (a). Whether

there should be separate trials and separate judgments rests in the sound discretion of the trial judge, and the determining factors are the doing of justice, the avoidance of prejudice, and the furtherance of convenience. *Seagram-Distillers Corp. v. Manos*, 25 F. Supp. 233; *Michigan Tool Co. v. Drummond*, 33 F. Supp. 540.

Where defendant admitted that he owed plaintiff the amount sued for, but filed counterclaims, and several motions for continuance had been granted on ground that defendant was too ill to appear at trial, but defendant was able to travel to Europe without giving a deposition before he left, the plaintiff would be granted a summary judgment for amount of defendant's admitted liability. *Seagram-Distillers Corp. v. Manos*, 25 F. Supp. 233.

I. Claims Against Assignee.

Editor's note.—Since this rule was taken from § 4 of the Code of Civil Procedure certain cases construing that section have been placed here.

Valid existing defenses could be interposed. *Howard v. Fisher*, 86 Colo. 493, 516, 283 P. 1042.

It appears that plaintiff gave his own due bill to A for the amount of his claim, in consideration of the assignment, and that A assigned this due-bill of plaintiff to one B, and in this way got his money. It appears, also, that plaintiff, by indorsement, made the assignment which he had received from A payable to B or his representatives, and caused the record to be amended so as to read, "Plaintiff, for the use and benefit of B." It does not appear that these matters in any way prejudiced the defendant. The cause of action remained unchanged. The defense of the unpaid board-bill or any other subsisting equity in favor of defendant against A was as available against plaintiff, or even B, as the assignee of A, as it would have been if A had been plaintiff; besides, there was no plea or offer to prove any defense as against A. *Jackson v. Hamm*, 14 Colo. 58, 60, 23 P.

88, cited in notes, 64 L. R. A. 598, 66 L. R. A. 765, 7 L. R. A. (N. S.) 1038.

Set-off was allowed in a suit upon a promissory note by an assignee, taking it after due.—Section 63 of the Code of Civil Procedure (supplanted by rule 13 (a)) expressly and explicitly gave the right to interpose set-off against the original payee, and this provision preserved it for application in defense of just such an action, namely, a suit upon a promissory note by an assignee, taking it after due. This holding was not only made possible but irresistible, when it was concluded, as has been often declared in code states, that set-off was embraced in the term counterclaim. *First Nat. Bank v. Lewis*, 57 Colo. 124, 127, 139 P. 1102, cited in notes, Ann. Cas. 1917C, 1188, 1194, 25 A. L. R. 938, 70 A. L. R. 249, 79 A. L. R. 126.

In *Harris v. Burwell*, 65 N. C. 584, the court, commenting on such a provision, said, that the language was as broad as it could have well been; so that a note assigned after it was due, a half dozen times, would have been subject to any set-off or other defense that the maker had against any one or all of the assignees at the date of assignment, or before notice thereof. *Id.*

The owner of a house was entitled to credit against building contractor's assignee for assignor's liabilities at time of assignment up to amount of assignee's claim. *Jones v. Panak*, 84 Colo. 62, 268 P. 535.

An assignee took no greater right than the assignor had to convey, and his rights and remedies were those of the assignor. *Howard v. Fisher*, 86 Colo. 493, 283 P. 1042.

J. Claims Against Personal Representative.

Editor's note.—For cases construing § 64 of the Code of Civil Procedure from whence this rule was derived, see *Rathvon v. White*, 16 Colo. 41, 42, 26 P. 323; *Inland Box, etc., Co. v. Richie*, 57 Colo. 532, 143 P. 581.

K. County Court Claim in Excess of \$2,000.00 Certified to District Court.

See committee note under subdivision (k).

Rule 14. Third-Party Practice.

(a) **When Defendant May Bring in Third Party.** Before the filing of his answer a defendant may move *ex parte* or, after the filing of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses as provided in Rule 12 and his counterclaims and cross-claims against the plaintiff, the third-party plaintiff, or any other party as provided in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff. The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant. [Supplants Code Sec. 139.]

Committee Note.

See Rule 110 (d).

(b) **When Plaintiff May Bring in Third Party.** When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

I. When Defendant May Bring in Third Party.

- A. General Consideration.
- B. Illustrations.

II. When Plaintiff May Bring in Third Party.

Cross Reference.

For a discussion of this rule, see Address no. 4, appx. D.

I. WHEN DEFENDANT MAY BRING IN THIRD PARTY.

A. General Consideration.

Cross reference.—As to form of motion to bring in third-party defendant, see Form 18, appx. A.

Origin of this rule.—The Civil Procedure Rule authorizing a defendant to bring in a third party was adopted for the purpose of extending, with some modifications, into the Civil Procedure of the District Courts of the United States the practice in respect of impleading third parties, of the federal admiralty courts, of certain state courts, and of the English courts. *General Taxicab Ass'n v. O'Shea*, 109 F. (2d) 671.

Its purpose.—The purpose of Federal Rule, permitting defendant to bring in third-party defendant, who is or may be liable to defendant or plaintiff, is to avoid circuity of action and adjust in single suit several phases of same controversy as it affects parties. *Sklar v. Hayes*, 1 F. R. D. 415; *McPherrin v. Hartford Fire Ins. Co.*, 1 F. R. D. 88; *Tullgren v. Jasper*, 27 F. Supp. 413; *Crim v. Lumbermen's Mut. Cas. Co.*, 26 F. Supp. 715, 719; *Gray v. Hartford Acci., etc., Co.*, 31 F. Supp. 299; *Schram v. Lucking*, 31 F. Supp. 749.

"Third-party practice is essentially concerned with the problems of settling as many conflicting interests as possible in one proceeding. The general aim is to avoid circuity of action, to save time and expense. The impleading of parties tends to promote consistent results from identical or similar evidence, and benefits the defendant by reducing the time difference between a judgment against him and his judgment against a third party." See article entitled, "Rule 14: Third-Party Practice," by Mr. James E. Corkey, 28 *Georgetown Law Journal*, pp. 826 et seq.

Where there is some connection between the nature of a plaintiff's claim against defendant and defendant's claim against

third parties, the entire matter should be disposed of, once jurisdiction has been obtained, and defendant should be allowed to bring in the third parties under procedural rule. *Schram v. Roney*, 30 F. Supp. 458.

In action on policy covering loss of live-stock during carriage for destruction of shipment of lambs in fire at feeding station, order granting leave to file third party petition against feeding station owner's insurer was vacated and petition stricken where third party procedure complicated procedure, had delayed and would delay speedy trial, and added expense to litigation. *McPherrin v. Hartford Fire Ins. Co.*, 1 F. R. D. 88.

It should be liberally construed.—The rule pertaining to third-party practice should be liberally construed where it serves purpose intended, but whenever it tends to the opposite, it should never be applied. *McPherrin v. Hartford Fire Ins. Co.*, 1 F. R. D. 88.

"The phrase 'one not a party' found in the rule limits the use of the impleader practice to the extent that it does not allow the impleading of one already a party to the suit. The necessity for this is obviated by the relief granted the rules allowing cross-claims and counter-claims." See article entitled, "Rule 14: Third Party Practice" by Mr. James E. Corkey, 28 *Georgetown Law Journal*, pp. 826 et seq.

Leave to bring in a third-party defendant is not mandatory, but is in the sound discretion of court. *Tullgren v. Jasper*, 27 F. Supp. 413; *McPherrin v. Hartford Fire Ins. Co.*, 1 F. R. D. 88; *General Taxicab Ass'n v. O'Shea*, 109 F. (2d) 671.

In action against taxicab owner for injuries to passenger in taxicab owned by third person, denial of motion of owner to implead third person as party defendant under Civil Procedure Rule was not an abuse of discretion especially where neither passenger nor taxicab owner sued asserted any cause of action against proposed third party defendant. *General Taxicab Ass'n v. O'Shea*, 109 F. (2d) 671.

A defendant may implead a third party when a relationship exists between the two, either ex contractu or ex delicto. *Tullgren v. Jasper*, 27 F. Supp. 413, 418.

If defendant sued for injuries has a substantive right to indemnity or contribution as against third-party defendants, procedure for its enforcement is by a third-party proceeding under this rule. *Kravas v. Great Atlantic, etc., Tea Co.*, 28 F. Supp. 66.

A store sued for injuries could file third-party complaint against owner of store premises and mortgagee in possession thereof on ground that owner and mortgagee were solely liable for injuries, as

against contention that claim of liability of owner and mortgagee arose on a contract which was separate and distinct from plaintiffs' cause of action. *Id.*

Where principal agreed to indemnify surety against all loss, damages, claims, costs, and expenses, including court costs and counsel fees or liability therefor, which surety might sustain or incur by reason of execution of specially denatured alcohol permit bond, and judgment was entered against surety for penalty of bond, and surety had incurred expense of \$350 in investigating alleged breach of bond, including court costs and counsel fees, surety was entitled to judgment against principal as third party defendant for amount of penalty and expenses incurred. *United States v. United States Fidelity, etc., Co.*, 1 F. R. D. 112.

Or when such party is or may be liable to the defendant or plaintiff.—A person not made a party by plaintiff may be impleaded by defendant under this rule only where that person is or may be liable to the defendant or to the plaintiff. *Tullgren v. Jasper*, 27 F. Supp. 413; *Lensch v. Boushell Carrier Co.*, 1 F. R. D. 200; *Barkeij v. Don Lee*, 34 F. Supp. 874.

Under this rule a defendant may have a person liable over to him brought in to secure a complete adjudication and protection in the original suit. For example, if the holder sues an endorser on a note, the endorser defendant may be able to bring in the maker or a prior endorser. Likewise a surety or guarantor may be able to bring in the principal debtor. See article entitled, "Trials and New Trials Under the New Federal Rules" by Mr. William H. Wicker, XV *Tenn. Law Rev.*, no. 6, pp. 570, 572.

Such person may be impleaded even though plaintiff seeks no relief against him.—A third-party defendant may be impleaded by defendant, though plaintiffs have not sought, nor indicated intention, to seek relief against party sought to be impleaded. *Sklar v. Hayes*, 1 F. R. D. 415; *Gray v. Hartford Acci., etc., Co.*, 31 F. Supp. 299; *Gray v. Hartford Acci., etc., Co.*, 32 F. Supp. 335.

A truck owner's liability insurer sued by injured passengers of automobile which collided with truck could bring automobile driver and his liability insurer into action as third-party defendants under third-party complaint alleging that accident was caused solely by automobile driver's negligence, or that his negligence was proximate cause of accident and that he was a joint tortfeasor, notwithstanding injured passengers did not set forth a legal claim against third-party defendants. *Gray v. Hartford Acci., etc., Co.*, 32 F. Supp. 335.

Or has no cause of action against him.—That plaintiff would have no right of action against a third-party sought to be brought in by defendant as a party defendant did not preclude defendant from having the third-party brought in pursuant to this rule. *Burris v American Chiclet Co.*, 29 F. Supp. 773.

But the privilege must be exercised promptly. *United States v Shuman*, 1 F. R. D. 251.

Defendants' motion for leave to bring in a third-party defendant under procedural rule, filed more than eight months after filing their answer, but within one week of date of trial, came too late, since to permit a third-party proceeding would further delay trial, and the courts must see that rule authorizing such a proceeding is not used for that purpose. *Id.*

Plaintiff may not choose one defendant when accident may have been fault of others also.—A plaintiff has no right of election of a defendant to exclusion of other defendants in an accident case where there are or may be several parties at fault, since legal relation is established in its substance at moment of the accident and parties thereafter by technical pleadings may not alter the substantive law. *Gray v Hartford Acci., etc., Co.*, 32 F. Supp. 335.

Insurance companies may be impleaded in case tried by jury.—By way of dictum, the court said in *Tullgren v Jasper*, 27 F. Supp. 413, that the insurer of one of defendants in automobile collision case could not avoid being made a third-party defendant in case at instance of one of the other defendants on ground that in jury trials it is prejudicial to defendant to permit jury to know that defendant is insured.

Third party summonses are not objectionable because original complaint is not directed against third-party defendants, especially as rule permits original plaintiff to amend complaint so as to state cause of action against third-party. *Morrell v United Air Lines Transport Corp.*, 29 F. Supp. 757.

For an article on what constitutes the plaintiff's claim, see article entitled, "Third-Party Practice Under the Federal Rules of Civil Procedure," 7 *University of Chicago Law Rev.*, pp. 359, 361.

B. Illustrations.

Cases in which parties were properly brought in as third-party defendants.—A truck owner's liability insurer sued by injured passengers of automobile which collided with truck could bring automobile driver and his liability insurer into action as third-party defendants under a third-party complaint alleging that accident was caused solely by driver's negligence, or that

his negligence was a proximate cause of accident and that he was a joint tort-feasor. *Gray v Hartford Acci., etc., Co.*, 31 F. Supp. 299.

Third-party complaint by manufacturer sued for injury resulting to purchaser from biting against stone when eating confection stated a cause of action against third-party defendants where the complaint alleged purchase of nuts used in manufacture from third-party defendants, that the nuts contained the stone in such a way that it was not discoverable through reasonable care and breach of implied warranty that nuts were fit for human consumption. *Saunders v Goldstein*, 30 F. Supp. 150.

Under this rule governing third-party complaints, power company sued for death of coal company's employee by electrocution could bring in coal company as third-party defendant on the alternative grounds that coal company only was negligent, or that, if power company were also negligent, it was entitled to contribution from coal company. *Crum v Appalachian Elec. Power Co.*, 29 F. Supp. 90.

In action against railroad for death of coal company's employee allegedly resulting from negligence of railroad, the railroad under this rule could bring in the coal company as a third-party defendant to answer railroad's complaint alleging coal company's contractual liability to indemnify railroad for any damages plaintiff might recover from the railroad. *Watkins v Baltimore, etc., R. Co.*, 29 F. Supp. 700.

In action for injuries sustained as result of defendant's failure to comply with state regulations relating to safety devices intended for protection of window cleaners, where it appeared from affidavits that cleaning of windows in question was done pursuant to contract between defendant and third-party and it was averred that if plaintiff was injured because of lack of suitable equipment it was due to failure of third-party to comply with contract with defendant, defendant, as a third-party plaintiff, could, pursuant to Civil Procedure Rules, have third-party brought in as party defendant. *Burris v American Chiclet Co.*, 29 F. Supp. 773.

Plaintiff, pleading alternative causes of action in separate counts of declaration to recover amount orally agreed to be paid her by defendant to desist from bringing action for personal injuries or damages for fraudulent misrepresentations inducing her to abandon such cause of action, may amend complaint so as to assert claim against third-party defendant, brought in by original defendant, for damages caused by negligence of third-party defendant as plaintiff's attorney in failing to bring such action. *Crim v Lumbermen's Mut. Cas. Co.*, 26 F. Supp. 715, 716.

**II. WHEN PLAINTIFF MAY BRING
IN THIRD PARTY.**

"The rule will probably be utilized chiefly in cases where the third-party plaintiff has a claim over for indemnity or contribution, but its scope is not so restricted. The rule

will normally apply only to defendants. Subdivision (b), however, provides: 'When a counterclaim is asserted against a plaintiff, he may cause a third-party to be brought in under circumstances which under this rule would entitle a defendant to do so.' " 1 Moore's Fed. Prac. 740.

Rule 15. Amended and Supplemental Pleadings.

(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is filed or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is filed. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders. [Supplants Code Secs. 59, 79, and part of Code Sec. 81.]

(b) **Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. [Supplants Code Sec. 84.]

(c) **Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) **Supplemental Pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented:

If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor. [Supplants part of Code Sec. 80.]

- I. Amendments.
- II. Amendments to Conform to the Evidence.
- III. Relation Back of Amendments.
- IV. Supplemental Pleading.

Cross Reference.

For a discussion of this rule, see Address no. 4, appx. D.

I. AMENDMENTS.

Editor's note.—In construing § 59 of the Code of Civil Procedure which this subdivision supplants, the court said that a defendant brought into the cause by an amended complaint appeared generally. *Wyoming Nat. Bank v Shippey*, 23 Colo. App. 225, 130 P. 1021.

Averments stricken from complaint might, in discretion of the court, be allowed in amended complaint. *Rice v Van Why*, 49 Colo. 7, 111 P. 599, cited in note, 68 A. L. R. 1439.

Whether amended complaint should be stricken rested in the sound discretion of the court. *Youngberg v Orlando Canal, etc., Co.*, 98 Colo. 111, 114, 53 P. (2d) 651.

Filing amended complaint waived error, if any, in striking an amendment to the complaint, and a bill of particulars. *Burson v Adamson*, 87 Colo. 451, 288 P. 623.

The striking of an amended complaint and dismissal of the action held not to be an abuse of discretion where no permission to file the amendment was obtained, the stricken amendment being plaintiff's third attempt to make his pleading unobjectionable, and the dismissal being without prejudice. *Id.*

This subdivision supplants part of § 81 of the Code of Civil Procedure. The court in construing that section said that an amendment was the defensive weapon offered to him whose defective pleading was assailed. *Lamar Bldg., etc., Ass'n v Truax*, 95 Colo. 77, 79, 33 P. (2d) 978.

Substantial rights should never have been sacrificed to mere forms, and amendments at all times should have been liberally allowed when they did not lead to surprise or injury. *Green v Davis*, 67 Colo. 52, 55, 185 P. 369, quoting *Sellar v Clelland*, 2 Colo. 532, cited in notes, 37 L. R. A. 610, 56 A. L. R. 18, 78.

When amendments asked were in the interest of justice, courts should have been liberal in allowing them, but where the

effect of an amendment was to interpose a purely legal obstruction to the enforcement of a just demand, the party making the application should have been allowed only what the letter of the law gives. *People v Barton*, 4 Colo. App. 455, 36 P. 299.

Thus, in one case, where a party sought to prevent an amendment of his adversary's pleading by filing a motion for judgment on the pleadings, the court held that the right of amendment could not thus be cut off. See *Cornett v Smith*, 15 Colo. App. 53, 60 P. 953. And see *Jackisch v Quine*, 62 Colo. 72, 160 P. 186; *Jones v Ceres Inv. Co.*, 60 Colo. 562, 154 P. 745, Ann. Cas. 1918C, 429; *Colorado Inv. etc., Co. v Riverview Drainage Dist.*, 83 Colo. 468, 473, 266 P. 501.

Amended pleadings superseded the originals. *Handy Ditch Co. v Greeley, etc., Irrigation Co.*, 86 Colo. 197, 280 P. 481.

Matters purely jurisdictional might have been made the subject of amendment the same as other matters of substance. *Johnson v Johnson*, 30 Colo. 402, 405, 70 P. 692, cited in notes, 67 L. R. A. 180, 12 L. R. A. (N. S.) 1200, 48 L. R. A. (N. S.) 779, Ann. Cas. 1912A, 976.

Courts had authority to grant leave to amend any time before final judgment, so long as they retained jurisdiction of the cause. *Id.*

Where the complaint in an action for divorce alleged that plaintiff was and had been for more than one year immediately preceding the commencement of the action a bona fide resident and citizen of the state but failed to allege that either party resided in the county in which the action was brought, the court might permit an amendment after verdict inserting in the complaint an allegation of plaintiff's residence in the county, where the proof showed such residence. *Johnson v Johnson*, 30 Colo. 402, 70 P. 692, cited in notes, 67 L. R. A. 180, 12 L. R. A. (N. S.) 1200, 48 L. R. A. (N. S.) 779, Ann. Cas. 1912A, 976.

That such an amendment was made after verdict was not conclusive against the validity of the order, for so long as the court retained jurisdiction of a cause, and certainly before final judgment, it had authority to grant leave to amend any pleading or proceeding therein. *Id.*

After a judgment had been reversed by the Supreme Court upon appeal, and the cause remanded for a new trial, the trial court might permit the pleadings to be amended whenever the ends of justice would be subserved thereby. *Horn v Reitler*, 15 Colo. 316, 25 P. 501.

Attention being called to a defective pleading by timely objections to evidence in support thereof, the duty of bringing the unsatisfactory pleading up to the conceded standard fell upon the defendant who would have had his remedy by way of amendment if he had chosen to use it and had made the requisite showing. *Lamar Bldg., etc., Ass'n v Truax*, 95 Colo. 77, 79, 33 P. (2d) 987.

To allow an amendment, without cause shown therefor, as required, was a violation of that provision. *Collins v Bailey*, 22 Colo. App. 149, 125 P. 543.

That all claims arising out of single transaction be brought in one case is aim of new rules.—The new rules 13, 15 (a), 18 (a) seek to require in a civil action what has always been aimed at in equity suit, that all claims growing out of a single transaction be brought in and settled in the one case. *Jones v St. Paul Fire, etc., Ins. Co.*, 108 F. (2) 123, 125.

The object of this rule is to permit amendments freely with the thought of making disposition of causes expeditious. *Gibbs v Emerson Elec. Mfg. Co.*, 31 F. Supp. 983; *Downey v Palmer*, 27 F. Supp. 993; *Moore v Illinois Cent. R. Co.*, 24 F. Supp. 731. The following cases construing § 81 of the Code of Civil Procedure which this subdivision supplants in part seem to agree with the above ruling. *Patrick v Crowe*, 15 Colo. 543, 25 P. 985, cited in notes, 23 Am. St. Rep. 550, 551, 42 L. R. A. (N. S.) 1173, Ann. Cas. 1917A, 1238, Ann. Cas. 1918E, 440, 11 A. L. R. 1325, 80 A. L. R. 919; *Saint v Guerrero*, 17 Colo. 448, 450, 30 P. 335, 31 Am. St. Rep. 320 cited in notes, 32 Am. St. Rep. 854, 33 Am. St. Rep. 215, 615, 50 Am. St. Rep. 214, 57 Am. St. Rep. 156, 71 Am. St. Rep. 68, 80 Am. St. Rep. 67, 30 L. R. A. 677, 42 L. R. A. 372, 373. See also, *Seymour v Fisher*, 16 Colo. 188, 199, 27 P. 240 cited in notes, 7 L. R. A. (N. S.) 780, 781, 883, Ann. Cas. 1918C, 71; *McCracken v Montezuma Water, etc., Co.*, 25 Colo. App. 280, 281, 137 P. 903, cited in notes, L. R. A. 1915A, 60, 1207.

Observance of Civil Procedure Rule, that leave to amend shall be freely given when justice so requires, is particularly appropriate when the party seeking to amend is permitted to proceed in forma pauperis and because of his circumstances does so without benefit of counsel. *Wyant v Crittenden*, 113 F. (2d) 170.

However, it is subject to the necessary constriction provided by Rule 82. *Radio Electronic Television Corp. v Bartniew Distributing Corp.*, 32 F. Supp. 431, 432. But see *Rohde v Dighton*, 27 F. Supp. 149, which held that this ruling was erroneous and no such restriction exists.

Distinction between amended and supplemental pleadings.—An "amended pleading" is designed to include matters occurring before the filing of the bill but either overlooked or not known at the time, whereas a "supplemental pleading" is designed to cover matters subsequently occurring but pertaining to the original cause. *Berssenbrugge v Luce Mfg. Co.*, 30 F. Supp. 101.

The plaintiff may only amend his original pleading as of course within the time which the defendant has to answer. *Buggeln v Standard Brands*, 27 F. Supp. 399.

A defendant's motions for leave to amend its answer by pleading three additional separate and distinct defenses were granted on condition that the amended answer be filed and served within ten days after filing of order entered on motions directed to the pleadings. *Phoenix Hdw. Co. v Paragon Paint, etc., Corp.*, 1 F. R. D. 116.

Appellate court will not review refusal to grant leave to amend for insufficiency except when an abuse of discretion is shown. *Stevens Co. v Foster, etc., Co.*, 109 F. (2d) 764, 769. The following cases construing § 81 of the Code of Civil Procedure which this subdivision supplants in part seem to agree with the ruling in the above case. *Perry v Perry*, 74 Colo. 106, 219 P. 221; *Wiggington v Denver, etc., R. Co.*, 51 Colo. 377, 379, 118 P. 88; *Klippel v Oppenstein*, 8 Colo. App. 187, 45 P. 224, cited in note, 37 A. L. R. 1403; *Cascade Ice Co. v Austin Bluff Land, etc., Co.*, 23 Colo. 292, 47 P. 268; *Buno v Gomer*, 3 Colo. App. 456, 34 P. 256; *Hyman v Jockey Club Wine, etc., Co.*, 9 Colo. App. 299, 48 P. 671, cited in notes, 11 L. R. A. (N. S.) 794, 50 L. R. A. (N. S.) 1036, L. R. A. 1915B, 32, 66, L. R. A. 1916C, 460, 43 A. L. R. 1454, 1476, 1489; *Gambrill v Brown Hotel Co.*, 11 Colo. App. 529, 54 P. 1025; *Atchison, etc., R. Co. v Baldwin*, 53 Colo. 426, 436, 128 P. 453, dissenting opinion of Mr. Justice Hill.

But pleadings may be amended to present new issues not inconsistent with appellate court's decision after reversal of appeal.—After remand of equity case to District Court for further proceedings consistent with opinion of Circuit Court of Appeals on reversal of decree appealed from, parties may introduce other evidence and present new issues, not inconsistent with appellate court's judgment, by amendment of pleadings. *Jones v St. Paul Fire, etc., Ins. Co.*, 108 F. (2d) 123.

After remand of equity case for further proceedings consistent with opinion of Circuit Court of Appeals on reversal of decree, reforming fire insurance policy so as to cover cotton destroyed by fire and allowing recovery of value thereof, because of insured's failure to keep cotton records as warranted, District Court properly recognized insured's right to amend his plead-

ings so as to introduce issue of his right to recover amount of premiums paid. *Id.*

Amendment during progress of cause allowed.—Amendment of petition by county eliminating theory of unjust enrichment of power company during prosecution of suit to enjoin county from constructing competing plant and basing county's right upon wrongful restraining orders and injunctions obtained by plaintiff during progress of the cause was permitted. *Duke Power Co. v Greenwood County*, 25 F. Supp. 963.

An amended complaint regarded as having been served pursuant to leave.—Where one defendant could, and asserted that he would, move to interplead if a motion to dismiss a particular cause of action were granted, an amended complaint would be regarded as having been served pursuant to leave, and motion to dismiss that cause of action was denied. *United States v Standard Surety, etc., Co.*, 1 F. R. D. 239.

Motion by defendant in interpleader proceeding for judgment and for costs against codefendant following striking out of pleading of codefendant was premature since codefendant was entitled to plead further if he desired to do so. *Massachusetts Mut. Life Ins. Co. v Switow*, 304 F. Supp. 809.

Where writ of scire facias in federal District Court merely alleged the existence of the bail bond and its forfeiture, but the petition for the writ stated a cause of action on the bond, petitioner could amend by substituting a prayer for relief upon breach of the bond. *Western Surety Co. v United States*, 100 F. (2d) 88.

II. AMENDMENTS TO CONFORM TO THE EVIDENCE.

Editor's note.—In construing § 84 of the Code of Civil Procedure, which this subdivision supplants, the court held that considerable liberality should have been exercised in allowing a complaint to be amended during a trial so as to correspond with the proof bearing on the subject of the quantum of damages. *Atchison, etc., R. Co. v Baldwin*, 53 Colo. 426, 428, 128 P. 453.

Amendments "to conform to the proof" should not have been allowed when not germane to the case as made. *Buchhalter v Myers*, 85 Colo. 419, 276 P. 972, cited in note, 68 A. L. R. 884.

Thus where, during the trial of a case, plaintiff asked leave to amend to "correspond with the proof," it was held, under the disclosed facts, that it was error, both from the standpoint of pleading, and as varying the terms of a written contract, to permit him to allege an oral promise by defendant made prior to the written contract and contrary to its terms, and other matters not legitimately connected with the

complaint, and which constituted a new cause of action and a departure from the issues as made. *Id.*

Where, upon a proper application interposed in apt time, it would become the duty of the trial court to permit a complaint to be amended to correspond with the proof, it was the duty of a court of review to treat the complaint as so amended. *English Lbr. Co. v Hireen*, 25 Colo. App. 199, 202, 136 P. 475, cited in note, 7 A. L. R. 1490, citing *Merritt v Hummer*, 21 Colo. App. 568, 122 P. 816, *Lang v Crescent Coal Co.*, 44 Wash. 267, 87 P. 261.

And such discretion is to be exercised liberally in favor of amendment in interest of justice. *Coblentz v Sparks*, 35 F. Supp. 605.

In action against store owner for injuries sustained by patron, where patron offered evidence that she had arthritis resulting from the accident involved, to which objection was made, permitting complaint to be amended so as to allege that arthritis resulted from accident and admitting evidence in support of such allegation was authorized particularly where verdict was in such an amount as to indicate that store owner could not have been prejudiced. *Caldwell v Sears-Roebuck & Co.*, 31 F. Supp. 888.

In action by property owner to enjoin levying and collection by county board of commissioners of special assessments on account of special benefits alleged to have been conferred by establishment of sanitary sewer district, complainant's motion for leave to file an amendment to second amended bill of complaint to conform the pleadings to evidence adduced at trial was granted. *Coblentz v Sparks*, 35 F. Supp. 605.

Pleadings may be amended, even after judgment, to conform with the evidence. *Cabel v United States*, 113 F. (2d) 998.

A complaint, allegedly not sufficient to justify submitting evidence under charge on the last clear chance doctrine, could be amended to conform it to the evidence, even after judgment. *Swift & Co. v Young*, 107 F. (2d) 170.

If an action by a plaintiff individually and as administratrix of the goods, chattels, rights, and credits which were of a deceased person was a derivative or stockholder's action, plaintiff should have so pleaded in the complaint rather than wait until trial to amend the complaint to conform to the evidence. *Dellefield v Blockdel Realty Co.*, 1 F. R. D. 42.

In action against telegraph company and others, sounding in tort, for damages resulting from negligent failure to transmit money order, plaintiffs who failed to prove actual damages, but showed a right

under contract to liquidated damages, could recover such damages without amending the pleadings to conform to the evidence, especially where defendants relied on the liquidated damages clause in their answer. *Nester v Western Union Tel. Co.*, 25 F. Supp. 478.

Illustrations of issues being tried with express or implied consent.—Where investor's complaint against manufacturer was predicated entirely upon 1923 contract between investors and manufacturer but manufacturer in its answer alleged that the 1923 contract was modified by a 1931 contract and attached copy of the 1931 contract to its answer and the 1931 contract was made an issue and no objection was made to evidence concerning it, the 1931 contract was an issue the same as if it had been pleaded. *Low v Davidson Mfg. Co.*, 113 F. (2d) 364.

In action to recover unpaid balance due upon a contract of employment, wherein employee relied upon a contract for years 1931 to 1936, inclusive, providing for salary of \$5,000 per year, and employer pleaded a counterclaim in which it declared upon a contract covering same period, but providing for a salary of \$3,600 for the year 1931 and \$1,800 for each of years 1932 to 1936, inclusive, trial court was authorized under Rules of Civil Procedure to grant recovery upon a contract for salary of \$5,000 for year 1931 and of \$3,600 for each of other years, though no such issue was presented by the pleadings, where it was a fair inference from the record that parties impliedly consented to try such issue. *Lientz v Wheeler*, 113 F. (2d) 767.

III. RELATION BACK OF AMENDMENTS.

An amendment of pleading will relate back to the beginning of the action. *White v Holland Furnace Co.*, 31 F. Supp. 32.

Unless it introduces a new cause of action which as an independent proceeding would be barred by statute of limitations. *Brown v New York Life Ins. Co.*, 32 F. Supp. 443; *White v Holland Furnace Co.*, 31 F. Supp. 32; *Whitham Const. Co. v Remer*, 105 F. (2d) 371.

Application of this rule presents the problem of determining when an amendment to a pleading constitutes a new cause of action. Accordingly, the courts of New Jersey have expressed themselves in this respect. In the case of *O'Shaughnessy v Bayonne News Co.*, 9 N. J. Misc. 345, 347, 154 A. 13, 14, the following statement is made: "It is quite generally held that if the identity of the transaction forming the cause of action originally declared upon is adhered to, an amendment is not ordinarily regarded as substantially changing the plaintiff's claim or as stating a new or substantially different

cause of action. So an amendment will not as a rule be held to state a new cause of action if the facts alleged show substantially the same wrong with respect to the same transaction, or if it is the same matter more fully or differently laid, or if the gist of the action or the subject of controversy remains the same; and this is true although the form of liability asserted or the alleged incidents of the transaction may be different. Technical rules will not be applied in determining whether the cause of actions stated in the original and amended pleadings are identical, since in a strict sense almost any amendment may be said to change the original cause of action. 49 C. J. 510, 511." *Maty v Grasselli Chemical Co.*, 303 U. S. 197, 58 S. Ct. 507, 82 L. Ed. 745; *Brown v New York Life Ins. Co.*, 32 F. Supp. 443, 444.

Under Federal Rule providing that amendment shall relate back to the date of original pleading, amendment should be allowed where factual situation is not changed even though a different theory of recovery is presented, notwithstanding that statute of limitations has run in the meantime. *White v Holland Furnace Co.*, 31 F. Supp. 32.

Meaning of "claim."—The new Federal Rules of Civil Procedure, using the words "claim" or "claim for relief" in place of the term "cause of action," manifest intent to avoid the former concept of "cause of action" and to refer to the specified conduct of the defendant upon which plaintiff tries to enforce his claim. *White v Holland Furnace Co.*, 31 F. Supp. 32.

IV. SUPPLEMENTAL PLEADINGS.

Editor's note.—This subdivision supplants part of § 80 of the Code of Civil Procedure. The court in construing that part of the section said that facts occurring subsequent to the commencement of an action should have been presented by supplemental pleadings and not by amendment to the original proceedings. *Sylvester v Jerome*, 19 Colo. 128, 34 P. 760, cited in notes, Ann. Cas. 1915D, 1252, 38 A. L. R. 1244.

In *Thomas v Mahin*, 76 Colo. 200, 202, 230 P. 793, leave was granted to file a supplemental petition, and pursuant to that leave, a petition was filed in which additional defendants were named. This so-called supplemental petition was partly an amendment to the original because it was not confined to facts which occurred after the action was commenced.

One of the reasons for requiring a party to file a supplemental pleading to enable him to rely upon matters that have accrued since the filing of his previous pleading, was that he should enable his adversary to take issue as to such new matters. *Macaluso v Easley*, 81 Colo. 50, 53, 253 P. 397.

In an action to recover rent, claim being made for rent accruing subsequent to the beginning of the action, it was held that there was no prejudice to the rights of defendant in allowing the allegation to be made by pleading styled an amendment to the complaint, instead of denominating it a supplemental complaint, the allegations being sufficient in substance. *Id.*

Objection made, that a claim for rent accruing after the commencement of the action could not have been brought into the case by amendment, but only by supplemental complaint, held insufficient to raise that question for review. *Id.*

In *McLaughlin v Niles Co.*, 88 Colo. 202, 206, 294 P. 954, the defendant filed an amendment to an answer but termed it a "supplemental answer." The court denied leave to file this so-called supplemental answer. Presumably this was done because a judgment on the pleadings, which had been entered, does not permit amendment of the pleadings. But for that very reason, a motion for judgment on the pleadings should not be sustained unless it appeared that the answer was such that no amendment could be made. *Lamon v Zamp*, 81 Colo. 90, 253 P. 1056; *Kingsbury v Vreeland*, 58 Colo. 212, 144 P. 887.

This rule was not designed to give a broader effect to supplemental bill or complaint than under prior court rules. *Berssenbrugge v Luce Mfg. Co.*, 30 F. Supp. 101.

Fundamentally, a "supplemental bill" is a mere addition or continuation of the orig-

inal bill or complaint. *Berssenbrugge v Luce Mfg. Co.*, 30 F. Supp. 101.

For distinction between amended and supplemental pleadings, see *Berssenbrugge v Luce Mfg. Co.*, 30 F. Supp. 101, in note to Rule 15 (a).

It cannot introduce a new cause of action.—Under this rule a new cause of action differing from that which formed the basis of the original complaint cannot be introduced into case by supplemental bill. *Berssenbrugge v Luce Mfg. Co.*, 30 F. Supp. 101.

Nor can it be used to introduce a cause of action where there originally was none.—A plaintiff who at time of filing of original bill had no cause of action cannot be amended or supplemental bill introduce a cause of action thereafter accruing. *Berssenbrugge v Luce Mfg. Co.*, 30 F. Supp. 101.

Where there is a good cause of action stated in the original bill, a supplemental bill setting up facts subsequently occurring which justify other or further relief is proper. If the original decree in the trial court had not been entered, this supplemental petition would simplify the controversy. *Texarkana v Arkansas-Louisiana Gas Co.*, 306 U. S. 188, 620, 59 S. Ct. 448, 455, 83 L. Ed. 598.

Jurisdiction to entertain such bill can only be granted where bill is designed to aid or effectuate prior decree or to seek relief not of a different kind or on a different principle but along the same lines as the original bill. *Berssenbrugge v Luce Mfg. Co.*, 30 F. Supp. 101.

Rule 16. Pre-Trial Procedure; Formulating Issues.

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
- (6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Cross references.—See Rule 56 (d) for summary judgment. In connection with clause (5), see Rules 53 (b) and 53 (e) (3). For a discussion of this rule, see Address no. 4, appx. D.

Purpose of this rule.—The rules relating to pre-trial procedure and formulating issues were adopted to enable courts to call the parties before them and cut away, by agreement and admission of parties, all encumbrances to a speedy trial on simplified issues. *Nichols v. Sanborn Co.*, 24 F. Supp. 908.

Motion by taxpayer that denials to certain paragraphs of complaint be supplemented and clarified so as to enable her to know on which one of several possible theories collector was defending action, so as to eliminate necessity of proof on defenses which would not be used at time of trial, would be granted on ground that purpose, of pre-trial conference provided by rules would be thus served. *Kearney v. Glenn*, 1 F. R. D. 203.

It is procedural in nature and permits the judge before whom matter is brought to determine in his discretion the most feasible way to proceed with trial, to eliminate issues from the trial which are unnecessary to a final disposition, and to eliminate a cumbersome record. *Eisman v. Goldwyn*, 30 F. Supp. 436.

It should be construed liberally.—The rules with respect to motions for bills of particulars, pre-trial conferences, and pre-trial disposition of nonessentials, undisputed matters, etc., should be given a liberal construction in the direction of requiring disclosure of all matters treated in the rules by one party on demand of the other unless some valid reason appears why disclosures should not be made. *Teller v. Montgomery Ward & Co.*, 27 F. Supp. 938.

Under this rule both parties in law action have unlimited scope of pre-trial examination of one another. *Dysart v. Remington Rand*, 25 F. Supp. 293.

Court may hold pre-trial hearing to decide whether there is a cause of action.—There is no reason why a pre-trial hearing could not be had in order to help the court determine whether or not there is reasonable

ground to believe that a cause of action exists, and to exercise its discretion intelligently. *Simonin's Sons v. American Can Co.*, 30 F. Supp. 901, 903.

“Pre-trial procedure is a technique designed to provide a test to determine in advance of the trial whether an issue formally set forth in the pleadings has sufficient merit to justify the time and expense of trying it. Since the fundamental problem is to ascertain before trial what needs to be tried, and for that purpose to determine whether there is a prima facie basis for the various allegations and denials in the pleadings, the only direct solution is to make a preliminary examination of the actual claims of the parties and of the evidence at their disposal. If such a plan is to be successfully employed it must be convenient and inexpensive.” See article entitled, “The Function of Pre-Trial Procedure” by Professor Edson R. Sunderland, 6 University of Pittsburgh Law Rev., pp. 1, 2.

Plaintiff's failure to appear at pre-trial hearing constitutes grounds for dismissal.—If plaintiff fails to appear at a pre-trial conference ordered by the court, after due notice, it constitutes a failure to prosecute and is grounds for dismissal. *Wisdom v. Texas Co.*, 27 F. Supp. 992.

Question of jurisdiction may not only be raised at pre-trial hearing but at any stage of case.—Though a defendant did not raise any question of jurisdiction at a pre-trial hearing held under procedural rule, the District Court was required to consider a jurisdictional attack made at the final hearing, since a party may question the jurisdiction of the court at any stage of the case. *Miles Laboratories v. Seignious*, 30 F. Supp. 549.

Question of damages not decided at pre-trial hearing.—Whether pipe line was constructed for town in accordance with contract, whether town was estopped from denying liability for extra work, and what damages were sustained if construction was not in conformity with contract or orders given as to changes would not be determined upon pre-trial hearing but would be left for determination of jury upon trial. *Ruedy v. White Salmon*, 1 F. R. D. 237.

Rule must be followed before limitation of issues will be allowed.—Where defendants moved for limitation of issues on basis of pre-trial conferences but recited only that defendants made concessions and undertaking and did not state that any agreement between parties had been made or any stipulations concluded, as required by this rule, motion was overruled. *United States v. Hartford-Empire Co.*, 1 F. R. D. 424.

Determination of facts at pre-trial is final.—Where parties through their attorneys come before the district court for a pre-trial hearing, and an admission or agreement concerning a factual issue is made and carried into effect by an order of the court, unless the order is thereafter modified by the court, the issue stands as fully determined as if adjudicated after the taking of testimony, and neither party need offer testimony con-

cerning any fact so determined, whether the fact is jurisdictional or a fact on the merits. *Miles Laboratories v. Seignious* 30 F. Supp. 549.

One holding back information has burden of proving that substantial grounds exist for such stand.—The burden rests on one from whom a pre-trial disclosure is sought to satisfy the court that there is substantial ground against making the disclosure. *Teller v. Montgomery Ward & Co.*, 27 F. Supp. 938.

The decision on motion for summary judgment need not be restricted to the pleadings, but should be made upon the whole record, including order made upon findings made in pre-trial conference, containing agreements of counsel. *Continental Illinois Nat. Bank, etc., Co. v. Ehrhart*, 1 F. R. D. 199.

CHAPTER III

PARTIES

Rule 17. Parties Plaintiff and Defendant; Capacity.

(a) **Real Party in Interest.** Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, conservator, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the people of the state of Colorado. [Supplants Code Secs. 3 and 5.]

C (b) **Capacity to Sue or be Sued.** A married woman may sue and be sued in all matters the same as though she were sole. A partnership or other unincorporated association may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right. A father and mother or the sole surviving parent may maintain an action for the injury or death of a child; where both maintain the action, each shall have an equal interest in the judgment; where one has deserted or refuses to sue, the other may maintain the action. A guardian may maintain an action for the injury or death of his ward. [From Code Secs. 6 and 9 and Federal Rule 17 (b).]

Committee Note.

See 2 C. S. A. Chap. 50, Secs. 1 to 3.

C (c) **Infants or Incompetent Persons.** Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, or such representative fails to act, he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person, provided, that in an action in rem it shall not be necessary to appoint a guardian ad litem for any unknown person who might be an infant or incompetent person. [Supplants Code Secs. 7, 8 and 50 (c).]

Committee Note.

The phrase "or such representative fails to act" was inserted in this subdivision so that suit might be brought by next friend where the guardian fails to act. It was felt that a situation might arise where the suit would be against the guardian himself.

I. Real Party in Interest.

- A. General Consideration.
- B. Who Is Real Party in Interest.
- C. Action by Executor, Trustee,
etc.

II. Capacity to Sue or Be Sued.

- A. General Consideration.
- B. Married Women.
- C. Action for Injury or Death of
Child.

III. Infants or Incompetent Persons.

Cross Reference.

For a discussion of the rule, see Address no. 6, appx. D.

I. REAL PARTY IN INTEREST**A. General Consideration.**

Editor's note.—This subdivision is almost identical with the corresponding Federal Rule. However, since it in part supersedes several Colorado statutes of identical import, cases construing those statutes are included in this note along with the pertinent federal decisions, as an aid in construing the instant subdivision.

Purpose of rule.—This rule, and Rules 19, 20 and 21 evidence the general purpose of the new rules to eliminate the old restrictive and inflexible rules of joinder designed for a day when formalism was the vogue and to allow joinder of interested parties liberally to the end that an unnecessary multiplicity of actions thus might be avoided. *Society of European Stage Authors, etc., v WCAU Broadcasting Co.*, 1 F. R. D. 264, 266.

Defendant is entitled to final judgment.—Where a claim is owned and may be sued upon by some one, all a defendant may properly ask is such a party plaintiff as will render the judgment final and res judicata of the right sued upon. *Rosenblum v Dingfelder*, 111 F. (2d) 406.

B. Who Is Real Party in Interest.

Effect upon action of ejectment.—The fiction by which John Doe and Richard Roe were made to represent the plaintiff and defendant, respectively, in an action of ejectment at common law permitted any number of actions of this character to be maintained between the same parties in interest after verdict and judgment. The litigation terminated only when the unsuccessful party tired of his futile efforts, or when a court of equity, after repeated trials at law resulting in like verdicts and judgments, enjoined the unsuccessful party from harrassing, by future actions in ejectment, him who had recovered these judgments. The effect of this section, which required actions in ejectment to be prosecuted in the name of the real party in interest, was to put an end to this practice. Under the section, standing alone, the first verdict and judgment in ejectment, as in other cases, unless it was set aside or vacated for cause, would be conclusive of the rights of the parties, that were, or might have been, there litigated. *Iron Silver Min. Co. v Campbell*, 61 F. 932, 933.

One who holds the legal title is the real party in interest. *Koch v Story*, 47 Colo. 335, 107 P. 1093, cited in notes, 32 A. L. R. 466, 498, 547; *Bassett v Inman*, 7 Colo. 270, 3 P. 383, cited in notes, 64 L. R. A. 584, 603, 7 L. R. A. (N. S.) 1038; *Gomer v Stockdale*,

5 Colo. App. 489, 39 P. 355, cited in note, 64 L. R. A. 583. See *Kent v Dana*, 100 F. 56, 64. Since the contractor held the legal title to the claim here sued on, it was the real party in interest and had the right to maintain this action. *American Surety Co. v Scott*, 63 F. (2d) 961, 963. See also, *Waiker v Steel*, 9 Colo. 388, 12 P. 423, cited in notes, 64 L. R. A. 612, 11 A. L. R. 587; *Limberg v Higenbotham*, 11 Colo. 156, 17 P. 481, cited in note, 64 L. R. A. 621; *Jackson v Hamm*, 14 Colo. 58, 23 P. 88, cited in notes, 64 L. R. A. 598, 66 L. R. A. 765, 7 L. R. A. (N. S.) 1038; *First Nat. Bank v Hummell*, 14 Colo. 259, 275, 23 P. 986, 20 Am. St. Rep. 257, 8 L. R. A. 788, cited in notes, 20 Am. St. Rep. 445, 23 Am. St. Rep. 446, 24 Am. St. Rep. 102, 32 Am. St. Rep. 129, 59 Am. St. Rep. 577, 23 L. R. A. 712, 29 L. R. A. 664, 61 L. R. A. 323, 64 L. R. A. 585, L. R. A. 1916C, 24, 71. As to the right of a bank commissioner to bring an action against the bank stockholders, see *Broadbent v McFerson*, 80 Colo. 264, 250 P. 852, cited in notes, 56 A. L. R. 528, 88 A. L. R. 999.

A bond taken by the county treasurer as security for county money deposited by him in a bank, running to him as treasurer, is a bond for his own safety, and not for the benefit of the county. He is the real party in interest therein and the one in whose name an action thereon should be brought. *Moulton v McLean*, 5 Colo. App. 454, 39 P. 78, cited in notes, 64 L. R. A. 607, 87 A. L. R. 168.

Thus, assignee of claim may bring action in his own name.—That an entire claim for damages to property may, under statutes like ours, be assigned so as to vest in the assignee the right of action in his own name, is well established by the current of authority. The general rule is, that assignability and descendibility go hand in hand. *Home Ins. Co. v Atchison, etc., R. Co.*, 19 Colo. 46, 49, 34 P. 281, cited in note, Ann. Cas. 1917A, 1299; *Arkansas Valley Smelting Co. v Belden Min. Co.*, 127 U. S. 379, 387, 8 S. Ct. 1308, 32 L. Ed. 346; *Rio Grande Extension Co. v Coby*, 7 Colo. 299, 301, 3 P. 481, cited in note, 64 L. R. A. 601.

In *Walsh v Allen*, 6 Colo. App. 303, 40 P. 473, cited in notes, 64 L. R. A. 600, 66 L. R. A. 543, 35 L. R. A. (N. S.) 517, Ann. Cas. 1914C, 236, plaintiff sued defendant upon a promissory note; defendant insisted that on account of some understanding between plaintiff and A, the original payee of the note, that a portion of the avails of the note when collected were to be paid to A, and that plaintiff was not the real party in interest, and therefore not entitled to maintain the suit. The court held that as the legal title to the note was in plaintiff by reason of the assignment, the action would lie in his name. *Best v Rocky Mountain Nat. Bank*, 37 Colo. 149, 159, 85 P. 1124.

7 L. R. A. (N. S.) 1035, cited in notes, 135 Am. St. Rep. 772, 774, 50 L. R. A. (N. S.) 1118, 35 A. L. R. 1376, 1387, 1404.

Whether it be an open account or otherwise, although there may be annexed to the transfer the condition that when the sum is collected the whole or some part of it must be paid over to the assignor. *Gomer v. Stockdale*, 5 Colo. App. 489, 492, 39 P. 355, cited in note, 64 L. R. A. 583, citing *Bliss on Code Pleading*, § 51; *Meeker v. Claghorn*, 44 N. Y. 349; *Allen v. Brown*, 44 N. Y. 228, 229; *Bassett v. Inman*, 7 Colo. 270, 3 P. 383, cited in notes, 64 L. R. A. 584, 603, 7 L. R. A. (N. S.) 1038.

Or though it be only for collection or suit.—In modern times the assignment of choses in action has come to be thoroughly recognized, and the "real party in interest" provision has been generally construed to include an assignee for collection or suit only. *Rosenblum v. Dingfelder*, 111 F. (2d) 406, 407, citing *Titus v. Wallick*, 306 U. S. 282, 59 S. Ct. 557, 83 L. Ed. 653; *Clark and Hutchins*, "The Real Party in Interest," 34 Yale L. J. 259; 2 Moore's Fed. Prac. 2005, 2051-2053.

Almost any surviving right of action may be assigned so as to enable the assignee to maintain a suit in his own name. *Reddicker v. Lavinsky*, 3 Colo. App. 159, 161, 32 P. 349.

For example, a claim asserted by the grantee of lands against the grantor, for moneys paid to relieve them of taxes for which the grantor was liable, may be effectually assigned so as to give the assignee an action in his own name. *Rambo v. Armstrong*, 45 Colo. 124, 100 P. 586, cited in notes, 43 L. R. A. (N. S.) 61, Ann. Cas. 1913E, 248, 251.

Also, judgments.—Assignee of judgment was "real party in interest" for purpose of prosecuting action on the judgment. *Larson v. Holten*, 1 F. R. D. 109.

Notes.—Where, after the execution and delivery of a promissory note, a person other than the payee and not otherwise connected with the note, for a new and sufficient consideration received by himself from the payee, promises to pay the note and thereupon indorses the same, he thereby makes the debt his own, and such debt is assignable so as to vest in the assignee a right of action in his own name. *Fisk v. Reser*, 19 Colo. 88, 34 P. 572, cited in note, 37 A. L. R. 1235.

And mechanic's liens.—The assignee of a valid mechanic's lien has a right to recover, and in an action to foreclose is the real party in interest. *Howard v. Fisher*, 86 Colo. 493, 283 P. 1042.

When devisee may prosecute action in own name.—The obligee in an appeal bond died pending the appeal, and devised her

entire estate to plaintiff charged with the support of her husband during his life. The husband was administrator with will annexed. No debts existed against the estate of testatrix. The husband died intestate, without any debts and leaving plaintiff as his only heir. No administrator was appointed for the husband's estate, nor was any one appointed to succeed him as administrator of his wife's estate. Held, not necessary to appoint an administrator to prosecute an action upon the appeal bond, but that such action could be prosecuted by plaintiff in her own name. *Austin v. Snider*, 17 Colo. App. 182, 68 P. 125, cited in note, 70 A. L. R. 389.

When vendee may sue.—While it may be proper for a vendor of land to bring suit against the disseizor, in order that he may be able to deliver possession to the purchaser, yet, after the recovery in such action, it is entirely proper for the purchaser to sue in his own name for the rents and profits which accrued pending the former action. He is the real party in interest. *Limberg v. Higenbotham*, 11 Colo. 156, 161, 17 P. 481, cited in note, 64 L. R. A. 621.

After dissolution of partnership one of partners may bring action in own name.—There was, in this case, no defect of parties plaintiff. The partnership had, in fact, been dissolved several months when the suit was brought; and plaintiff, through the settlement between himself and co-partner, and his purchase of the partnership property, had become the exclusive owner of the account sued on. He was therefore the only party really interested in collecting the balance due. Hence, under this section the action was properly brought in his name alone. *Bassett v. Inman*, 7 Colo. 270, 3 P. 383, cited in notes, 64 L. R. A. 584, 603, 7 L. R. A. (N. S.) 1038. The common law principle that an action for a partnership debt, whether instituted before or after dissolution of the firm, must be prosecuted in the name of all the partners, does not, under the present practice, and the facts disclosed, apply to this case. *Walker v. Steel*, 9 Colo. 388, 389, 12 P. 423, cited in notes, 64 L. R. A. 612, 11 A. L. R. 587.

Application to fire insurance.—Under policy providing that any person or his legal representative who has secured judgment or written agreement should be entitled to recover under terms of policy in same manner as insured, where plaintiff was real party in interest and would receive proceeds of any recovery under policy, action would not be dismissed under the rule because brought by plaintiff instead of by insured for the use of plaintiff. *Mason v. Royal Indemnity Co.*, 1 F. R. D. 176.

In construing the Federal Rule it was held that in an action for damages for defendant's alleged negligence which allegedly

caused burning of plaintiff's manufacturing plant, plaintiff was "real party in interest" and not fire insurance companies which allegedly made payments to plaintiff as results of the fire, and the controversy was between plaintiff and defendant with respect to "diversity of citizenship" necessary to give federal court jurisdiction. *Dayton Veneer, etc., Mills v. Cincinnati, etc., Ry. Co.*, 1 F. R. D. 444.

Nature of plaintiff's title must appear in complaint.—Where the capacity of plaintiff to sue was based solely upon alleged assignments, the nature of plaintiff's title was required to be made to appear for purpose of showing its right to maintain the action, and the names of the parties to whom the alleged causes of action accrued were required to be averred. *Louisiana Farmers' Protective Union v. Great Atlantic, etc., Tea Co.*, 31 F. Supp. 483.

In an action to recover on promissory notes, complaint considered and held not to state a cause of action, the contract lacking mutually and the plaintiff not being the real party in interest. *Gates v. Hepp*, 95 Colo. 285, 35 P. (2d) 857.

And the real parties in interest must follow the proceedings throughout, and, if not satisfied, must present the judgment of which complaint is made, for review. *Gates v. Hepp*, 95 Colo. 285, 35 P. (2d) 857.

The test of "diverse citizenship" to confer jurisdiction on federal court, irrespective of powers of attorney, is whether or not there is diversity between real parties in interest and opposing party or parties. *International Allied Printing Trades Ass'n. v. Master Printers Union*, 34 F. Supp. 178.

C. Action by Executor, Trustee, etc.

The trustee may at his option sue in his own name or may join his cestuis que trust.—*Hecker v. Cook*, 20 Colo. App. 282, 286, 78 P. 311, citing *Merchant's Bank v. McClelland*, 9 Colo. 608, 13 P. 723, cited in note, 10 L. R. A. 678; *Faust v. Goodnow*, 4 Colo. App. 352, 36 P. 71, cited in note, 41 L. R. A. (N. S.) 643.

Where the official bond of an officer in a fraternal society ran to the trustees of the society under the name the society bore prior to incorporation, such trustees could maintain an action in their own names on the bond for a default therein without making the society a party thereto, although at the time of the execution of the bond and the bringing of the action the society was incorporated under a slightly different name from that it bore prior to incorporation. *Hecker v. Cook*, 20 Colo. App. 282, 78 P. 311.

It is not necessary that the trustees set forth the name of the beneficiary.—The

trustee of an express trust in real property may maintain an action to restrain irreparable injury thereto, without setting forth the nature of the trust, the name of the beneficiary or his character as trustee. An averment of his trust capacity may be treated as surplusage. *Koch v. Story*, 47 Colo. 335, 107 P. 1093, cited in notes, 32 A. L. R. 466, 498, 547.

The judgment in an action by either will bar a subsequent action by the other. *Hecker v. Cook*, 20 Colo. App. 282, 286, 78 P. 311.

A suit on contract is properly brought in the name of the contractor, and, although others are interested in the contract, it is not necessary that they should be made parties. *Denver v. Morrison*, 88 Colo. 67, 291 P. 1023.

The trustee of an express trust is authorized to maintain an action. *Hardy v. Swigart*, 25 Colo. 136, 143, 53 P. 380, cited in note, Ann. Cas. 1913B, 390; *Houck v. Williams*, 34 Colo. 138, 140, 81 P. 800, cited in note, Ann. Cas. 1912D, 103.

Cashier of bank may become the trustee of an express trust.—The cashier of an unincorporated bank, who is also a partner, and is alone authorized to transact all the business, and in whose name contracts are habitually made for the bank, may become by virtue of such a contract the trustee of an express trust, and may sue thereon in his own name. *Merchants' Bank v. McClelland*, 9 Colo. 608, 13 P. 723, cited in note, 10 L. R. A. 678.

When county treasurer is proper party to maintain action upon a bond.—Where an injunction against a county treasurer to restrain the collection of taxes was dissolved, a right of action upon the injunction bond was a personal right of the treasurer, and he might maintain a personal action upon the bond after his term of office had expired. He was the proper party to maintain such action, and the fact that the county may have paid the expenses of resisting the injunction and would be entitled to receive the amount of damages recovered when collected, was immaterial to the obligors in the bond. *Breeze v. Haley*, 13 Colo. App. 438, 59 P. 333.

A person with whom or in whose name a contract has been made for the benefit of another may maintain an action thereon in his own name. *Rockwell v. Holcomb*, 3 Colo. App. 1, 31 P. 944.

But the rights of real party in interest are superior to those of person allowed to sue in own name.—While one who has made a contract for the benefit of another can prosecute an action in his own name, there is nothing to prevent the real party in interest from becoming the actual litigant.

and when as a matter of fact the beneficiary becomes an actual party to the action, the latter, in respect to the primary right, supersedes the former, whereupon the judgment entered must be in favor of the beneficiary if he succeeds or against him if he fails. *Gates v Hepp*, 95 Colo. 285, 35 P. (2d) 857.

Under this section, an action may be brought by a bank on a promissory note given in renewal of a similar note made payable to it, although such renewal note by mistake was made payable to the president of the bank, who turned it over to the bank as its property, and the latter retained it in possession at all times; notwithstanding § 5 of the code (now superseded by the instant subdivision), provides that one in whose name a contract is made for the benefit of another may sue without joining the person beneficially interested. *Best v Rocky Mountain Nat. Bank*, 37 Colo. 149, 85 P. 1124, 7 L. R. A. (N. S.) 1035, cited in notes, 135 Am. St. Rep. 772, 774, 50 L. R. A. (N. S.) 1118, 35 A. L. R. 1376, 1387, 1404.

First Nat. Bank v Hummel, 14 Colo. 259, 23 P. 986, 20 Am. St. Rep. 257, 8 L. R. A. 788, cited in notes, 20 Am. St. Rep. 445, 23 Am. St. Rep. 446, 24 Am. St. Rep. 102, 32 Am. St. Rep. 129, 59 Am. St. Rep. 577, 23 L. R. A. 712, 29 L. R. A. 664, 61 L. R. A. 323, 64 L. R. A. 585, L. R. A. 1916C, 24, 71, was an action by the bank to collect certain money which it had been expressly authorized to collect by A, to whom the money was owing. It was contended that the suit should have been brought in the name of the beneficial owner, A. The court held that the suit could be maintained in the name of the plaintiff, the trustee. The holding is entirely consistent with the conclusion we have reached in this case. *Id.*

Where a contract is made for the benefit of a third person, the latter may bring an action thereon. *Haldane v Potter*, 94 Colo. 558, 31 P. (2d) 709.

Having the right to sue, no error can be based on the proceeding, regardless of the proof respecting this matter. *Rockwell v Holcomb*, 3 Colo. App. 1, 31 P. 944. So far as concerns this particular case, it is apparent that the defendants had full opportunity to protect their rights. The original contract disclosed the fact that it was made on behalf of A, and if the defendants imagined it to be necessary for their protection that A should be brought into the suit, doubtless they might have procured an order for the purpose. Having taken no action in the trial court, they cannot be held on this appeal to assign error concerning it. *Faust v Goodnow*, 4 Colo. App. 352, 354, 36 P. 71, cited in note, 41 L. R. A. (N. S.) 643.

Under equity rule and Rule of Civil Procedure for District Courts and Idaho statutes, every action in Idaho is required to be prosecuted in the name of the real party in interest, but a trustee of an express trust or the party with whom or in whose name a contract has been made for the benefit of another may sue in his own name without joining party for whose benefit the action is brought. *Farmers Underwriters Ass'n v Wanner*, 30 F. Supp. 358.

In construing the Federal Rule, it was held that where pledge or mortgage executor by city curb and gutter district provided that upon default the trustee might declare entire debt or any part thereof due and should, on request of a majority in amount of the holders of the bonds, institute in any court proceeding for foreclosure of the pledge and might proceed by mandamus or in any manner it thought best to compel the levying of assessments to pay bonds, there was an "active trust" and the citizenship of the trustee and not of the bondholders controlled as regards diversity of citizenship for jurisdictional purposes. *Curb, etc., Dist. v Parrish*, 110 F. (2d) 902.

II. CAPACITY TO SUE OR BE SUED.

A. General Consideration.

Editor's note.—This subdivision is a radical departure from the corresponding Federal Rule, which in the main refers to the appropriate state law to be applied in determining capacity. Therefore, the cases construing former code sections from which this subdivision was largely taken, are peculiarly applicable and useful. Hence, they are included in this note.

In speaking of the Federal Rule the court in *Bicknell v Lloyd-Smith*, 109 F. (2d) 527, 529, said: "Rule 17 (b) changed the law as to individuals (*New York Evening Post Co. v Chaloner*, 265 F. 204) but not as to corporations (*Lupton's Sons Co. v Automobile Club*, 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699). Literally at any rate, it also changed the law as to receivers of all sorts."

B. Married Women.

Cross reference.—As to rights of married women generally, see vol. 4, ch. 108.

Substantive right conferred.—It is urged with some force that this section relates to procedure only, and does not confer a substantive right. But that objection cannot be urged successfully against § 6, art. II, of the constitution or § 2 of ch. 108 (vol. 4). *Rains v Rains*, 97 Colo. 19, 24, 46 P. (2d) 740.

Common-law fiction that husband and wife are one no longer exists.—Whatever may be the law elsewhere, if the common-law fiction of unity ever existed in this

state, it does not exist here now. *Hedlund v Hedlund*, 87 Colo. 607, 290 P. 285. In the *Hedlund* case the court said: "First, it is assumed that the common-law fiction that husband and wife are one still persists in this state. In *Whyman v Johnston*, 62 Colo. 461, 163 P. 76, the court said that the fiction of one legal personality no longer exists. One has but to read the statutes of the state and the decisions of the supreme court and of the court of appeals to realize that in the present state of the law the so-called unity of husband and wife is a mere figure of speech no longer having any practical significance." *Rains v Rains*, 97 Colo. 19, 21, 46 P. (2d) 740.

In *Wells v Caywood*, 3 Colo. 487, cited in notes, 131 Am. St. Rep. 145, 154, 20 L. R. A. 703, L. R. A. 1915D, 1009, 49 A. L. R. 122, the court noted the fact that the asperities of the common law "are gradually softening and yielding to the demands of this enlightened and progressive age." And in *Williams v Williams*, 20 Colo. 51, 56, 37 P. 614, cited in notes, 46 Am. St. Rep. 475, 9 L. R. A. (N. S.) 324, 4 A. L. R. 505, 16 A. L. R. 1320, 33 A. L. R. 388, 66 A. L. R. 611, 82 A. L. R. 830, 851, the court said: "By sundry legislative acts, dating from an early period, the disabilities of coverture have been gradually removed in Colorado, and these acts have been so liberally construed by the courts that controversies respecting the status of married women have practically disappeared from our jurisprudence." *Id.*

A married woman may, in this state, enter into any contract, express or implied, the same as if she were sole; she may, in like manner, be held liable thereon; and in civil actions, she may sue and be sued in all matters the same as if she were sole. *Rose v Otis*, 18 Colo. 59, 60, 31 P. 493, cited in note, 82 Am. St. Rep. 42, citing *Wells v Caywood*, 3 Colo. 487, cited in notes, 131 Am. St. Rep. 145, 154, 20 L. R. A. 703, L. R. A. 1915D, 1009, 49 A. L. R. 122; *Coon v Rigden*, 4 Colo. 275, cited in notes, 3 Am. St. Rep. 728, 77 Am. St. Rep. 97, 21 L. R. A. 624, L. R. A. 1917A, 158; *Colorado Cent. R. Co. v Allen*, 13 Colo. 229, 22 P. 605, cited in notes, 22 Am. St. Rep. 49, 57 Am. St. Rep. 169, 11 L. R. A. 605, L. R. A. 1915D, 1009, L. R. A. 1916C, 248.

She may sue husband for injuries caused by his negligence.—In view of the broad, liberal provisions of the constitution and statutes of this state and the liberal construction thereof adopted by the courts of this state, we are unwilling to follow the decisions of courts that hold that a wife has no right to sue her husband for a personal injury caused by him. The following cases, holding that a wife may sue her husband for such an injury, seem to us to define

more justly the legal rights of married women in this day and age. *Brown v Brown*, 88 Conn. 42, 89 A. 889; *Bushnell v Bushnell*, 103 Conn. 583, 131 A. 432; *Fiedler v Fiedler*, 42 Okla. 124, 140 P. 1022; *Roberts v Roberts*, 185 N. C. 566, 118 S. E. 9; *Fitzpatrick v Owens*, 124 Ark. 167, 186 S. W. 832, 187 S. W. 460; *Gilman v Gilman*, 78 N. H. 4, 95 A. 657; *Prosser v Prosser*, 114 S. C. 45, 102 S. E. 787; *Wait v Pierce*, 191 Wis. 202, 209 N. W. 475, 210 N. W. 822; *Harris v Harris*, 211 Ala. 222, 100 So. 333; *Johnson v Johnson*, 201 Ala. 41, 77 So. 335. We hold that in this state a wife may sue her husband for personal injuries caused by the negligence of her husband. *Rains v Rains*, 97 Colo. 19, 25, 46 P. (2d) 740.

C. Action for Injury or Death of Child.

While the father and mother may join in a damage suit, it is not essential that they should so join. The joining of the father and mother appears to be permissive, not imperative. *Pierce v Conners*, 20 Colo. 178, 184, 37 P. 721, 46 Am. St. Rep. 279, cited in notes, 49 Am. St. Rep. 172, 409, 55 Am. St. Rep. 608, 631, 62 Am. St. Rep. 316, 120 Am. St. Rep. 366, 10 L. R. A. (N. S.) 401, 848, 48 L. R. A. (N. S.) 687, L. R. A. 1917F, 21, L. R. A. 1918E, 281, 292, Ann. Cas. 1912C, 58, 60, 63, 65, Ann. Cas. 1916E, 652, 74 A. L. R. 17, 46, 60.

The joinder or nonjoinder of a parent in an action for damages is material only to the parents themselves. Since either or both may sue, the defendant cannot be affected or prejudiced whichever course they may take; the grounds and measure of recovery are the same in either case, and the defendant can only be subjected to a single suit. *Id.*

III. INFANTS OR INCOMPETENT PERSONS.

Cross references.—See generally vol. 3, ch. 76. As to duty of administrators, executors, guardians and conservators of infants to prosecute and defend actions, see vol. 4, ch. 176, § 136. As to service of process, on infants, see Rule 4 (c) (2).

Editor's note.—Here again, cases construing similar Colorado statutes which were superseded by this subdivision are included.

Where an infant is a party to a suit, he must appear by next friend or guardian to be appointed by the court or judge. He is in reality, however, but the agent of the court through whom it acts to protect the interest of the minor. The court is itself the guardian. *Seaton v Tohill*, 11 Colo. App. 211, 216, 53 P. 170, cited in notes, L. R. A. 1918A, 188, 43 A. L. R. 126, 44 A. L. R. 189, 65 A. L. R. 50.

An infant cannot be bound by the admissions of his guardian unless they are for his

benefit, nor by his errors or omissions in his answers or pleadings. The court will suffer no advantage to be taken of those acting in the infant's behalf to the detriment of the infant. *Seaton v. Tohill*, 11 Colo. App. 211, 216, 53 P. 170, cited in notes, L. R. A. 1918A, 188, 43 A. L. R. 126, 44 A. L. R. 189, 65 A. L. R. 50.

Or by guardian's errors or omissions.—In *Hutchison v. McLaughlin*, 15 Colo. 492, 495, 25 P. 317, 11 L. R. A. 287, cited in note, 66 L. R. A. 89, it is said: "It is the policy of the law to fully protect the rights of minors, and this may be done, even if the guardian or *prochein ami* does not properly claim such rights or has even failed to claim them at all." *Seaton v. To-*

hill, 11 Colo. App. 211, 216, 53 P. 170, cited in notes, L. R. A. 1918A, 188, 43 A. L. R. 126, 44 A. L. R. 189, 65 A. L. R. 50.

Power to appoint is limited.—The power to appoint a guardian ad litem for an infant or incompetent under this rule is confined to cases where the infant or incompetent is "not otherwise represented" in the action. *Southern Ohio Sav. Bank, etc., Co. v. Guaranty Trust Co.*, 27 F. Supp. 485, 486.

It does not apply to adoption proceedings.—This rule, authorizing court to appoint guardian ad litem for infant or incompetent person not otherwise represented in an action, do not govern procedure in adoption proceedings. *Barnes v. Paanakker*, 111 F. (2d) 193.

Rule 18. Joinder of Claims and Remedies.

(a) **Joinder of Claims.** The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied. [Supplants Code Sec. 76.]

(b) **Joinder of Remedies; Fraudulent Conveyances.** Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money. [Supplants Code Sec. 178.]

I. General Consideration.

II. Joinder of Claims.

A. In General.

B. Application.

III. Joinder of Remedies.

Cross References.

For a discussion of this rule, see Address no. 6, appx. D. As to joinder of parties, see the two following rules, and notes thereto.

I. GENERAL CONSIDERATION.

This rule provides for unlimited joinder of action. A party can get all the relief he is entitled to in a single action. Mr. James W. Moore, writing in 25 *Georgetown Law Journal*, p. 551 said: "This rule is a repudiation of the common law rules of joinder of actions which the common-law judges could state but could not explain, and which the common people had to bear as they would bear perils of war and contagious diseases." See article entitled, "Trials and New Trials Under the New Federal Rules" by Mr.

William H. Wicker, XV Tenn. Law Rev., no. 6, pp. 570, 572.

Its purpose is to settle in one case all claims growing out of a single transaction.—The new rules (Rules 13, 15 (a), 18 (a)) seek to require in a civil action what has always been aimed at in an equity suit, that all claims growing out of a single transaction be brought in and settled in the one case. *Jones v. St. Paul Fire, etc., Ins. Co.*, 108 F. (2d) 123, 125.

To this end the court must be given extensive discretionary power.—Under this rule authorizing unlimited joinder of claims where there is only one plaintiff and one defendant, the court must be given extensive discretionary powers to expedite determination of the issues and avoid delay and inconvenience. *Collins v. Metro-Goldwyn Pictures Corp.*, 106 F. (2d) 83.

But a litigant must not be deprived of a substantive right.—The rules concerning joinder of claims and remedies should be construed so as not to deprive a litigant of a substantive right. *Allegheny County v. Maryland Cas. Co.*, 32 F. Supp. 297. See also, Rule 20 (a).

This rule indicates that both plaintiff and defendant may file counterclaims.—This rule which was adopted contemporaneously with Rule 13 indicates that it was the intent of the framers of the new rules to give the pleaders, that is, both the plaintiff and the defendant, the right to file a counterclaim. *Bethlehem Fabricators v. Bowen Co.*, 1 F. R. D. 274, 275.

This rule strengthens the theory that the permissive counterclaim under Rule 13 (b) would apply as well to a counterclaim filed by plaintiff as to the allowance of the wholly unrelated counterclaim permitted by the defendant. *Warren v. Indian Refining Co.*, 30 F. Supp. 281, 282.

II. JOINDER OF CLAIMS.

A. In General.

This rule permits the joinder of as many separate claims as plaintiff may have, regardless of their consistency. *Michelson v. Shell Union Oil Corp.*, 26 F. Supp. 594.

A plaintiff may plead his claim alternatively and even hypothetically. *Taiyo Trading Co. v. Northam Trading Corp.*, 1 F. R. D. 382.

What complaint must show.—A complaint in order to present an alternative claim against multiple defendants must contain a clear statement that there is some liability to the plaintiff, and a showing that plaintiff is unable to state upon which of the defendants the liability should fall. *Taiyo Trading Co. v. Northam Trading Corp.*, 1 F. R. D. 382.

By this rule, when a joinder involves multiple parties, Rule 20 becomes applicable, and under Rule 20 the test is "do the claims involve a common question of law or fact?" *Federal Housing Administrator v. Christianson*, 26 F. Supp. 419.

Improper joinder.—A complaint, stating causes of action in two counts against three defendants on one note and two of such defendants on another note, improperly joined causes of action involving separate questions of fact and law. *Federal Housing Administrator v. Christianson*, 26 F. Supp. 419.

In such case action is dismissed without prejudice.—Where party defendant had been joined contrary to contract and rules of civil procedure, the action against such party would be dismissed without prejudice. *Allegheny County v. Maryland Cas. Co.*, 32 F. Supp. 297. See also, Rule 20 (a).

Complaint may be amended to include third-party defendant.—Plaintiff, pleading alternative causes of action in separate counts of declaration to recover amount orally agreed to be paid her by defendant to desist from bringing action for personal injuries or damages for fraudulent misrepresentations inducing her to abandon such cause of action, may amend complaint so as to assert claim against third-party defendant, brought in by original defendant, for damages caused by negligence of third-party defendant as plaintiff's attorney in failing to bring such action. *Crim v. Lumberman's Mut. Cas. Co.*, 26 F. Supp. 716.

B. Application.

A claim for personal injuries and one for damages to automobile may properly be joined under this section. *Gray v. Blight*, 112 F. (2d) 696.

As may a count in tort with one in contract.—Joinder of counts in tort based upon copyright statute with a count in contract is within the spirit of Federal Court Rules, irrespective of whether such rules apply to copyright suits. *Michelson v. Shell Union Oil Corp.*, 26 F. Supp. 594.

And a request for a declaration and for some coercive relief.—It is not improper for a pleader to combine in one complaint a request for a declaration and for some coercive relief. *Chase Nat. Bank v. Citizens Gas Co.*, 113 F. (2d) 217, 230.

Other examples of proper joinder.—Where theory of action was for rescission for fraud arising out of conspiracy, but complaint set forth allegations based on transactions claimed to be void for violation of California Corporate Securities Act, and also allegations claiming certain transactions were voidable because of fraudulent misrepresentations, and contained alternative prayer for relief for damages from both defendants for fraud, motion to require plain-

tiffs to separately state and number each cause of action was denied. *Grauman v. City Company*, 31 F. Supp. 172. See also, Rules 8 (e), 10 (b).

There is no rule to prevent plaintiff from joining in the one complaint a suit for an infringement of copyright, with a suit for an accounting under a contract, express or implied. *Bergmann v. Morris Music Co.*, 27 F. Supp. 985, 987.

A complaint, alleging that an importer imported and sold matches to a buyer who agreed to pay internal revenue taxes, but that collector of internal revenue compelled the importer to pay such taxes, that buyer "maintains and claims that it paid the tax" and that importer, being in doubt as to what party was liable therefor, joined both buyer and collector, stated a cause of action in the alternative against collector of internal revenue. *Taiyo Trading Co. v. Northam Trading Corp.*, 1 F. R. D. 382.

In construing the Federal Rule it was held that damages could properly be claimed and allowed in an action for an injunction under the Sherman Anti-Trust Act. *Columbia River Packers Ass'n. v. Hinton*, 34 F. Supp. 970.

In action by receiver of national bank and trust company for balance due on liability of stockholder who pleaded in her answer an accord and satisfaction and release from liability, receiver could assert in reply a cause of action for rescission of settlement and cancellation of release, under this rule, notwithstanding that better pleading would have been for receiver to have served complaint pleading cause of action for rescission of agreement of settlement, and cause of action for balance due on the liability. *Downey v. Palmer*, 31 F. Supp. 83.

In action by automobile occupant against township and county in New Jersey for injuries from improper construction and maintenance of highway across railroad track, township and county could bring in railroad company and owner of automobile as third-party defendants, notwithstanding that owner and occupant were residents of New York, where railroad company and owner could have been joined originally had occupant elected to do so. *Satink v. Holland Township*, 28 F. Supp. 67.

Two causes may not be joined if recovery on one is "condition precedent" to right of action on other.—Where indemnity bond provided that it was supplementary to a prior bond for \$200,000 and that prior bond must be fully paid or judgment for full amount thereof obtained before any action or proceeding could be maintained on supplementary bond, payment of prior bond, or recovery of judgment thereon, was a "condition precedent" to a right of action on supplementary bond and constituted a

valuable "substantive right" of surety on supplementary bond and hence to permit maintenance of action on both bonds would be contrary to "due process." *Allegheny County v. Maryland Cas. Co.*, 32 F. Supp. 297. See also, Rule 20 (a).

If there are multiple defendants there must be sameness of law or fact.—In view of Rule 20 (a), a cause of action against defendant and co-defendant for alleged patent infringement, by defendant's manufacturing and selling co-defendant's selling infringing machines, could not under this rule be joined with a cause of action against defendant for alleged unfair competition when there was no sameness of law or fact in the charge against defendant for unfair competition based upon facts outside of those alleged as constituting infringement and the charge against co-defendant for selling alleged infringing machines. *Man-Sew Pinking Attachment Corp. v. Chandler Mach. Co.*, 29 F. Supp. 480.

Summary judgment denied.—Plaintiff who joined causes of action based on license agreement and for alleged patent infringement could plead inconsistent causes of action as alternate claims under this rule, but he was not entitled to summary judgment on cause of action based on agreement as still in force in 1938, where there was an issue of fact concerning contract claim which, if it was decided against plaintiff, would still leave him with his alleged infringe claim. *Ottinger v. General Motors Corp.*, 27 F. Supp. 508.

III. JOINDER OF REMEDIES.

Cross reference.—As to form of complaint on claim for debt and to set aside fraudulent conveyance under subdivision (b) of this rule, see Form 13, appx. A.

Editor's note.—It will be noted that this subdivision supplants code § 178. That section dealt with suits on bonds, permitting joining of surety and principal in a single suit. Although the instant subdivision is much broader in its application, the practitioner may be able to draw an analogy which may prove useful. Accordingly, and for that purpose alone, the following cases construing old § 178 are hereto appended: *Wirt v. Peck*, 184 F. 54, 56; *Thomas v. Wason*, 8 Colo. App. 452, 458, 46 P. 1079; *Ducket v. Price*, 7 Colo. 84, 1 P. 228; *Wason v. Frank*, 7 Colo. App. 541, 547, 44 P. 378; *Lynch v. Metcalf*, 3 Colo. App. 131, 133, 32 P. 183; *Smith v. Atkinson*, 18 Colo. 255, 32 P. 425.

Under this rule, the court may exercise its full equity powers in any civil action. *Fischer v. Excess Ins. Co.*, 31 F. Supp. 651.

But this rule is construed to apply only to cases where there are at least two distinct claims or causes of action and not to a

case which involves only one cause of action which may give rise to legal or equitable relief or both. *Lee v Matheny*, 31 F. Supp. 246.

Procedure under the rule.—Where complaint alleged in two counts a breach of contract by buyer to pay for rose bushes, and of fraud by bank in taking assignments of buyer's property, thus preventing buyer from making payment, all issues common to the legal causes of action in either count and to the equitable cause stated in second count would be tried together, the legal issues to the jury and the equitable issues to the court, the equitable issues not pertaining to the legal causes being tried to the court immediately following the jury trial. *Ford v Wilson & Co.*, 30 F. Supp. 163.

Under this rule the court may grant relief by issuing injunction restraining respondent from transferring assets, notwithstanding a judgment for debt has not yet been obtained. *Reconstruction Finance Corp. v Central Republic Trust Co.*, 30 F. Supp. 933.

"In awarding such relief, however, the court should be guided largely by the considerations which were the basis for the old rule. The court should have the power in a proper case to make the proceedings which may result in a judgment be something more than a mere empty form." *Id.*

Also, an action could be maintained against surety on bond of derelict and deceased administrator before an accounting in probate court and determination of amount for which surety was liable. *Utesch v United States Fidelity, etc., Co.*, 27 F. Supp. 933.

Furthermore, it is unnecessary in proceeding to set aside fraudulent conveyance that plaintiff's claim be first reduced to judgment. *Dubia v Ebeling*, 30 F. Supp. 992.

But the allegations are the same as formerly.—Two causes of action may be joined,

but it is not the intent of this rule that an action to set aside conveyances in fraud of creditors may succeed upon any lesser or smaller allegations than previously. *Iroquois Oil, etc., Co. v Hollingsworth*, 1 F. R. D. 201.

Sufficient complaint.—In action by trustee in bankruptcy, complaint alleging that defendant was in possession, under a fraudulent transfer from bankrupt, of pig iron to which trustee was entitled, stated a claim on which relief could be granted. *Commonwealth Trust Co. v Reconstruction Finance Corp.*, 28 F. Supp. 586.

Example of proper joinder.—The joining of claims whereby complainants sought to have their rights as stockholders adjudicated and, on behalf of corporation, to secure from individual defendants relief based on alleged misconduct and breaches of trust, was proper under this rule. *Richardson v Blue Grass Min. Co.*, 29 F. Supp. 658.

This rule does not authorize joinder of automobile insurer in action against insured, and whether the policy contains a "no action" clause makes little difference. *Jennings v Beach*, 1 F. R. D. 442. In reaching this result the court said: "I do not believe that Rule 18 (b) was ever intended to cover a situation such as is presented here. As a matter of fact, there is nothing in the pleadings to indicate that the plaintiffs even have a claim against the defendant insurance company at the present time. The purpose of joining the defendant is to ascertain this very fact."

In view of settled public policy of the state of Michigan as evidenced by judicial rulings of Supreme Court and by statutory enactments, the right of liability insurer to have enforced the condition of its policy requiring judgment against assured as a condition to action against insurer is a "substantive right" governed by laws of Michigan where bond was given and not by Rules of Civil Procedure. *Pitcairn v Rumsey*, 32 F. Supp. 146.

Rule 19. Necessary Joinder of Parties.

(a) **Necessary Joinder.** Subject to the provisions of Rule 23 and of subdivision C (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, or his consent cannot be obtained, he may be made a defendant, or in proper cases, an involuntary

plaintiff. [This and Rule 20 (a) supplant Code Secs. 10 and 11, and the first half of Sec. 12.]

Committee Note.

The inserted phrase "or his consent cannot be obtained" clarifies and makes certain what was otherwise limited to the occasion when "a plaintiff refuses to do so."

C (b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to service of process, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them can be acquired only by their consent or voluntary appearance; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

(c) Same: Names of Omitted Persons and Reasons for Nonjoinder to be Plead. In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

I. Necessary Joinder.

A. General Consideration.

B. When Persons Must be Joined.

C. When Plaintiff Does Not Consent.

II. Effect of Failure to Join.

III. Names of Omitted Parties, etc.

Cross Reference.

For a discussion of this rule, see Address no. 6, appx. D.

I. NECESSARY JOINDER

A. General Consideration.

This rule deals with compulsory joinder of parties.—Parties whose presence before the court is conditionally necessary or indispensable. Indispensable parties must in every case be before the court. Parties conditionally necessary must be before the court unless one of the conditions referred to in subdivision (b) exists. See 2 Moore's Fed. Prac. 2135.

"The interest" referred to in this rule is one which must be directly affected legally by the adjudication. Not only this, but we go further and state that the interest of the absent party must be cognizable, that is to say within the jurisdiction of the court or the power given to the court by law to adjudicate the controversy. *Goldwyn v. United Artists Corp.*, 113 F. (2d) 703, 707.

This rule is applicable to declaratory judgment actions. *Goldwyn v. United Artists Corp.*, 113 F. (2d) 703.

B. When Persons Must be Joined.

One having a "joint interest" must be joined.—If the absent party's interest be "joint" with that of either the plaintiff or defendant, the absent party is then an indispensable party and must be joined as either a party plaintiff or a party defendant in accordance with this subdivision. *Goldwyn v. United Artists Corp.*, 113 F. (2d) 703, 707.

The phrase "joint interest" must be construed to mean those who would be necessary or indispensable parties under previous practice. *Society of European Stage Authors, etc., v. WCAU Broadcasting Co.*, 1 F. R. D. 264.

"Indispensable parties" defined.—"Indispensable parties" are those who have an interest in the controversy "of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Ducker v. Butler*, 104 F. (2d) 237, 238.

"Necessary parties" must be joined if subject to process.—If the absent party's legal interest is cognizable in the suit but is not joint with that of the plaintiff or the defendant, and he should be joined in order to afford complete relief to those already parties, then he is a necessary party and must be joined if subject to the process and within the venue of the court. *Goldwyn v. United Artists Corp.*, 113 F. (2d) 703, 707.

Where nonresident grantee in oil lease brought suit to restrain resident defendants from interfering with grantee's rights and defendants filed counterclaim against

grantee and grantor urging that grantor's title was held merely as security, others to whom grantor had conveyed interest in the real estate were not "indispensable parties" to determination of the issue raised by the original complaint but were "necessary parties" to complete adjudication of the questions raised by the counterclaim and counterclaimants were ordered to bring in the other parties or show why they were omitted. *Carter Oil Co. v. Wood*, 30 F. Supp. 875.

Where defendants in death action claimed that workmen's compensation insurer of deceased's employer was a "necessary party" and the insurer would be entitled to share in the recovery, if any, from the defendants in the death action, the insurer was directed to be listed as an involuntary plaintiff. *Slanson v. Standard Oil Co.*, 29 F. Supp. 497.

Procedure if "necessary party" is not subject to process.—If a "necessary party" is not subject to the process and within the venue of the court, then under the conditions laid down in the last sentence of subdivision (b) the court may or may not, within its discretion, proceed to judgment as to the parties before it. *Goldwyn v. United Artists Corp.*, 113 F. (2d) 703, 707.

Raising question of non-joinder.—In action to recover disability benefits under contract of insurance, insurer's answer which alleged that disability benefits were not listed by insured in bankruptcy proceedings and were not made available to creditors of insured, and that creditors of insured received nothing from bankrupt estate, was sufficient, as raising issue of a non-joinder of trustee in bankruptcy as a party. *Crook v. Prudential Ins. Co.*, 34 F. Supp. 239.

C. When Plaintiff Does Not Consent.

Editor's note.—As stated in the above committee note the phrase "or his consent cannot be obtained" does not appear in the Federal Rule. As an aid to construing said phrase, cases construing a similar provision of § 12 of the Code of Civil Procedure are herein placed.

The presumption obtains that all consented to become party plaintiffs, as otherwise those not consenting would have been joined as defendants. *Weese v. Barker*, 7 Colo. 178, 2 P. 919, cited in notes, 50 Am. St. Rep. 842, 91 Am. St. Rep. 889, 6 L. R. A. (N. S.) 713, 7 L. R. A. (N. S.) 786, 877.

Non-consenting water consumers claiming a priority must be made defendants.—In an action by consumers of water from a ditch, claiming a prior right to the use of water over other consumers to prevent the pro-rata distribution of the water in times of scarcity, all consumers claiming such priority of right must be joined as parties

plaintiff, or if their consent thereto cannot be had, must be made parties defendant, and all consumers alleged to have inferior rights must be made parties defendant, so that the rights of all consumers from the ditch can be adjudicated and settled in the one action. In such action the ditch company cannot represent water consumers who are stockholders in the ditch company, and the fact that the ditch company answered over after demurrer would not waive the objection of nonjoinder of parties. *Farmers' High Line Canal, etc., Co. v. White*, 32 Colo. 114, 75 P. 415, cited in notes, Ann. Cas. 1913B, 390, Ann. Cas. 1913D, 625, 626.

When it is presumed that action was prosecuted in behalf of plaintiff and his co-owners.—A complaint in an action by a single plaintiff recited that by reason of the number and diverse residences of the plaintiffs it was impracticable to bring them all before the court; and subsequently the court granted leave to file an amended complaint, and overruled a motion to strike and a demurrer to the same. Held, that, on appeal, it must be presumed that the court ordered that the action might be prosecuted by the plaintiff for and in behalf of himself and his alleged co-owners. *Knight v. Bor-ing*, 38 Colo. 153, 98 P. 1078.

Objection as to parties will not be considered on appeal when none was taken in court below.—An action was brought by the presiding officer of a fraternal organization suing for himself and all other members of the society. No order was taken for the prosecution of the suit in this manner. No objection having been taken upon this ground, nor upon the ground that only equitable actions are contemplated by the provision, the court upon appeal refused to consider such objection. *Rice v. Cassells*, 48 Colo. 73, 108 P. 1001, cited in note, L. R. A. 1918D, 1044.

II. EFFECT OF FAILURE TO JOIN.

Editor's note.—The provisions in the Federal Rule referring to jurisdiction have been omitted from the instant subdivision, since they are unnecessary in a state rule.

The distinction between "necessary" and "indispensable parties" is recognized in this rule. *Wyoga Gas, etc., Corp. v. Schrack*, 27 F. Supp. 35, 36.

"Indispensable parties" defined.—"Indispensable parties" are those with such an interest in the controversy that a final decree cannot be entered in their absence without adversely affecting their rights, or without leaving the action in a state which would be inconsistent with equity and good conscience. *Wyoga Gas, etc., Corp. v. Schrack*, 27 F. Supp. 35, 36.

"Necessary parties" defined.—"Necessary parties" are those whose presence is necessary in order to adjudicate the entire con-

trover, but whose interests are so far separable that the court can proceed to final judgment without adversely affecting them. *Wyoga Gas, etc., Corp. v. Schrack*, 27 F. Supp. 35, 36.

Failure to join "necessary parties" does not warrant dismissal of complaint. — In action by trustee in bankruptcy of corporation against defendant for breach of contract between two majority stockholders of corporation and defendant to loan money to the corporation, the majority stockholders were "necessary parties" rather than "indispensable parties," and hence failure to join them did not warrant a dismissal of the complaint, but rather they would be joined as parties in accordance with this rule. *Mahoney v. Bethlehem Engineering Corp.*, 27 F. Supp. 865.

Former officers and directors sued by corporation for fraud, negligence, and misconduct as joint tort-feasors were jointly and severally liable, and nonresident officers and directors were "necessary" as distinguished from "indispensable parties," and action was not dismissible on motion of resident officers and directors for lack of jurisdiction which was based solely on diversity of citizenship. *Wyoga Gas, etc., Corp. v. Schrack*, 27 F. Supp. 35.

Nor does this rule compel the joinder of omitted parties if complete relief can be given as between the plaintiffs and defendants. *Sauer v. Newhouse*, 24 F. Supp. 911.

In representative suit by stockholders against directors of corporation to secure restitution for losses from mismanagement, where only purpose in bringing in certain omitted directors as parties defendant would

be to avoid a possible suit for contribution instituted by those already defendants against the omitted directors, stockholders could not be compelled to bring in the omitted directors as parties defendant. *Id.*

A properly designated trustee may bring a class suit wherein a great multitude of parties may be represented and grouped, and bind those for whom he acts; but the practice should not be extended to the point where one person occupying a similar status may bind himself and another without the other's presence or consent. *Women's Catholic Order of Foresters v. Arlington*, 28 F. Supp. 663.

Thus, a holder of city's bonds was not bound by judgment in suit by another bondholder, under which city was allowed to issue refunding bonds on terms more favorable to the city, and hence such holder was entitled to judgment against the city for interest, subject to directions to intervene in the other suit for determination of its rights. *Women's Catholic Order of Foresters v. Arlington*, 28 F. Supp. 663. See Rule 23 for class actions.

III. NAMES OF OMITTED PARTIES, ETC.

Cross reference.—As to allegation of reason for omitting party, see Form 22, appx. A.

The names of omitted persons and reasons for non-joinder are to be pleaded only when such parties are "necessary."—This rule has no application to those who are merely "proper" parties. See 2 Moore's Fed. Prac. 2163.

Rule 20. Permissive Joinder of Parties.

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according

to their respective rights to relief, and against one or more defendants according to their respective liabilities. [Supplants Code Secs. 10, 11, 21, 242 and 243.]

(b) **Separate Trials.** The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice. [Supplants Code Sec. 24.]

C (c) **Parties Jointly or Severally Liable.** Persons jointly or severally liable upon the same obligation or instrument, including the parties to negotiable instruments and sureties on the same or separate instruments, may all or any of them be sued in the same action, at the option of the plaintiff. [From Code Sec. 13.]

Committee Note.

There is no Federal subdivision 20 (c).

- I. Permissive Joinder.
- II. Separate Trials.
- III. Parties Jointly or Severally Liable.
 - A. In General.
 - B. Joint and Several Obligations.

Cross Reference.

For a discussion of this rule, see Address no. 6, appx. D.

I. PERMISSIVE JOINDER.

Cross reference.—As to form of complaint for negligence where plaintiff is unable to determine person responsible, see Form 10, appx. A.

Editor's note.—As above indicated, this subdivisions supplants §§ 10, 11, 21, 242 and 243 of the code. While those sections are akin to the instant subdivision in purpose, the language of the two are so dissimilar that the cases construing those sections do not appear relevant and are therefore omitted.

This rule is based on trial convenience, and is designed to permit the joinder of plaintiffs or defendants whenever there is a common question of law or fact. *Securities, etc., Comm. v. Timetrust*, 28 F. Supp. 34, 43.

"The rule recognizes the economy of a procedure whereunder several demands arising from the same occurrence may be tried together, thus avoiding the reiteration of the evidence relating to facts common to the several demands." *Chappell & Co. v. Santangelo*, 30 F. Supp. 599.

It is a departure from the stern logic of the so-called common law, but although illogical, it does have the practical merit of redressing, as here, in one action, a com-

plaint which would otherwise require three separate actions. *National Surety Corp. v. Allentown*, 27 F. Supp. 515, 516.

It does not require that suit shall be dismissed for lack of such parties.—This rule permitting defendant to bring in other parties does not require that suit shall be dismissed for lack of such parties. *Texas, etc., Ry. Co. v. Elgin, etc., Ry. Co.*, 1 F. R. D. 136.

Necessary elements of complaint against multiple defendants.—So far as pleadings are concerned, the elements essential to save a complaint presenting an alternative claim against multiple defendants, from a motion to dismiss, are: (1) A clear statement that there is some liability to the plaintiff, and (2) a showing that plaintiff is unable to state upon which of the defendants the liability should fall. *Taiyo Trading Co. v. Northam Trading Corp.*, 1 F. R. D. 382, 383.

The propriety of joinder of actions involving multiple parties depends on whether claims involve common question of law or fact, not whether same general principles of law are applicable. *Federal Housing Administrator v. Christianson*, 26 F. Supp. 419.

Examples of proper joinder.—Under this rule, joinder of several claimants as defendants in action by federal deposit insurance corporation for declaratory judgment as to corporation's liability vel non on claims asserted against it by reason of alleged deposits in banks in which deposits were insured by corporation was authorized. *Federal Deposit Ins. Corp. v. Records*, 34 F. Supp. 600.

Operators of gasoline service stations were properly joined as plaintiffs in action for violations of anti-trust laws by oil

companies' sale of tank car lots of gasoline to tire companies for less than prices of tank wagon or truck lots sold to plaintiffs. *Alabama Independent Service Station Ass'n. v. Shell Petroleum Corp.*, 28 F. Supp. 386.

In suit to enjoin fraudulent sales of securities by use of mails, persons aiding and abetting sales were properly joined as defendants. *Securities, etc., Comm. v. Time-trust*, 28 F. Supp. 34.

Where importer sold imported matches to buyer who agreed to pay internal revenue taxes thereon, but thereafter importer was compelled by collector of internal revenue to pay such taxes, importer was entitled to join, in action to recover taxes, collector and buyer who it was alleged "maintains and claims that it paid the tax", since importer's right to relief against either of the defendants, "arises out of the same series of transactions" within meaning of this rule. *Taiyo Trading Co. v. Northam Trading Corp.*, 1 F. R. D. 382.

Where statute imposed obligation to pay premium of official bond on obligee for whose benefit bond was given surety on official bond of city treasurer claiming that each of three defendant municipalities was liable for one-third of total premiums due on bond could maintain one action against all and recover separate judgments against each, if liable, for one-third of the premiums for which each was liable. *National Surety Corp. v. Allentown*, 27 F. Supp. 515.

When a plaintiff has a like claim against each of two or more defendants, he is not driven to a separate action against each but may sue all in one action, recovering separate judgments against each for the part of the claim for which he is liable. *Id.*

Former officers and directors sued by corporation for fraud, negligence, and misconduct as joint tort-feasors were not required to be sued separately or jointly where questions raised appeared to be substantially the same with respect to all parties sued. *Wyoga Gas, etc., Corp. v. Schrack*, 27 F. Supp. 35.

In action for injuries sustained by children passengers, in automobile collision, the children's mother who was driving automobile at time of collision and who sought damage for loss of services of children and for medical and other expenses incurred as a result of their injuries was a "proper party plaintiff." *Middleton v. Coxen*, 25 F. Supp. 532.

Improper joinder.—In service station operators' action to enjoin and recover damages for violations of anti-trust laws by discrimination in prices of gasoline sold by oil companies to tire companies and plaintiffs, such companies were improperly joined as defendants, where only collusion or conspiracy alleged in complaint was between

each tire company and one oil company and no facts indicating that right to relief against any of each pair of defendants grew out of same transactions or occurrences as such right against any other pair sufficiently appeared in complaint. *Alabama Independent Service Station Ass'n. v. Shell Petroleum Corp.*, 28 F. Supp. 386.

A complaint, stating causes of action in two counts against three defendants on one note and two of such defendants on another note, improperly joined causes of action involving separate questions of fact and law. *Federal Housing Administrator v. Christianson*, 26 F. Supp. 419.

A statutory proceeding against the United States does not fall under provisions of this rule and should not be embarrassed by joining other litigants who may be entitled to jury trial, and whose liability must depend on different principles. *Lynn v. United States*, 110 F. (2d) 586.

In suit for fraud and conspiracy, defendants as to whom there was nothing to show any knowledge of any fraudulent acts would be dismissed on motion; but if knowledge had been shown they would have been properly joined as parties. *Shultz v. Manufacturers, etc., Trust Co.*, 1 F. R. D. 53.

II. SEPARATE TRIALS.

No separate trial where case arose out of same series of transactions.—Under this rule, one defendant was not entitled to separate trial of action against four defendants, where case arose out of the same series of occurrences and there were a number of common questions of fact and law in issue. *McNally v. Simons*, 29 F. Supp. 926.

Nor where there was no danger of prejudice and granting of motion would foster delay. *Chappell & Co. v. Santangelo*, 30 F. Supp. 599.

Motion to add party denied.—Where motion of defendant to make another a party plaintiff was made only after all parties had announced ready for trial and trial had begun, although defendant had notice of all facts alleged many months prior to presentation of motion, and granting of motion would necessitate the declaration of a mistrial and cause embarrassment, delay, and expense to plaintiff, motion was overruled. *Pettit v. Rheman Co.*, 1 F. R. D. 271.

III. PARTIES JOINTLY OR SEVERALLY LIABLE.

A. In General.

Editor's note.—Since this subdivision is taken from § 13 of the code, the cases construing that section are applicable here and are therefore placed in this note.

The effect of this subdivision is to abrogate the common law rule respecting parties

to actions on joint contracts of the descriptions specified. *Mattison v. Childs*, 5 Colo. 78, 79, cited in notes, 68 Am. Dec. 762, 67 A. L. R. 639.

A joint maker having died, a separate action was maintainable against either the survivor, or the executors of the deceased; they could not, however, be joined in the same action; as against one the judgment would be *de bonis propriis*, and against the other *de bonis testatoris*. In this respect the section is not believed to have changed the common law rule. *Id.*

It does not purport in any wise to alter the obligations which parties have assumed in their contracts. It does not make a contract valid which would otherwise be invalid. It operates merely as an enlargement of the remedy upon the contract, permitting suit to be brought against any of the parties liable, or against all, at the plaintiff's pleasure. But, where parties contract jointly, there must be a joint liability, in order that there may be a several liability. If a joint agreement is invalid or incapable of enforcement against all of its makers, it is invalid and incapable of enforcement against any one or more of them. *Bennett v. Morse*, 9 Colo. App. 122, 126, 39 P. 582.

Subdivision is broad enough to apply to cases originally brought before justices of the peace.—We cannot concede the correctness of counsel's assertion that this provision has no application to cases originally brought before justices of the peace. A number of other provisions, such as this subdivision, which do not in words speak of justice courts, are broad and sweeping in their language, and were evidently intended to include proceedings in other tribunals besides courts of record. This objection might, perhaps, be overruled upon other grounds, but we deem the foregoing sufficient. *Hughes v. Fisher*, 10 Colo. 383, 386, 15 P. 702, cited in notes, 14 Am. St. Rep. 793, 5 L. R. A. 617, 26 L. R. A. 622, Ann. Cas. 1912B, 446, 13 A. L. R. 253, 260.

It applies to actions on appeal bonds. *Wilson v. Welch*, 8 Colo. App. 210, 46 P. 106, cited in notes, L. R. A. 1915A, 851, Ann. Cas. 1916C, 1226.

A stranger cannot become a surety without the consent of both parties.—A stranger to a contract cannot become a party to it without the consent of both parties, nor can he become a surety without such consent within the meaning of this subdivision, which in this respect, applies only to persons jointly or severally liable upon the same instrument, including parties to bills of exchange and promissory notes and sureties on the same or separate instruments, and not to the independent volunteer guarantor of the payment of the instrument executed by other parties. *Kruschke v. Quatsoe*, 49 Colo. 312, 315, 112 P. 769.

Where the action was dismissed as to the principal, and continued as to the surety, it was the same as though the action in the first instance had been brought by the obligee against the surety only. This is permitted by this section. *McAllister v. People*, 28 Colo. 156, 158, 63 P. 308, cited in note, Ann. Cas. 1917C, 665.

If a judgment creditor seeks by *scire facias* to keep a judgment in force then he must proceed against all defendants and revive the specific judgment. If he selects the other method, namely, a new action on the judgment, he need join only such as he elects to join. This conclusion is not only supported by the weight of authority, but is in accord with principles of harmonious and consistent procedure, and also with equity and good conscience. *Allen v. Patterson*, 69 Colo. 302, 307, 194 P. 934.

B. Joint and Several Obligations.

A joint obligation will not support a judgment in an action brought against but one of the joint obligors.—*Cooper v. German Nat. Bank*, 9 Colo. App. 169, 47 P. 1041, cited in note, Ann. Cas. 1912D, 1201, is relied upon by the appellee as being conclusive in this case because there it was held that the trial court erred in ordering, upon the application of the defendants, that an indorsee of a promissory note should be made a party defendant. The ground for the application in that case was that at the time of the making of the note there was an agreement between the indorsee and the makers of the note that each should pay his proportionate share of the debt. It was held that the trial court erred in making the indorsee a defendant, but this seems to have been based largely upon the ground that this section provided that persons jointly or severally liable upon promissory notes may all or any of them be included in the action at the option of the plaintiff, and that as the plaintiff did not see fit to make the indorsee a defendant, it was beyond the power of his co-defendant to have him brought in. That case rests upon an entirely different theory from this one. There the obligation was joint and several and here the obligation is joint and, as we have hereinbefore stated, a joint obligation will not support a judgment in an action brought against but one of the joint obligors. *Erskine v. Russell*, 43 Colo. 449, 455, 96 P. 249, cited in notes, 52 L. R. A. (N. S.) 970, Ann. Cas. 1916E, 796.

But, see *Mattison v. Childs*, 5 Colo. 78, cited in notes, 68 Am. Dec. 762, 67 A. L. R. 639, wherein it is said that under this subdivision, an action upon a joint note may be maintained against both jointly, or either, separately. The survivor and the executor of a deceased joint maker cannot, however, be joined in the same action, and in such case it is irregular to proceed against the

executor without dismissing the complaint as to the survivor.

Firm debts are joint obligations, and not joint and several, and action therefor must be brought against the firm, and not against an individual member; and hence, in an action against an individual for rent under a lease signed by him, where it appeared that the lease was made to defendant's firm and that defendant was not acting in his individual capacity, the partner should be made a party to the suit. *Erskine v Russell*, 43 Colo. 449, 96 P. 249, cited in notes, 52 L. R. A. (N. S.) 970, Ann. Cas. 1916E, 796.

This subdivision does not apply to partnership obligations. An action cannot be maintained against the executor or administrator of a deceased partner upon a partnership contract, whether such contract be written or oral, unless it be shown that the partnership has been finally settled, and that the partnership assets are insufficient to pay the firm debts. *Thompson v White*, 25 Colo. 226, 54 P. 718, cited in note, 21 A. L. R. 279.

But where the obligation is joint and several the action is proper against either of the joint makers. *Milner Bank, etc., Co., v Estate of Whipple*, 61 Colo. 252, 255, 156 P. 1098, citing *Cone v Eldridge*, 51 Colo. 564, 119 P. 616, cited in note, 74 A. L. R. 385; *Hamill v Ward*, 14 Colo. 277, 23 P. 330, cited in notes, Ann. Cas. 1914A, 1107, 1110.

This was a judgment against appellant individually. He says the obligation sued on was one of a partnership, of which he, appellant, was a member, and that a personal judgment could not be taken against him in this character of an action. Decisive of this contention is the fact shown, by undisputed testimony, that the obligation in suit was the joint and several contract in writing of the individuals, A, B, and C. This being true, plaintiff was entitled to sue any one or more of them. *Doyle v Nesting*, 37 Colo. 522, 527, 88 P. 862, cited in notes, Ann. Cas. 1912A, 782, 27 A. L. R. 113. See *Lux v McLeod*, 19 Colo. 465, 36 P. 246, cited in notes, L. R. A. 1915A, 852, Ann. Cas. 1916C, 1226, 1231.

Under this subdivision the holder of a note who sues the maker and indorser as joint makers, dismisses as to the indorser, without prejudice, and obtains judgment against the maker, may afterwards sue the indorser. *Hamill v Ward*, 14 Colo. 277, 23 P. 330, cited in notes, Ann. Cas. 1914A, 1107, 1110.

The obligee in a bond given on appeal from a justice of the peace to the county court may, if he so elects, sue the surety thereon without joining the principals; or having joined them and not having procured

service of summons upon them, may proceed against the defendant served as if he were the only defendant. *Lux v McLeod*, 19 Colo. 465, 36 P. 246, cited in notes, L. R. A. 1915A, 852, Ann. Cas. 1916C, 1226, 1231.

And where the liability is several the parties may be joined.—Upon a contract expressing a several liability of the defendants they may, under this subdivision, be joined in an action thereon. This construction is in accord with the reform spirit and express purpose of the code practice. *Irvine v Wood*, 7 Colo. 477, 4 P. 783.

It is perfectly proper to unite in one suit both the maker and the acceptor of such an instrument (order). *Hughes v Fisher*, 10 Colo. 383, 386, 15 P. 702, cited in notes, 14 Am. St. Rep. 793, 5 L. R. A. 617, 26 L. R. A. 622, Ann. Cas. 1912B, 446, 13 A. L. R. 253, 266.

A corporation publishing certain newspapers executed to A a written lease of a certain carrier's route, in several clauses, specifying the obligations and liabilities of each party. At the foot of the paper, under the title, "Guarantee," was a writing subscribed by A and two others, whereby it was provided that in consideration of the lease the three subscribers "guarantee and obligate themselves" to the corporation, that A "shall faithfully perform each and all of the terms of the above contract, and that in case of his failure, the other subscribers, upon demand, and the presentation of an itemized statement, etc., will pay to the corporation "all damages in full," but limiting the liability of the three subscribers, "as sureties under this contract," to a sum specified. Held, that inasmuch as the contract of leasing, and the supplemental undertaking of the three were made at the same time, upon a single consideration, that the latter was executed by A as well as by the others, that the word surety appears, as well as the word guarantee, that all of the parties subscribed the later agreement, and all thereby obligate themselves, absolutely, to pay at a fixed time, without reference to the solvency of A, the supplemental agreement must be regarded as one of suretyship, and not of guarantee; that the subscribers were liable severally as well as jointly; and that the failure to serve a statement of the damages upon one of the sureties did not affect the liability of the other. *News-Times Pub. Co. v Doolittle*, 51 Colo. 386, 118 P. 974.

One who has indorsed a promissory note previous to its delivery is a maker, and the obligation is joint and several. *Tabor v Miles*, 5 Colo. App. 127, 38 P. 64, cited in note, 72 Am. St. Rep. 477.

A receiver and purchaser of a railroad are both proper parties in an action for damages.—Where a passenger on a railroad was killed after a foreclosure sale of

the road, but before the sale had been consummated and while the road was still being operated by a receiver, and the decree of foreclosure provided that the purchasers should take the property upon condition that they should pay all indebtedness, obligations or liabilities legally contracted or incurred by the receiver before the delivery of possession, to the extent that the assets or proceeds in the hands of the receiver were insufficient for that purpose, and the property was conveyed to the purchaser and the receiver was discharged under an order which provided that the discharge should not operate to prevent the prosecution in the name of the receiver of any suit then pending, or from defending any suit then pending or which might thereafter be brought against him as such receiver, the receiver and purchaser were both proper parties defendant to an action for damages for the death of such passenger brought after the discharge of such receiver, but within the time limited for bringing such actions. *Denver, etc., R. Co. v. Gunning*, 33 Colo. 280, 80 P. 727, cited in notes, L. R. A. 1916C, 866, Ann. Cas. 1915A, 701, 10 A. L. R. 1057, 74 A. L. R. 17, 46, 56.

But this subdivision does not apply to an action against two persons, who, acting separately, deprive plaintiff of what belongs to him by the terms of a lease, as they are in no sense liable jointly or severally as contemplated. *Millard v. Miller*, 39 Colo. 103, 88 P. 845, cited in notes, 40 L. R. A. (N. S.) 105, 9 A. L. R. 943, 94 A. L. R. 542.

Thus where two parties, acting separately, appropriated to their respective use certain pastures belonging to plaintiff, the liability, if any, against them is several, and must be availed of, if at all, in separate actions. *Id.*

Obligation, as employed in this subdivision does not embrace or apply to oral contracts. *Exchange Bank v. Ford*, 7 Colo. 314, 3 P. 449, cited in notes, 43 L. R. A. 166, 10 A.

L. R. 562, 580; *Townsend v. Heath* (Colo.), 103 P. (2d) 691.

It is argued that giving this restricted meaning to the word "obligation," in this subdivision renders the word "instrument" entirely superfluous; that "instrument" includes all written contracts, sealed as well as simple; and that unless we assent to the proposition that "obligation" includes oral contracts, we violate the rule requiring effect to be given, if possible, to all the language used. But the use of the word "obligation," under the common law, was originally confined to sealed instruments of a certain kind; and courts have not always given it the significance we have adopted. *Exchange Bank v. Ford*, 7 Colo. 314, 3 P. 449, cited in notes, 43 L. R. A. 166, 10 A. L. R. 562, 580.

In *Exchange Bank v. Ford*, 7 Colo. 314, 3 P. 449, cited in notes, 43 L. R. A. 166, 10 A. L. R. 562, 580, the court had under consideration the meaning to be given to the word "obligation" in this subdivision, as therein used to designate the contract itself; and in a very able and well reasoned opinion held that the word, when so used, referred to a written instrument; and in announcing its conclusion, laid down what we take to be the correct distinction, as follows: "As the result of our investigation, we feel justified in stating the conclusion that whenever the word obligation is used in a statute as the name of a contract—as it is in this subdivision—an agreement in writing, sealed or unsealed, is referred to; where, in a legislative provision, it is used with reference to legal duty or liability, such duty or liability may arise from an oral or written contract, or, in some instances, from actionable tortious conduct. * * * The word is used in statutes, as well as in textbooks and decisions, with these different meanings, and the significance to be given it in each statute must be gathered from the purpose and context of the enactment." *Sawyer v. Armstrong*, 23 Colo. 287, 289, 47 P. 391, cited in note, 43 L. R. A. (N. S.) 542.

Rule 21. Misjoinder and Non-Joinder of Parties.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Cross reference.—For a discussion of this rule, see Address no. 6, appx. D.

Formerly, misjoinder made necessary the dismissal of the complaint.—Prior to the

adoption of the new rules, a misjoinder of a party plaintiff having no interest and to whom no relief could be granted made necessary the dismissal of the complaint. *Eliot v. Geare-Marston*, 30 F. Supp. 301, 307.

But now, misjoinder is not ground for dismissal of action. *Eliot v. Geare-Marston*, 30 F. Supp. 301.

Illustrations.—That title to patent may have been in only two plaintiffs and not in the three plaintiffs suing to enjoin infringement of patent did not require dismissal of infringement suit. *Gillman v. Stern*, 114 F. (2d) 28.

A suit to enforce double liability of shareholders of joint stock land bank was not subject to dismissal on ground of misjoinder of parties complainant and of parties defendant. *Holmberg v. Hannaford*, 28 F. Supp. 216.

Nor is misjoinder a defense.—Misjoinder of plaintiffs is not a ground for dismissal, and, therefore, not a defense. *Macleod v. Cohen-Erichs Corp.*, 28 F. Supp. 103.

The suitable remedy in such a case is to drop the party who has been improperly joined. *Diepen v. Fernow*, 1 F. R. D. 378, 379.

Improper joinder of automobile insurer in action against insured did not authorize allowance of motions to dismiss the entire action, but only of insurer's motion, so far as it pertained to insurer. *Jennings v. Beach*, 1 F. R. D. 442.

Where liability insurer was wrongfully joined as defendant in original action against assured by receivers, insurer would be dismissed, but without prejudice to right of receivers to apply later for relief against insurer. *Pitcairn v. Rumsey*, 32 F. Supp. 146.

Or separate the claims for trial.—Where the United States and the Tennessee Valley Authority were improperly joined as defendants, the petition ought not to be dismissed, but the claims should be separated for trial with repleader if advisable. *Lynn v. United States*, 110 F. (2d) 586.

A motion to dismiss action for misjoinder of causes of action in two counts

against three defendants on one note and two of such defendants on another note should be denied, as such counts may be deemed completely severed and case considered on merits as if two actions were pending, unless two causes appear appropriate for consolidation under Rule 42. *Federal Housing Administration v. Christianson*, 26 F. Supp. 419.

A motion to dismiss complaint does not properly raise question of misjoinder of parties. *Taiyo Trading Co. v. Northam Trading Corp.*, 1 F. R. D. 382.

Parties may be added.—If plaintiff is entitled to recover against defendant in an action at law, it makes no difference that another may be liable over to defendant, and motion to dismiss for want of such parties will not lie. The new rules provide that defendant may bring other parties, but not that the suit shall be dismissed for lack of such parties. *Texas, etc., Ry. Co. v. Elgin, etc., Ry. Co.*, 1 F. R. D. 136.

In patent infringement suit where it was alleged that another corporation was jointly liable with defendant for infringing patents involved, and that it could be properly joined as a defendant, the joining of such corporation as a defendant was proper. *Boysell Co. v. Franco*, 26 F. Supp. 421.

A motion to add new parties plaintiff need not be made by such parties in order to be granted, in view of this rule, providing that parties may be added by court order on motion of any party or of court's own initiative. *Society of European Stage Authors, etc. v. WCAU Broadcasting Co.*, 1 F. R. D. 264.

New rules applied where fair and feasible.—Where demurrers were filed two days prior to effective date of Federal Rules abolishing demurrers and eliminating misjoinder of parties as ground for dismissal of an action, and application of new rules would not work injustice and was feasible, demurrer based on misjoinder of parties should have been overruled. *Weaver v. Mark*, 112 F. (2d) 917.

For a short note in comparison of cases arising under this rule, see article entitled, "Misjoinder and Non-Joinder of Parties Under the New Federal Rules" by Mr. Philip Alan Rouse, *Rocky Mountain Law Rev.*, vol. 13, p. 76.

Rule 22. Interpleader.

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20. [Supplants Code Sec. 18.]

Committee Note.

This is Federal subdivision (1). Subdivision (2) is omitted. For additional parties defendant, on counter-claim for interpleader, see Rule 13 (h).

Cross references.—As to form of complaint for interpleader and declaratory relief, see Form 14, appx. A. As to answer to complaint, see Form 17, appx. A. For a discussion of this rule, see Lecture No. 6, appx. D.

Editor's note.—For cases construing § 18 of the Code of Civil Procedure which provided for a limited sort of interpleader, see *Fisher v. Hanna*, 8 Colo. App. 471, 492, 47 P. 303; *Engineers' Const. Corp. v. Tolbert*, 74 Colo. 542, 543, 223 P. 56; *Price v. Lucky Four Gold Min. Co.*, 56 Colo. 163, 136 P. 1021.

This subdivision recognizes interpleader as the converse of joinder in the alternative accorded to the plaintiff in Rule 20, and as a consequence materially liberalizes the old equity practice on bills of interpleader and bills in the nature of interpleader along the modern lines of joinder in the alternative. See 2 Moore's Fed. Prac. 2192.

Plaintiff may have some personal interest in subject matter.—The fact that plaintiff has some personal interest in subject matter does not preclude plaintiff from maintaining a bill in the nature of interpleader. *Standard Surety, etc., Co. v. Baker*, 105 F. (2d) 578.

And claims need not be identical.—Where surety on security dealer's bond was confronted with multiplicity of suits on some 70 claims, the aggregate amount of which exceeded surety's liability, and claimants were citizens of various states, the surety could maintain bill in nature of a bill of "interpleader," notwithstanding the surety denied

validity of claims against it and had some personal interest in the subject matter, and notwithstanding the claims did not have a common origin, and were not identical. *Standard Surety, etc., Co. v. Baker*, 105 F. (2d) 578.

But claims must be on same obligation.—Under this rule authorizing interpleader of persons having claims which may expose plaintiff to double or multiple liability, the "double or multiple liability" must be on the same obligation, and a plaintiff which was not under the same obligation to any two claimants against it could not rely on this rule. *Standard Surety, etc., Co. v. Baker*, 26 F. Supp. 956.

Since mere multiplicity of suits is no ground for interpleader.—"Plaintiff must have some right to equitable relief against the several claimants touching the identical subject matter. That cannot be true here, where the claimants do not seek to reach the same subject matter. Moreover, the plaintiff has no claim to equitable relief against any claimant as to any subject matter. That is an essential of a bill in the nature of a bill of interpleader. The suggestion that that essential is satisfied by showing a multiplicity of suits instituted or threatened we think is untenable. Under some circumstances, there is jurisdiction in equity to enjoin a multiplicity of suits, but the equitable relief essential to a bill in the nature of a bill of interpleader is equitable relief concerning some fund or subject matter, not merely relief against multiplicity of suits." *Standard Surety, etc., Co. v. Baker*, 26 F. Supp. 956, 958.

Rule 23. Class Actions.

(a) **Representation.** If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought. [Supplants the second half of Code Sec. 12.]

(b) **Secondary Action by Shareholders.** In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall aver that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

(c) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

I. Representation.

A. General Consideration.

B. When Primary Owner Refuses to Sue.

C. When Common Question of Law or Fact Exists.

II. Secondary Action by Shareholders.

III. Dismissal or Compromise.

Cross Reference.

For a discussion of this rule, see Address no. 6, appx. D.

I. REPRESENTATION.

A. General Consideration.

A person seeking to bring a class action must first establish himself as fairly and honestly representative of the class for whom he seeks to act. *Peelias v. Caterpillar Tractor Co.*, 30 F. Supp. 173, 176.

Plaintiff, in class action against a former employer to compel accounting for dividends paid by insurer to employer under group policy, did not fairly insure the adequate representation of those he proposed to represent as required by this rule, where plaintiff and his counsel resided many hun-

dreds of miles from the seat of the court, plaintiff was not and had not been for more than three years employed by defendant or insured, his interest was small, and there was no averment that other persons had made claim similar to his or were asserting such claims or had asked that action be brought. *Pelelas v. Caterpillar Tractor Co.*, 113 F. (2d) 629; *Pelelas v. Caterpillar Tractor Co.*, 30 F. Supp. 173.

This is question of fact for the court.—It is a condition precedent to the existence of the right to maintain a class action that the court find that the plaintiff's suit will fairly insure the adequate representation of all. This raises a question of fact for the trial court upon which it passes judicially. *Pelelas v. Caterpillar Tractor Co.*, 113 F. (2d) 629, 632; *Pelelas v. Caterpillar Tractor Co.*, 30 F. Supp. 173.

Complaint may be amended so as to become a class suit.—Where complaint seeking specific performance of contract stated that complainant was a certain labor organization, an unincorporated association, the complaint was subject to amendment so as to become a class suit. *Moreschi v. Mosteller*, 28 F. Supp. 613.

Rule applied.—Where employer alleged that regional director of wage and hour law claimed that employer's method of compensating employees violated the law and threatened to compel employer to alter its employment agreement, and that director claimed that he had been designated by an employee to bring suit against employer as employee's representative, employer was entitled to maintain action for declaratory judgment against director and employees as class representatives notwithstanding highest enforcement officers, administrator of the wage and hour division, and attorney general of the United States were not made parties. *Belo Corp. v. Street*, 35 F. Supp. 430.

A nonresident holder of special improvement bonds could maintain a class action against the municipality to have determined amount due by municipality on account of paving improvements abutting municipally owned property in improvement district without alleging that persons were so numerous as to make it impossible to bring them all before the court, where any funds bondholder might compel city to pay would go into a fund for payment of all bonds issued under improvement district. *Hovenden v. Bristow*, 34 F. Supp. 674.

Federal.—International unions which were unincorporated associations of seven or more members, some of whom were residents of New Jersey, failed to establish "diverse citizenship" to authorize suit against New Jersey residents, and unions' remedy was in a class action where only citizenship of representative or representa-

tives, need appear. *International Allied Printing Trades Ass'n v. Master Printers Union*, 34 F. Supp. 178.

B. When Primary Owner Refuses to Sue.

Suit by minority stockholders.—Representative suit by and on behalf of minority stockholders for fraud and mismanagement would not be dismissed except with prejudice, or resumption of trial would be required, after issues of fraud and mismanagement had been raised without corporation having had opportunity to refute the allegations. *Delahanty v. Newark Morning Ledger Co.*, 26 F. Supp. 327.

Representative suit by and on behalf of stockholders for alleged mismanagement and dissipation of assets was subject to dismissal with prejudice, after offer and acceptance of settlement had been confirmed, and all plaintiffs and majority of preferred stockholders had sold their stock to corporation created for such purpose. *Sauer v. Newhouse*, 26 F. Supp. 326.

C. When Common Question of Law or Fact Exists.

A class action, based on common question of law or fact, by one member of class, is proper. *National Hairdressers' Ass'n. etc., v. Philad. Co.*, 34 F. Supp. 264.

Thus, a small minority of numerous interested parties may maintain a class suit in behalf of themselves and others, similarly situated, for an object common to them all. *Waybright v. Columbian Mut. Life Ins. Co.*, 30 F. Supp. 885. See also, note under analysis line, Secondary Action by Shareholders.—Ed. note.

Operators of gasoline service stations could sue on behalf of all similarly situated parties to enjoin violations of anti-trust laws through differentials in prices of tank car lots of gasoline sold to tire companies and tank wagon or truck lots sold to plaintiffs by oil companies, but for the recovery of damages each member of the class was required to intervene to assert and prove such damages to himself. *Alabama Independent Service Station Ass'n v. Shell Petroleum Corp.*, 28 F. Supp. 386.

As could defrauded purchasers where misrepresentations were common to all sales.—An action by purchasers allegedly defrauded in the sale of securities to recover consideration paid could be maintained under the Securities Act as a "spurious class suit" brought by purchasers on their own behalf and for the benefit of all purchasers similarly situated, where misrepresentations set forth were alleged to be common to the sales made to purchasers named as plaintiffs and other purchasers on whose behalf action was instituted. *Independence Shares Corp. v. Deckert*, 108 F. (2d) 51.

But a class action is not maintainable where each member is not similarly situated. —In employee's action against employer to recover, in employee's behalf and in behalf of employer's former and present employees, unpaid minimum wages and overtime compensation allegedly due under Fair Labor Standards Act, complaint was not maintainable as a "class action" where it was not alleged that each employee was similarly situated and it was apparent that as to respective employees there would be differences as to time worked, wages due, and hours of overtime. *Saxton v. Askew Co.*, 35 F. Supp. 519.

In action by holders of two of corporation's outstanding certificates of indebtedness for balance due on profit-sharing certificates issued to them, complaint stated no cause of action by plaintiff and others similarly situated as a class, since rights of each former and present holder of such certificates depended on different facts, such as when he acquired certificates, how long he held them, and what was paid him and what corporation's profits were while he held them. *Johnson v. Beneficial Loan Soc.*, 34 F. Supp. 392.

II. SECONDARY ACTION BY SHAREHOLDERS.

Editor's note.—The provision with respect to collusions to confer jurisdiction have been stricken as unnecessary to a state rule.

Under this rule, the making of a demand on officers and directors is condition precedent to stockholder's action or to intervention therein, and application to intervene therein is defective if unaccompanied by a proposed pleading. *Bachrach v. General Inv. Corp.*, 29 F. Supp. 966.

Amendment must be alleged.—Where complaint of stockholder seeking an accounting listed twelve grounds of misconduct of directors, but did not show that matters were particularly brought to attention of directors and stockholders, or that any action was specifically requested, and did not allege that corporation was under domination of others to such an extent that proper demand would not have been considered, complaint was required to be dismissed for failure to comply with this rule. *Isaac v. Milton Mfg. Co.*, 33 F. Supp. 732.

Under this rule requiring the setting forth with particularity efforts made by complaining stockholder to secure action by managing directors and shareholders or in the alternative showing good cause why no request was made, failure to meet the requirement of particularity is a fatal defect requiring dismissal of a bill. *Id.*

Complaint must also allege that plaintiffs were shareholders.—In class action by stockholders, complaints not alleging that

plaintiffs were stockholders at time of transactions complained of were fatally defective. *Robbins v. Sperry Corp.*, 1 F. R. D. 229.

As a condition precedent to any consideration of the allegations in the complaint it must appear affirmatively that plaintiff was a shareholder and how and when she became such. *Gallup v. Caldwell*, 32 F. Supp. 711, 712.

Since there is no recovery based on transaction before plaintiff became stockholder.

—In stockholder's suit for accounting for mismanagement of corporation, plaintiff must allege and prove that he was a shareholder at time of transaction of which he complains, or that his holding had since come to him by operation of law, since there can be no recovery based on transaction occurring prior to time when he became a stockholder. *Rinn v. Asbestos Mfg. Co.*, 101 F. (2d) 344.

Whether derivative suit is authorized depends upon circumstances.—Whether refusal by board of directors to bring suit for corporation was wrongful, so as to authorize derivative suit by stockholders, depends upon all the circumstances. *Fleishkacker v. Blum*, 109 F. (2d) 543.

Federal.—It was held in *Jablow v. Agnew*, 30 F. Supp. 712, that the Federal Rule does not apply to cases removed from state court on grounds of federal question notwithstanding general provision that "These rules apply to civil actions removed to the District Courts of the United States from the state courts."

III. DISMISSAL OR COMPROMISE.

This subdivision changed the prevailing rule.—Under practice prevailing in 1933, it was not necessary that court fix attorney's fees on settlement of stockholders' derivative and representative action, but the corporation and attorney for stockholder could arrive at a figure as a reasonable fee for his services, since present rule requiring notice to stockholders of settlement or dismissal of derivative action did not then prevail. *Rogers v. Hill*, 34 F. Supp. 358.

It applies only to voluntary dismissals, and is intended to prevent a collusive dismissal by plaintiff of an action in which others may be legitimately interested, and does not apply to an order of dismissal of the court on the merits. *Peuelas v. Caterpillar Tractor Co.*, 113 F. (2d) 629.

And not to dismissal by court after hearing on merits.—The notice herein provided for is required in case of voluntary dismissal or compromise of a class action, so as to limit the power of the named plaintiff to terminate the suit which he has brought for others as well as for himself. It was never intended, of course, that such notice should be a condition precedent to dismissal by

the court after hearing on the merits. *Hutchinson v. Fidelity Inv. Ass'n*, 106 F. (2d) 431, 436.

In suit for appointment of receiver for corporation engaged in selling annuity contracts, judgment dismissing complaint after hearing on merits could be entered without notice to all contract holders of association. *Id.*

Application.—Representative suit by and on behalf of minority stockholders for fraud by majority stockholders and directors, and mismanagement by directors, could not be dismissed except on notice to minority stockholders and approval of the court. *Delahanty v. Newark Morning Ledger Co.*, 26 F. Supp. 327.

Under this rule, plaintiffs in stockholders' suit had no absolute right to discontinue

as against defendant removing to federal court, and their motion to remand must be denied. *Robbins v. Sperry Corp.*, 1 F. R. D. 220.

Where creditor in representative suit obtained a decree for an accounting of assets of bank allegedly improperly converted to defendant's use and bank's receiver petitioned for order permitting him to compromise indebtedness found by decree and court authorized receiver to make compromise requested, this rule precluding dismissal or compromise of a class action without notice to members of class was inapplicable since suit was no longer a class action but represented a judgment for benefit of bank's receiver, who was entitled to petition for leave to compromise. *Chlupsa v. Posvic*, 113 F. (2d) 375.

Rule 24. Intervention.

(a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof. [Supplants Code Secs. 17 and 22.]

(b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) When a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. [Supplants Code Secs. 17 and 22.]

(c) **Procedure.** A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. [Supplants Code Secs. 22 and 23.]

- I. General Consideration.
- II. Intervention of Right.
- III. Permissive Intervention.
- IV. Procedure.

Cross Reference.

For a discussion of this rule, see Address no. 6, appx. D.

I. GENERAL CONSIDERATION.

Editor's note.—Throughout this rule the reference to statutes of the United States has been deleted.

The new rules must be liberally construed to avoid a multiplicity of suits, and all related controversies should as far as possible be settled in one action. *Brotherhood of Locomotive Engineers v. Chicago, etc., R. Co.*, 34 F. Supp. 594.

Prompt action is required on part of intervenor.—Courts are unanimous in requiring prompt action on the part of an intervenor who seeks to assert rights in a suit to which he is not a party. *United States v. Columbia Gas, etc., Corp.*, 27 F. Supp. 116, 119.

Petition of alleged bondholder of defendant company to intervene for purpose of taking an appeal from decree refusing confirmation of public sale of defendant company's property to one company and confirming a sale to another company, was not "timely filed" within meaning of this rule and would be denied, where proceedings were originally instituted about seven years before petition was filed, all bondholders had ample notice within last two years of status of proceedings, and sale was regarded by others as satisfactory and there was no assurance that a higher price could be obtained. *Baltimore Trust Co. v. Inter-ocean Oil Co.*, 30 F. Supp. 484.

Petitions for intervention after a decree are very unusual and are seldom granted. *Baltimore Trust Co. v. Inter-ocean Oil Co.*, 30 F. Supp. 484.

The intervening litigation must be related to that opened by original complaint.—An intervention introducing litigation having no relation to that opened by original complaint will not be permitted. *Babcock v. Erlanger*, 34 F. Supp. 293.

Intervention must be in subordination to and in recognition of the main litigation, and that intervention may not be allowed solely to attack jurisdiction. *Dolcater v. Manufacturers, etc., Trust Co.*, 25 F. Supp. 637, 640.

In action against city by buyers of water works bonds, to cancel contract for purchase of bonds and to recover money advanced by buyer to city, contractors employed by city to build water works system would not be permitted to intervene on ground that city would not vigorously defend the action. *Babcock v. Erlanger*, 34 F. Supp. 293.

Federal.—This rule amplifies and restates both at law and in equity the federal practice at the time of its adoption. The cases prior to the adoption of the rule are therefore in point on this question. *Babcock v. Erlanger*, 34 F. Supp. 293, 295.

Where stockholder's action against directors and corporation had been dismissed prior to adoption of Federal Rules, the rule relating to intervention did not apply to the litigation, but former equity rule applied on motion to reopen case and to permit intervention. *Rogers v. Hill*, 34 F. Supp. 358.

II. INTERVENTION OF RIGHT.

Cross reference.—As to form of motion to intervene as a defendant under this rule, see Form 19, appx. A.

This rule should be liberally interpreted.—This rule, that any one shall be permitted to intervene in action when representation of his interest by existing parties is or may be inadequate and he is or may be bound by judgment in action, should be liberally interpreted. *United States v. Lane Lifeboat Co.*, 25 F. Supp. 410.

But the person seeking intervention must have a legal interest in the property in custody of court.—The provision of this rule for intervention of right when applicant is so situated as to be adversely affected by distribution or disposition of property in custody of court or officer thereof contemplates that person having right of intervention should have legal interest in property in the custody of court. *United States v. Columbia Gas, etc., Corp.*, 27 F. Supp. 116.

It would produce chaos to require the courts to recognize the absolute right to intervention of strangers who had no legal or equitable interest in the subject matter of the action. *Id.*

Scope of clause (2).—Clause (2) of this rule relates to cases in which the applicant for intervention has an interest in the action represented by a party so that the applicant may be bound by a judgment in the action. *United States v. Columbia Gas, etc., Corp.*, 27 F. Supp. 116, 119.

Determining right of intervention.—In action against city to cancel contract for purchase of water works bonds, question of intervention of contractors employed by city to build water works system, as a matter of right, or by permission of court, depended on whether intervening petitions stated causes of action against complainant. *Babcock v. Erlanger*, 34 F. Supp. 293.

Application granted.—A petition for permission to intervene as interested party defendant in pending action will not be denied on ground of prejudice to plaintiff in granting defendant opportunity for two opening statements to jury and additional and special examination and cross-examination, as such matters may be left to trial judge's control. *United States v. Lane Lifeboat Co.*, 25 F. Supp. 410.

Application denied.—Where receivership litigation had been going on since 1932, and

foreclosure action since 1935, a person who owned notes, bonds, and stock, and who had taken an active part in court hearings and had been familiar with situation for years, and who had asserted incompetence and faithlessness of parties representing his interests at least as early as July, 1938, was not entitled as of right to intervene in September, 1939, after a plan for settlement had been drawn up on assumption that no party to proceedings was attacking validity of pledged bonds, nor was denial to intervene under subsec. (b) an abuse of discretion. *American Brake Shoe, etc., Co. v. Interborough Rapid Transit Co.*, 112 F. (2d) 669.

An application for leave to intervene as parties plaintiff in stockholder's derivative action against former officers and directors for an accounting for assets allegedly diverted and dissipated would be denied as a matter of discretion, where other suits involving same subject matter were pending in both state and federal courts, and interest of applicants and all other stockholders would be amply protected, and application was not accompanied by a proposed pleading, and was not filed until just before the trial. *Bachrach v. General Inv. Corp.*, 29 F. Supp. 966.

III. PERMISSIVE INTERVENTION.

Permissive intervention under this rule is within discretion of trial court and can be reviewed only for abuse. *American Brake Shoe, etc., Co. v. Interborough Rapid Transit Co.*, 112 F. (2d) 669.

In foreclosure action where mortgaged property was sold under foreclosure judgment preserving prior liens, right to intervene of petitioners, who held stock in corporation which had leased mortgaged property to mortgagor under lease providing that part of rent was payment of 7 per cent upon shares in lessor held by petitioners, was "permissive," and within court's discretion, and hence appeal did not lie from judgment denying petition to intervene. *Palmer v. Guaranty Trust Co.*, 111 F. (2d) 115.

In exercise of which, court should consider whether intervention will unduly delay or prejudice adjudication of rights of original parties. *Carpenter v. Wabash Ry. Co.*, 103 F. (2d) 996.

This codifies prior equity practice.—The provision of this rule that in exercising discretion in permitting intervention of applicant whose claims and main action have question of law or fact in common, court shall consider whether intervention will unduly delay or prejudice adjudication of rights of original parties, codifies prior equity practice. *United States v. Columbia Gas, etc., Corp.*, 27 F. Supp. 116.

But this does not mean the court may consider only such delay or prejudice.—The rule regarding permissive intervention, providing that in exercising its discretion the court shall consider whether intervention will unduly delay or prejudice adjudication of the rights of the parties, does not mean that in exercising discretion the court may consider only such delay or prejudice. *Tachna v. Insuranshares Corp.*, 25 F. Supp. 541.

Thus, a person who can show an interest in property in custody of court has a permissive right to intervene.—Under this rule, a party who can show an interest in property which is in possession of corporate debtor and in custody of bankruptcy court following appointment of temporary trustee in corporate reorganization proceeding, has at least a permissive right to intervene in the proceeding. *Seaboard Terminals Corp. v. Western Maryland Ry. Co.*, 108 F. (2d) 911.

Applicant must show necessity of intervention to protect his rights.—In receivership proceeding, leave to intervene will not be granted to an individual creditor whose claim has been filed and whose status has been determined, where no reason appears why claim may not ultimately be disposed of in like manner as other claims of same nature without necessity of special intervention. *Carpenter v. Wabash Ry. Co.*, 103 F. (2d) 996.

In stockholder's suit in Massachusetts federal District Court against Delaware corporation and other defendants who were Massachusetts citizens, to enforced cause of action against the Massachusetts citizens allegedly belonging to the corporation, the court in exercise of its discretion would deny motions for leave to intervene by other stockholders who were citizens of Massachusetts, in absence of showing that their rights would be inadequately protected unless intervention were permitted, in view of possibility that such intervention might deprive the court of jurisdiction. *Tachna v. Insuranshares Corp.*, 25 F. Supp. 541.

While it is permissible to add prior encumbrancers as defendants in a foreclosure action brought in a federal court, it is not necessary to do so when the sale protects their rights. *Palmer v. Guaranty Trust Co.*, 111 F. (2d) 115.

But a direct or pecuniary interest is not required.—This rule plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation. *Securities, etc., Comm. v. United States Realty, etc., Co.*, 310 U. S. 434, 60 S. Ct. 1044, 1055; *Brotherhood of Locomotive Engineers v. Chicago, etc., R. Co.*, 34 F. Supp. 594.

Thus, the securities and exchange commission was entitled to intervene in arrangement proceeding for an extension and modi-

fication of debtor's unsecured guaranty of publicly held mortgage certificates issued by debtor's subsidiary. *Securities, etc., Comm. v. United States Realty, etc., Co.*, 310 U. S. 434, 605 S. Ct. 1044, reversing *In re United States Realty, etc., Co.*, 108 F. (2d) 794.

However, an applicant for intervention can not introduce issues outside the scope of the issues raised in the main suit. *United States v. Columbia Gas, etc., Corp.*, 28 F. Supp. 168, 170.

The range of activity of intervener in prosecution or defense of the interest he is permitted to assert must be as extensive as but no greater than that allowed original parties to the suit. *United States v. Columbia Gas, etc., Corp.*, 27 F. Supp. 116.

Application granted.—A corporation was entitled to intervene in corporate reorganization proceeding to assert ownership of property which allegedly constituted chief asset of the debtor corporation, and to assert execution of lease to the debtor, debtor's default under lease and intervening corporation's desire to exercise its right to re-enter and take possession of the property, the intervention not being an attempt to answer the petition but merely to establish or release intervenor's rights under specified transactions. *Seaboard Terminals Corp. v. Western Maryland Ry. Co.*, 108 F. (2d) 911.

Where distributor of oil was liable, under consignment agreements with refiner, to pay any federal unemployment taxes that refiner might be forced to pay with respect to wages of distributor's employees, distributor should be permitted to intervene in action by refiner to recover sums paid as such taxes. *Indian Refining Co. v. Dallman*, 31 F. Supp. 455.

IV. PROCEDURE.

Editor's note.—The last part of the Federal Rule referring to procedure under a federal statute, has been omitted as inapplicable to a state rule.

The pleading accompanying motions to intervene should set up interests of intervener. *Babcock v. Erlanger*, 34 F. Supp. 293.

Where it appeared that suit for a declaratory judgment could not be maintained without the presence of another party as plaintiff and an order was entered permitting the intervention of such party, but intervener filed no pleading setting forth its claim, motion for want of jurisdiction would be denied, since there was nothing upon which to act, but the complaint would be dismissed for want of an indispensable party. *Paasche v. Atlas Powder Co.*, 31 F. Supp. 31.

Rule 25. Substitution of Parties.

(a) Death.

C (1) If a party dies and the claim is not extinguished or barred, the court may order substitution of the proper parties. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of process; provided that, if the service upon persons not parties be made by publication, the publication of the notice shall be sufficient without the publication of the motion, but in such case the notice shall state the names of the persons who are sought to be substituted upon whom the service by publication is made. [Supplants part of Code Secs. 15, and all of 290.]

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving de-

fendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) **Incompetency.** If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) **Transfer of Interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule. [Supplants part of Code Sec. 15.]

(d) **Public Officers; Death or Separation from Office.** When any public officer is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

C (e) Substitution at Any Stage. Substitution of parties, under the provisions of this rule, may be made by the trial court, either before or after judgment, and by the supreme court in proceedings on writ of error. [New.]

I. Death.

- A. Where Claim Survives in Toto.
- B. Where Claim Survives Only as to Surviving Parties.

II. Incompetency.

III. Transfer of Interest.

IV. Public Offices.

Cross Reference.

For a discussion of this rule, see Address no. 6, appx. D.

I. DEATH.

A. Where Claim Survives in Toto.

Cross reference.—As to actions which abate upon death of party, see vol. 4, ch. 176, § 247.

Editor's note.—It should be noted that the Federal Rule has a two year limitation which is omitted from the state rule. Sec-

tion 15 of the code contained a provision almost identical in substance with the instant subdivision, and therefore cases construing that provision are inserted in this note—not as authority, but rather as an aid to construction.

It should be further noted that the last proviso as to service by publication is entirely new with the state rule.

This rule merely provides the procedure for substitution, it does not affect substantive rights which will determine whether the action abates. See 2 Moore's Fed. Prac. 2427.

It does not define the causes that survive. It merely provides that if the cause survives, the action shall not abate. Clapp v. Williams, 90 Colo. 13, 14, 5 P. (2d) 872.

An action does not abate by the death of a party, if the cause survive or continue. In case of the death of a party, the court may, on motion, allow the action to be con-

tinued by his representative or successor in interest. *Williams v. Carr*, 4 Colo. App. 363, 36 P. 644, cited in notes, 2 A. L. R. 1479, 1480, 88 A. L. R. 251.

Substitution is mandatory.—The substitution of representative of deceased party pursuant to statute and Civil Procedure Rule relating to substitution in the event of the death of a party is mandatory. *Winkelman v. General Motors Corp.*, 30 F. Supp. 112.

Thus, action against deceased cannot be further prosecuted until administrator is substituted.—This suit did not abate by reason of death, but it could not be further prosecuted against the estate of deceased or any liability on that account established against it until his legal representative, the administrator of the estate, was substituted as a party defendant. *First Nat. Bank v. Hotchkiss*, 49 Colo. 593, 597, 114 P. 310, cited in notes, Ann. Cas. 1916A, 590, 41 A. L. R. 182; *Colorado Nat. Bank v. Irvine*, 105 Colo. 588, 101 P. (2d) 30, 31.

Until this step is taken, the action commenced against deceased remains in abeyance. *First Nat. Bank v. Hotchkiss*, 49 Colo. 593, 598, 114 P. 310, cited in notes, Ann. Cas. 1916A, 590, 41 A. L. R. 182, citing *Williams v. Carr*, 4 Colo. App. 363, 36 P. 644, cited in notes, 2 A. L. R. 1479, 1480, 88 A. L. R. 251; *Colorado Nat. Bank v. Irvine*, 105 Colo. 588, 101 P. (2d) 30, 31.

An action upon a promissory note commenced by the payee does not abate upon the death of the plaintiff, but remains in abeyance a reasonable time until a representative can be appointed and qualified, who may be substituted and the suit proceed to judgment. *Williams v. Carr*, 4 Colo. App. 363, 36 P. 644, cited in notes, 2 A. L. R. 1479, 1480, 88 A. L. R. 251.

And the administrator is not required to take notice of its pendency or defend until made a party thereto. *First Nat. Bank v. Hotchkiss*, 49 Colo. 593, 598, 114 P. 310, cited in notes, Ann. Cas. 1916A, 590, 41 A. L. R. 182 citing *Symes v. Charpiot*, 17 Colo. App. 463, 69 P. 311, cited in notes, L. R. A. 1918D, 474, 39 A. L. R. 427; *Judson v. Love*, 35 Cal. 463; *Colorado Nat. Bank v. Irvine*, 105 Colo. 588, 101 P. (2d) 30, 31.

Under statute and Civil Procedure Rule relating to substitution of representative of deceased party, the death of defendant places on plaintiff, and not on defendant's executor, the burden of substituting the executor as a party defendant, notwithstanding that executor, if he sees fit, can move to have himself substituted as a party defendant. *Winkelman v. General Motors Corp.*, 30 F. Supp. 112.

However, after such substitution intervenor is not required to move for revivor.—When substitution of parties is made and

the legal representatives appear in the action, the court perceives no valid reason why an intervenor therein, who supports the side of the party bringing about the revival and who originally intervened at the behest of the adverse party, should be required separately to additionally move for a revivor as a condition precedent to the final adjudication of the mutual controversy with the common adversary. *Colorado Nat. Bank v. Irvine*, 105 Colo. 588, 101 P. (2d) 30, 31.

Duty of administrator to defend.—The action commenced against deceased did not abate by reason of his death. It became the duty of the administrator to defend. Under this section he was properly made a party defendant. *Morgan v. King*, 27 Colo. 539, 560, 63 P. 416, cited in notes, L. R. A. 1916A, 587, 10 A. L. R. 370, 378, 89 A. L. R. 1309.

The rule that an administrator cannot be joined in his capacity as administrator with co-defendants in their individual capacity, does not apply where an administrator is substituted in place of a deceased defendant, who died during the pendency of the action. *Id.*

Lien may be enforced by substituting executrix.—If a valid lien existed during the lifetime of deceased, it might be enforced, under our practice, by the substitution of his executrix as a party defendant, and the subsequent rendition of a judgment against her in her representative capacity in favor of the plaintiff. *Thompson v. White*, 25 Colo. 226, 230, 54 P. 718, cited in note, 21 A. L. R. 279.

B. Where Claim Survives Only as to Surviving Parties.

Under this subdivision there need be no substitution. Death need only be suggested on the record and action proceed, when under the substantive law, the right survives as to the remaining parties. See 2 Moore's Fed. Prac. 2430.

II. INCOMPETENCY.

"The principles applicable on substitution because of death are equally applicable to substitution for incompetency." See 2 Moore's Fed. Prac. 2431. See also, note under sub-analysis line A, "Where Claim Survives in Toto."—Ed. note.

III. TRANSFER OF INTEREST.

Transfer may be eliminated as a party.—Where defendant in patent infringement suit filed a counterclaim but subsequently transferred all its interests in patent involved, an order would be entered eliminating such defendant as a party. *Irving Air Chute Co. v. Switlik Parachute, etc., Co.*, 26 F. Supp. 329.

Transferee cannot file a counterclaim foreign to original pleadings.—In patent infringement suit, successor to defendant which had transferred all its interests would not be permitted to file a counterclaim to litigate patents foreign to those in original complaint and counterclaim. *Irving Air Chute Co. v Switlik Parachute, etc., Co.*, 26 F. Supp. 329.

Under this rule the transferee pendente lite of interests of plaintiff in subject matter of suit would be joined as a party plaintiff rather than substituted as party plaintiff. *Vandenbark v Busiek*, 1 F. R. D. 366.

Appeal.—Where original pleading in suit against bank named receiver as a defendant, appeal was addressed to both bank and receiver, appeal bond ran to them, copy of contents of record was served on their counsel, and there was no withdrawal of counsel for either of defendants, appeal would not be dismissed because of failure to make successor receiver a party to the appeal. *Myers v Canton Nat. Bank*, 109 F. (2d) 31.

For cases construing the former state provision (vol. 1, ch. 1, § 15), see *Portland Gold Min. Co. v Stratton*, 196 F. 714, 716; *Metropolitan State Bank v Bisher*, 82 Colo. 421, 422, 260 P. 688; *Perkins v Marrs*, 15 Colo. 262, 25 P. 168, cited in note, 96 A. L. R. 81; *Winchester v Walker*, 59 Colo. 17, 147 P. 343.

IV. PUBLIC OFFICERS.

Editor's note.—This subdivision is substantially the same as the Federal Rule with

the exception that provisions with reference to federal law are omitted.

This rule is mandatory.—The rule governing continuance of action brought by public officer after such officer's death or separation from office is mandatory, and under it action is abated when county officer is a party and ceases to be such officer, but his successor fails to revive within six months. *Oklahoma v Missouri-Kansas-Texas R. Co.*, 29 F. Supp. 968.

In an action to escheat lands brought by the state of Oklahoma on the relation of a county attorney, the county attorney was a "party" within procedural rule governing the continuance of an action when a public officer is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office. *Oklahoma v Magnolia Petroleum Co.*, 114 F. (2d) 111.

Action against state treasurer held not to abate by reason of the expiration of the term of office.—The obligation which relator sought to enforce, if the allegations in the alternative writ were true, was a duty devolving upon no particular state treasurer, but was perpetual, upon the then incumbent of that office, and his successors, unless legally excused; and, consequently, under former § 15, the action would not abate by reason of the expiration of the term of office of the official against whom the action was originally commenced. *Nance v People*, 25 Colo. 252, 257, 54 P. 631, cited in notes, Ann. Cas. 1918A, 207, 1001.

CHAPTER IV
DEPOSITIONS AND DISCOVERY

Rule 26. Depositions Pending Action.

(a) **When Depositions May be Taken.** After jurisdiction has been obtained over any defendant or over property which is the subject of the action the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. [Supplants Code Secs. 376, 382 and 383.]

(b) **Scope of Examination.** Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.

(c) **Examination and Cross-Examination.** Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43 (b). [See also 4 C. S. A., Chap. 177, Sec. 16.]

(d) **Use of Depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions: [Supplants Code Secs. 378 and 379.]

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, body politic, or association which is a party may be used by an adverse party.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2,

that the witness is absent from the state of Colorado or is at a greater distance than 100 miles from the place of trial or hearing, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon motion and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. [Supplants Code Secs. 378 and 379.]

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of record of this state or of any United States Court in Colorado has been dismissed or otherwise concluded and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(e) **Objections to Admissibility.** Subject to the provisions of Rule 32 (c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying. [Supplants Code Secs. 378, 379 and 388.]

C (f) Effect of Taking or Using Depositions. A party shall not be deemed to have waived his objection to the competency of nor to have made a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent waives any objection to the competency of such witness, and makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party. [Supplants Code Sec. 379.]

Committee Note.

The words "have waived his objection to the competency of nor to" and "waives any objection to the competency of such witness" and were added to the Federal subdivision in order to insure that an incompetent witness would not be made competent by taking his deposition.

For depositions in divorce see Chapter 111, Session Laws of Colorado, 1937. The Supreme Court has not passed upon the constitutionality of suppressing the name of the co-respondent.

- I. General Consideration.
- II. When Depositions May Be Taken.
- III. Scope of Examination.
 - A. In General.
 - B. Privileged Communications.

- C. Relevancy.
- D. Existence and Nature of Documents or Other Tangible Things.
- E. Identity and Location of Witnesses.

IV. Use of Depositions.

V. Objections to Admissibility.

VI. Effect of Taking or Using Depositions.

Cross References.

See vol. 4, ch. 177, § 1 and the note thereto. As to taking and reading depositions in evidence in criminal cases, see vol. 2, ch. 48, § 471 et seq. As to taking depositions in justices' courts, see vol. 3, ch. 96, § 34. Depositions may be taken in the following instances: In investigations by the industrial commission, vol. 3, ch. 97, § 26; in hearings under the workmen's compensation law, vol. 3, ch. 97, § 393; in investigations by state tax commission, vol. 4, ch. 142, § 171; to prove execution of wills, vol. 4, ch. 176, § 59; in election contests of county officers, vol. 3, ch. 59, § 289; in election contests of state officers, vol. 3, ch. 59, § 271.

For discussion of this rule, see Address no. 8, appx. D.

I. GENERAL CONSIDERATION.

Editor's note.—Under § 376 of the Code of Civil Procedure, which is supplanted by subdivision (a) of this rule, it was said that the Supreme Court was not bound by the findings of the jury as to any matters contained in depositions, but was at liberty to place their own interpretation upon the testimony therein given. See *Morrison v McCluer*, 27 Colo. App. 264, 269, 148 P. 380; *Rinderie v Morse*, 27 Colo. App. 457, 150 P. 245.

Rules 34 and 45 (b) should be construed in pari materia with this rule.—*Connecticut Importing Co. v Continental Distilling Corp.*, 1 F. R. D. 190, wherein it was said that this rule and Rule 34 should receive with respect to the subject matter a construction of similar scope, and thus construed both are valid within reasonable limits as determined in each case.

And Rules 26 to 37 should be construed together.—Rules 26 to 37 constitute a largely exclusive code of deposition and discovery practice. They are placed together under the common title "Depositions and Discovery", and should obviously be construed together as a consistent and interrelated group of provisions designed to serve a common purpose. See article entitled, "Discovery before Trial Under the New Federal Rules" by Mr. Edson R. Sunderland, XV Tenn. Law Rev., No. 8, pp. 737, 739.

To secure the just, speedy, and inexpensive determination of actions.—*Babcock, etc., Co. v North Carolina Pulp Co.*, 25 F. Supp. 596, *Nichols v Sanborn Co.*, 24 F. Supp. 908.

This and the following rules show a clear intent on the part of the draftsman to simplify and expedite trial procedure by disposing of non-essentials, undisputed matters, surprise testimony, and uncertainties to the greatest extent possible in advance of trial. These rules, taken in conjunction with the provision for motions for bills of particulars in Rule 12 (e), and with the growing practice of pre-trial conferences under Rule 16, clearly show that an attempt has been made to set up a machinery by the operation of which a cause reaches actual trial stripped to its essentials: with issues defined, clarified and narrowed, with both parties (if properly diligent) thoroughly prepared to meet all possible issues and fortified against surprise, and with a record already complete, except as to those matters which by their inherent nature can only be presented before a trial judge. *Teller v Montgomery Ward & Co.*, 27 F. Supp. 938, 941.

The present theory of procedure is to change former pleadings from the generalized type wherein merely ultimate facts were stated and the items of evidence to support the alleged ultimate facts were omitted to present type as exemplified under this and following rules relating to depositions and discovery embracing not only the statement of ultimate facts but the additional privilege of compelling either or both parties to disclose before trial the detailed items in evidence. *Dixon v Sunshine Bus Lines*, 27 F. Supp. 797.

The purpose of this rule is to authorize the taking of a deposition in a pending action either to make discovery in preparation for, or to be used as evidence upon the trial of, such action. *Bachrach v General Inv. Corp.*, 31 F. Supp. 84.

Facility in procuring evidentiary details is purpose of rules relating to depositions and discovery. *Dixon v Sunshine Bus Lines*, 27 F. Supp. 797.

The function of this and the following rules is the setting forth of the contentions of the parties in such a way as to fully disclose the nature and scope of the controversy. *Id.*

One important object of the rules was to require simplicity and brevity in the pleadings, but with the most ample provision for facilities of discovery of facts before trial, so that surprise at the trial and possible miscarriage of justice thereby could be avoided. *New England Terminal Co. v Graver Tank, etc., Corp.*, 1 F. R. D. 411.

One of the purposes of the rules of discovery is to enable any party to obtain information, as well as evidence that will aid in "preparation for trial," meaning preparation on all phases of the case. *Fox v House*, 29 F. Supp. 673.

The right to proceed under this rule or under Rule 33 is one of choice, and a defendant having elected to proceed under one rule was precluded from proceeding against the same party under another rule. *McNally v. Simons*, 1 F. R. D. 254, wherein it was held that leave of court was necessary since the taking of a deposition under this rule makes the subsequent service of interrogatories to the same party under Rule 33 analogous to the service of a second set of interrogatories.

Rule is applicable to cities.—This rule is not limited to examinations of business corporations, and in a proper case, is applicable to a city. *Joy Mfg. Co. v. New York*, 30 F. Supp. 403.

In action against city for death allegedly resulting from injuries sustained by decedent at airport, city was not exempt from examination before trial of commissioner of docks or other employee of city having knowledge of the facts, because of fact that city was a civil division of the state. *Conneway v. New York*, 32 F. Supp. 54.

Use of bill of particulars and discovery.—In view of the broad provisions for discovery under the procedural rules, a motion for a more definite statement or for a bill of particulars should be granted only where the complaint is stated in such general terms that the defendant cannot understand the general nature of the charges made so as generally to prepare for trial. *Zoller v. Smith*, 1 F. R. D. 182, citing *Brinley v. Lewis*, 27 F. Supp. 313.

Use of the provisions of the procedural rules for discovery should be encouraged and the use of a motion for a more definite statement should be limited to clear cases where the motion is necessary to prevent hardship and injustice to the defendant. *Zoller v. Smith*, 1 F. R. D. 182. See *Downey v. Banker*, 1 F. R. D. 123.

Where complaint in action for death of motorist in accident allegedly resulting from unrevealed defective condition of automobile was as detailed as complaint suggested in official form for a complaint for negligence, and information desired by defendant could readily be obtained under procedural rules providing for discovery, defendant's motion for a more definite statement of claim was denied. *Zoller v. Smith*, 1 F. R. D. 182.

II. WHEN DEPOSITIONS MAY BE TAKEN.

Depositions may be taken at any time after service of summons.—"Federal Rule 26 allows unlimited right to take a deposition after answer, but only by leave of court before that time. Our committee believes that this is an unnecessary and expensive practice. In Colorado if an attorney lives outside of Denver he would have the extra

expense of a trip to the city to get this order. If the judge is absent, nothing can be done until his return, unless we bother one of the judges of the Circuit Court of Appeals. And in states where none of them is in residence that relief is not available. The speaker has known too many cases where service of a summons, accompanied by a notice to take deposition, has brought many a crooked defendant to time right now, where delay would have been fatal. That absolute right to take depositions at any time after the service of the summons is now in our code and we have preserved it." See article entitled "The Federal Rules from the Standpoint of the Colorado Code" by Col. Philip S. Van Cise, Chairman of Rules Committee, *Dicta XVII*, no. 7, pp. 170, 174. For federal cases dealing with necessity of leave of court, see *Rejsenhoff v. Colonial Nav. Co.*, 1 F. R. D. 395; *Brach v. McFadden Publications*, 1 F. R. D. 445; *Seman v. Leibovitz*, 1 F. R. D. 280.

Rules 26 to 37 apply to all special proceedings.—See article entitled "The Federal Rules from the Standpoint of the Colorado Code" by Col. Philip S. Van Cise, Chairman of Rules Committee, *Dicta XVII*, no. 7, pp. 170, 174.

Rule 1 provides that the rules apply to all suits of a civil nature, whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. This is substantially the same language employed in 28 U. S. C. A., § 41, conferring jurisdiction on the District Courts of the United States, where it has been given a very broad construction by the Supreme Court so as to include special proceedings as well as ordinary action at law and in equity. Presumably discovery may be had in any such suits, even though they may be more accurately and technically described as "special proceedings." See article entitled, "Discovery before Trial Under the New Federal Rules" by Mr. Edson R. Sunderland, *XV Tenn. Law Rev.*, no. 8, pp. 737, 741.

Persons subject to examination.—There is no restriction regarding the persons who may be subjected to discovery examinations. Rule 26 (a) provides that "The testimony of any person, whether a party or not, may be taken." Under this provision a party may take his own deposition. This eliminates all the questions which are constantly arising in those states where only certain classes of persons can be examined. There is a great deal of variety in such restrictions. In some states only parties to the record can be examined, in others there can be discovery from nominal as well as real parties; in some assignors may, and in others they may not, be examined; many state statutes prescribe in detail exactly what officers, agents and employees may be examined as representatives of a corporation and whether former employees are to be included or ex-

cluded; and there is much variety in regard to whether mere witnesses can be examined. See article entitled, "Discovery before Trial Under The New Federal Rules" by Mr. Edson R. Sunderland, XV Tenn. Law Rev., no. 8, pp. 737, 742.

Inspection of documents in possession of one who is not a party may be ordered as an adjunct to the deposition of the person who has the documents. *Eastern States Petroleum Co. v. Asiatic Petroleum Corp.*, 27 F. Supp. 121.

Extent of privilege of deposition-taking.—In suit by assignee of claim for merchandise sold to corporate defendant, which denied purchase and set up counterclaim for breach of contract between assignor and defendant, assignee was entitled to a full and fair examination of defendant's president pursuant to this rule. *Laverett v. Continental Briar Pipe Co.*, 25 F. Supp. 80.

The plaintiff was not entitled to bill of particulars which requested either production of evidence and proof of ultimate facts, or judicial interpretation of substantive law, where the law had been discussed in former opinion of court, although desired relief might be obtained by interrogatories or by taking depositions. *Massachusetts Bonding, etc., Co. v. Harrisburg Trust Co.*, 27 F. Supp. 987.

A defendant who examined plaintiff under rule relating to depositions would not thereafter be permitted to serve interrogatories on plaintiff, notwithstanding that plaintiff had examined seven witnesses since defendant's examination of plaintiff, where there was no suggestion by defendant that further examination of plaintiff was required by any matter brought out in testimony of seven witnesses, of which defendant did not have knowledge sufficient to have enabled him to further question plaintiff at time of prior examination. *McNally v. Simons*, 1 F. R. D. 254.

Interrogating party may determine whether to use written interrogatories or oral examination.—It is the right of the interrogating party to determine which method of examination, whether by oral examination or written interrogatories, will provide sufficient information in order that a suit may be properly defended. *Goldberg v. Raleigh Manufacturers*, 28 F. Supp. 975.

Right of court to order that discovery be had only upon oral examination.—Where court finds that interrogatories are being used to discover matters which can be better or more conveniently discovered by oral examination, it may order that discovery be had only by taking objecting party's depositions upon oral examination. *New England Terminal Co. v. Graver Tank, etc., Corp.*, 1 F. R. D. 411. See notes to Rule 33.

Plaintiff's contention that defendant could obtain by written interrogatories sufficient information to make the taking of proposed deposition unnecessary did not warrant granting plaintiff's motion that he be not required to submit to the taking of a deposition upon oral examination, in view of greater advantages in obtaining facts and circumstances involved by a confronting examination rather than in a written one. *Goldberg v. Raleigh Manufacturers*, 28 F. Supp. 975.

III. SCOPE OF EXAMINATION.

A. In General.

Examination is not limited to the specific items set forth in subdivision (b).—*Madison v. Cobb*, 29 F. Supp. 881, 882, citing *Grauer v. Schenley Products Co.*, 26 F. Supp. 768; *Laverett v. Continental Briar Pipe Co.*, 25 F. Supp. 80.

The purpose of the rules relating to depositions before trial is to liberalize greatly the scope of permissible examination by depositions for purpose of effecting just, speedy, and inexpensive termination of every action. *Maryland v. Pan-American Bus Lines*, 1 F. R. D. 213. See *Barter v. Eastern S. S. Lines*, 1 F. R. D. 65; *Rose Silk Mills v. Insurance Co.*, 29 F. Supp. 504; *Unlandherm v. Park Contracting Corp.*, 26 F. Supp. 743.

Court rule regarding taking of depositions is liberally construed in affording litigants the widest latitude in examination before trial. *Pirnie v. Andrews*, 1 F. R. D. 252.

And this rule permits broadest type of examination, and will not avail a party to raise the cry of a "fishing expedition." *Laverett v. Continental Briar Pipe Co.*, 25 F. Supp. 80.

Objection that defendant's request was too broad in scope and placed no limit upon extent to which the oral examination might be carried did not warrant granting motion by plaintiff that he be not required to submit to the taking of a deposition upon oral examination, where plaintiff did not show that defendant intended to go outside permitted scope and offered nothing to induce court to limit examination to certain matter within permitted scope. *Goldberg v. Raleigh Manufacturers*, 28 F. Supp. 975.

But an examination under this rule has its limitations and must not be allowed to develop into a "fishing excursion." *Schweinnert v. Insurance Co.*, 1 F. R. D. 247.

The Rules of Civil Procedure were designed to permit liberal examination and discovery but they were not intended to be made the vehicle through which one litigant could make use of the opponent's preparation of his case. *Byers Theaters v. Murphy*, 1 F. R. D. 286.

Court rule regarding taking of depositions before trial has been liberally construed, but many abuses might present themselves if litigants could without limitation compel examination of each other and their witnesses. *Seman v. Leibovitz*, 1 F. R. D. 280.

Under Civil Procedure Rules relating to depositions respondent was not entitled to examination for purpose of obtaining information to be used in cross-examining and collaterally impeaching a witness who might testify for complainant at the trial. *Lynch v. Pollak*, 1 F. R. D. 120.

And the court, upon proper showing, may limit the scope of examination. *Bough v. Lee*, 28 F. Supp. 673.

An order limiting scope of examination by deposition before trial is discretionary, the procedure for examination by deposition being flexible in discretion of judge. *Maryland v. Pan-American Bus Lines*, 1 F. R. D. 213. See *Berke v. United Paperboard Co.*, 26 F. Supp. 412.

Although Rule 30 does not require a party to state the matters upon which the examination is to be made, this rule limits the examination to matters, not privileged, which are relevant to subject matter involved in action unless otherwise ordered by court rule concerning orders for the protection of parties and deponents. *Goldberg v. Raleigh Manufacturers*, 28 F. Supp. 975.

Where notice to examine plaintiff had been served over two months prior to notice of defendant's intention to take deposition of defendant's insurer, on defendant's motion to set aside or limit examination of insurer, defendant's alternative request that examination of insurer be postponed until completion of oral deposition of plaintiff would be granted and plaintiff would be required to complete her testimony on her deposition before statements made by plaintiff and defendant to insurer's investigator were open to plaintiff's inspection through examination of insurer. *Bough v. Lee*, 28 F. Supp. 673.

Court could authorize plaintiff to take depositions limited to questions of jurisdiction raised by defendants' motion to quash service and to dismiss action for lack of jurisdiction, where answer had not been served and nature of jurisdictional issues presented by defendants' motion apparently required a full and complete hearing. *Jiffy Lubricator Co. v. Alemite Co.*, 28 F. Supp. 385.

One party should not be allowed to require another to make investigation, research or compilation of data or statistics for him which he might equally as well make for himself. *Byers Theaters v. Murphy*, 1 F. R. D. 286.

As to negligence.—Plaintiff in personal injury suit should not be required to answer

interrogatory asking in what respect defendant corporation, its agents or servants, were negligent. *Bailey v. General Sea Foods*, 26 F. Supp. 391.

Notice to examine is not required to particularize upon subject matter.—The notice to examine defendant by its officers, directors, managing agents or employees was not required to particularize upon subject matter involved. *Freeman v. Hotel Waldorf-Astoria Corp.*, 27 F. Supp. 303; *Madison v. Cobb*, 29 F. Supp. 881.

B. Privileged Communications.

Privileged communications are respected.—On examination of a witness by deposition taken prior to trial, witness cannot be compelled to answer questions concerning privileged communications between himself and a party to the action. *Grauer v. Schenley Products Co.*, 26 F. Supp. 768.

What communications are privileged.—Rule 26 (b) provides that discovery shall not extend to any matter which is "privileged." There are no suggestions in the rules as to what shall be deemed privileged, and, the matter would be determined in accordance with the rules of evidence. See article entitled, "Discovery before Trial Under the New Federal Rules" by Mr. Edson R. Sunderland, XV Tenn. Law Rev., no. 8, pp. 737, 745.

In action against air lines corporation for damages wherein, on motion of corporation, a steel company, which had manufactured cylinder of airplane engine in question, was made a third party defendant, an engineering expert employed by corporation's attorneys to assist attorneys in preparation for trial was not privileged to refuse to answer questions by third party defendant in taking a deposition, where questions related to examination of cylinder by expert. *Lewis v. United Air Lines Transport Corp.*, 31 F. Supp. 617.

In personal injury suit, written statements of plaintiff and her companions at time of accident and doctors' reports, obtained by defendants' liability insurer during investigations not made by attorney, were relevant and not privileged, so as to entitle plaintiff to obtain copies thereof from defendants' attorney and insurer's employee. *Price v. Levitt*, 29 F. Supp. 164.

C. Relevancy.

Examination is restricted to matters relative to subject matter involved.—Unless limited by Rule 30 (b) or (d), defendant could be examined regarding any matter, not privileged, which was relevant to the subject matter involved. *Michels v. Ripley*, 1 F. R. D. 332. See *Lynch v. Pollak*, 1 F. R. D. 120; *Lanova Corp. v. National Supply Co.*, 29 F. Supp. 119; *Stankewicz v. Pillsbury Flour Mills Co.*, 26 F. Supp. 1003.

This rule contemplates examinations not merely for narrow purpose of adducing testimony which may be offered in evidence but also for broad discovery of information which may be useful in preparation for trial and the rule does not restrict the examinations to matters relevant to the precise issue but only to matters relevant to subject-matter involved in the action. *Lewis v United Air Lines Transport Corp.*, 27 F. Supp. 946. See *Stevenson v Melady*, 1 F. R. D. 329.

"It is to be noted that the matter sought to be examined into must be relevant to the 'subject matter' involved in the pending action, not to the 'issues' therein. Subject matter is a very broad term and can be identified even in the absence of specific issues." See article entitled "Discovery before Trial Under The New Federal Rules" by Mr. Edson R. Sunderland, XV Tenn. Law Rev., no. 8, pp. 737, 743.

After service of notice to take depositions the deponent may be examined regarding any matter not privileged which is relevant to the subject matter involved, unless after notice is served on application of party to be examined, the court otherwise directs. *Nekrasoff v United States Rubber Co.*, 27 F. Supp. 953.

While examinations under Civil Procedure Rules relating to depositions can be had for purpose of obtaining information upon which to cross examine party or witness, such examination must be had on matter relevant to subject matter involved in pending action. *Lynch v Pollak*, 1 F. R. D. 120.

Deponent whose deposition was taken pending the action was not required to answer general questions which asked deponent to give names of anybody who knew anything about the accident in question and names of any officers or petty officers of a ship or members of the crew that knew anything about how the accident happened. *Barter v Eastern S. S. Lines*, 1 F. R. D. 65.

In action for injuries allegedly caused by negligence of defendant or its employees, plaintiff was entitled to obtain by deposition testimony of former employees on issue of negligence. *Bennett v The Westover*, 27 F. Supp. 10.

Interrogatory propounded by defendant was required to be answered where properly within intent of this rule, although it was impossible to determine exact bearing of interrogatory. *B. B. Chemical Co. v Catara Chemical Co.*, 25 F. Supp. 472.

Where it was not shown as to how records of repairs of defendant's truck would be relevant to issue in automobile accident case, defendant, on examination before trial, would be required to produce the records merely for one month prior to accident rather than for six months as requested by

plaintiff. *Fletcher v Foremost Dairies*, 29 F. Supp. 744.

Defendant may be required to give his recollection of an oral conversation which is relevant to the issue. *Byers Theaters v Murphy*, 1 F. R. D. 286.

The examining party is not restricted to securing testimony that would be admissible in evidence at the trial, but he may go further and obtain information that may be useful in securing such evidence. *Mackerer v New York Cent. R. Co.*, 1 F. R. D. 408. See *Pirnie v Andrews*, 1 F. R. D. 252; *Union Cent. Life Ins. Co. v Burger*, 27 F. Supp. 556.

"That the examination may develop useful information by way of discovery which may not be admissible or material upon the precise issue is aside from the point; to the extent that the examination develops useful information it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible." *Lewis v United Air Lines Transport Co.*, 27 F. Supp. 946, 947.

In order that an interrogatory be proper, it is not necessary that it be previously determined that the answer thereto will be admissible in evidence and a general objection that the interrogatories constitute a "fishing expedition" is of no avail. *Byers Theaters v Murphy*, 1 F. R. D. 286.

Thus, under subdivision (b), it is not necessary to establish admissibility of the testimony or document. It is sufficient that the inquiry be made as to matters generally bearing on the issue and relevant thereto or that there is reasonable probability that the document in question contains material evidence. *Mackerer v New York Cent. R. Co.*, 1 F. R. D. 408, 409.

However, it is held that an examination should conform to rules of admissibility as tested by Rule 43 (a).—An examination is for the purpose of discovery or for use as evidence in the action or for both purposes and ordinarily should conform to the general rules of admissibility as tested by Rule 43 (a) relating to the form and admissibility of evidence. *Schweinert v Insurance Co.*, 1 F. R. D. 247, citing *Union Cent. Life Ins. Co. v Burger*, 27 F. Supp. 556.

And that insurance adjuster could not be required to produce statements that were hearsay.—In action for death of pedestrian struck by bus, investigator for bus company's insurer could be examined by deposition before trial by plaintiff concerning any relevant facts which came to adjuster's knowledge, including names and addresses of persons who were at scene of accident, but could not be required to produce statements of persons interviewed by adjuster, since such statements would be inadmissible

as "hearsay", and insurer should not be required to furnish plaintiff with result of investigation made at insurer's expense. *Maryland v. Pan-American Bus Lines*, 1 F. R. D. 213.

In personal injury action, investigator for insurer which had issued liability policy to the defendant could not, at taking of his deposition, be required to answer questions as to names of persons and as to how many persons were present at time of accident, since the questions called for "hearsay". *Poppino v. Jones Stores Co.*, 1 F. R. D. 215.

Relevancy is for trial judge.—Generally, the relevancy of testimony taken by deposition for purpose of discovery or for use as evidence should be left for determination to the trial judge. *Rose Silk Mills v. Insurance Co.*, 29 F. Supp. 504.

D. Existence and Nature of Documents or Other Tangible Things.

Purpose of provision.—"Rule 26 (b) expressly permits inquiry regarding 'the existence, description, nature, custody, condition and location of any books, documents or other tangible things.' This is to furnish means for obtaining information upon which a subsequent request may be made for an order for the production of documents or things, or for a subpoena duces tecum." See article entitled "Discovery before Trial Under The New Federal Rules" by Mr. Edson R. Sunderland, XV Tenn. Law Rev., no. 8, pp. 737, 744.

The Federal Rules that any person's testimony may be taken by deposition for purpose of discovery and that deponent may be examined regarding any relevant matter not privileged, including existence, description, custody, and location of books, documents, etc., unless otherwise ordered by court, were intended to liberalize practice and should not be unduly restricted. *Price v. Levitt*, 29 F. Supp. 164.

Illustrations.—Where defendant in automobile accident case admitted the maintenance, operation and control of truck alleged to have collided with automobile in which plaintiff was riding, defendant would not be required, upon examination before trial, to furnish records pertaining to maintenance, operation and control of truck. *Fletcher v. Foremost Dairies*, 29 F. Supp. 744.

In suit by receiver to recover money allegedly due because of withdrawal from lease belonging to receivership estate of crude oil without receiver's knowledge, where court granted leave to take testimony and to produce certain documents, witnesses were required to answer questions, if necessary, by reference to books, records and documents regarding names of parties from whom oil was purchased, in view of fact that defendants defended on ground that oil had been

purchased from third parties. *Thompson v. Oil Refineries*, 27 F. Supp. 123.

E. Identity and Location of Witnesses.

Purpose of provision is to give all parties equal access to evidence.—"There is another important provision in Rule 26 (b), namely that the permissible inquiry upon the discovery examination may include 'the identity and location of persons having knowledge of relevant facts.' It is not, of course, the primary purpose of this part of Rule 26 (b) to enable parties to discover the names of their opponent's witnesses, but rather to give all parties equal access to evidence upon which the merits of controversies can be adequately determined. Persons having knowledge of relevant facts are not necessarily the witnesses of any particular party." See article entitled "Discovery before Trial Under The New Federal Rules" by Mr. Edson R. Sunderland, XV Tenn. Law Rev., no. 8, pp. 737, 744.

Such provision must be read with rule as a whole.—The concluding clause of court rule regarding scope of examination of deponent authorizing inquiry touching the identity and location of persons having knowledge of relevant facts must be read with the rule as a whole, and the testimony sought to be elicited must be relevant to the subject matter involved in pending action. *Poppino v. Jones Store Co.*, 1 F. R. D. 215.

Illustrations.—Under rule regarding scope of examination of a deponent, if deponent knows of his own knowledge the identity and location of a person who has knowledge of relevant facts he may be required to reveal the identity and location of such person. *Poppino v. Jones Store Co.*, 1 F. R. D. 215.

IV. USE OF DEPOSITIONS.

Subdivision (d) deals with the use of a deposition against a party who had "due notice" of its taking.—*United States v. Aluminum Co.*, 27 F. Supp. 820, wherein it was held that a deposition was inadmissible against defendants who had notice of proposed deposition but who had no notice that they had any concern in taking of deposition or that it was intended to be offered against them.

Depositions may be used for impeachment under subdivision (d) (1).—This would allow a party to impeach the testimony of his own witness by means of the deposition of that witness, but obviously only to the extent of contradicting such testimony. See article entitled, "Discovery before Trial Under The New Federal Rules" by Mr. Edson R. Sunderland, XV Tenn. Law Rev., no. 8, p. 737.

To show admissions under subdivision (d) (2).—The limitations here stated re-

garding the representative of a corporate or group party are those ordinarily applicable where it is sought to bind the party by the statements of the representative. See article entitled, "Discovery before Trial Under The New Federal Rules", by Mr. Edson R. Sunderland, XV Tenn. Law Rev., no. 8, p. 737.

Deposition of a defendant corporation by a named vice president should not be taken, where such person was no longer in the employ of the defendant. *Cohen v. Pennsylvania R. Co.*, 30 F. Supp. 419.

Requiring plaintiff to prove admissions of witnesses by putting in evidence the entire deposition of the witness and reading extracts therefrom, rather than by testimony of one who heard such admissions at the taking of the deposition was justified under this rule. *Buder v. New York Trust Co.*, 107 F. (2d) 705.

As substantive evidence where witnesses are unavailable under subdivision (d) (3).—See article entitled, "Discovery before Trial Under The New Federal Rules" by Mr. Edson R. Sunderland, XV Tenn. Law Rev., no. 8, p. 737.

Plaintiff's motion for leave to use depositions taken in a case pending in state court was granted, where it was shown that parties and subject were same, that witnesses would not appear by subpoena and resided more than 100 miles from place of trial, and that plaintiff was financially unable to again

pay for taking new depositions. *Eller v. Mutual Ben. Health, etc., Assn.*, 1 F. R. D. 280.

V. OBJECTIONS TO ADMISSIBILITY.

Editor's note.—In construing § 388 of the Code of Civil Procedure, which is supplanted by subdivision (e) of this rule, it was said that the objection that a question propounded to a witness examined upon commission was leading, could not be made at the trial. See *Greenlaw Lbr., etc., Co. v. Chambers*, 46 Colo. 587, 588, 105 P. 1091.

Procedure in objecting to admissibility.—When a motion is made pursuant to Rule 30 (b) before the examination, it may at times be difficult for the court to pass upon the admissibility of evidence solely upon the pleadings and the affidavits submitted. In such a case the better procedure would be for the objecting party to raise the question of admissibility at the examination and by a motion under Rule 30 (d) or when the deposition is used at the time of the trial pursuant to subdivision (e) of this rule. *Union Cent. Life Ins. Co. v. Burger*, 27 F. Supp. 556, 557.

VI. EFFECT OF TAKING OR USING DEPOSITIONS.

See committee note under subdivision (f) of this rule. See also, Address no. 8, appx. D which explains the difference between this and the federal subdivision.

Rule 27. Depositions Before Action or Pending Appeal.

Committee Note.

Subdivision (a) is entirely state procedure as it was preferred to the Federal.

(a) Before Action.

(1) **Petition. Order. Notice.** A person who desires to perpetuate his own testimony or that of other persons may file in a district or county court a petition verified by his oath (or, if there be more than one petitioner, then by the oath of at least one of them) stating: either: (1) that the petitioner expects to be a party to an action in a court in this state and, in such case, the name of the persons who he expects will be adverse parties; or (2) that the proof of some facts is necessary to perfect the title to property in which petitioner is interested or others similarly situated may be interested or to establish any other matter which it may hereafter become material to establish, including marriage, divorce, birth, death, descent or heirship, though no action

may at the time be anticipated, or, if anticipated, the expected adverse parties to such action are unknown to petitioner. The petition shall also state the names of the witnesses to be examined and their places of residence and a brief outline of the facts expected to be proved, and if any person named in the petition as an expected adverse party is known to the petitioner to be an infant or incompetent person the petition shall state such fact. If the expected adverse parties are unknown, it shall be so stated. The court shall make an order allowing the examination and directing notice to be given, which notice, if the expected adverse parties are named in the petition, shall be personally served on them in the manner provided in Rule 4 C (e) and, if the expected adverse parties are stated to be unknown, and if real property is to be affected by such testimony a copy of such notice shall be served on the county clerk and recorder, or his deputy, of the county where the property to be affected by such testimony or some part of such property is situated but in any event said notice shall be published for not less than two weeks in some newspaper to be designated by the court making the order in such manner as may be designated by such court. If service of said notice can not with due diligence be made, in the manner provided in Rule 4 C (e), upon any expected adverse party named in the petition, the court may make such order as is just for service upon him by publication or otherwise and shall appoint, for persons named in the petition as expected adverse parties who are not served in the manner provided in Rule 4 C (e), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the witness. Such notice shall state the title of the proceeding, including the court and county in which it is pending, the time and place of the examination and either a brief outline of the facts expected to be proved or a description of the property to be affected by such testimony. Any notice heretofore given which contains the above required matters shall be deemed sufficient. Any personal service required by the provisions hereof shall be made at least 10 days before the testimony is taken. If any person named in the petition as an expected adverse party is stated in any paper filed in such proceeding to be an infant or incompetent person, the provisions of Rule 17 (c) apply, but no guardian ad litem need be appointed for any expected adverse party whose name is unknown.

Committee Note.

As to period of publication see 4 C. S. A., Chap. 130, Sec. 6.

(2) **Testimony Taken.** Upon proof of the service of the notice the court shall take the testimony of the witnesses named in the petition upon the facts therein set forth; and the taking of same may be continued from time to time, in the discretion of the court, without giving any further notice. The testimony shall be taken on question and answer unless the court otherwise direct, and any party to the proceeding may question witnesses either orally or upon written interrogatories. The testimony, when taken, shall be signed and sworn to in writing by each respective witness and certified by the court. If any witness is absent from the county in which the proceedings are

pending, the court shall designate some person authorized to administer oaths, by name or otherwise, to take and certify his testimony and the person so designated shall take his testimony in manner aforesaid and certify and return same to the court with his certificate attached thereto showing that he has complied with the requirements of said order.

Committee Note.

This is a separate procedure from that provided by Rule 31.

(3) Proofs Prima Facie Evidence. The affidavit, return, certificate and other proofs of compliance with the provisions of this subdivision (a), or certified copies thereof, shall be prima facie evidence of the facts therein stated.

(4) How and When Used. If a trial be had in which the petitioner named in the petition or any successor in interest of such petitioner or any person similarly situated shall be a party, or between any parties, in which trial it may be material to establish the facts which such testimony proves or tends to prove, upon proof of the death or insanity of the witness or witnesses, or of his or their inability to attend the trial by reason of age, sickness, infirmity, absence or for any other cause, any testimony, which shall have been taken as herein provided, or certified copies thereof, may be introduced and used by either party to such trial. [This subdivision from Code Secs. 400 to 405, as amended by 1939 Session Laws, Chap. 82, pages 269 to 271; part from Federal Rule 27 (b).]

C (b) After Judgment or After Writ of Error. If a writ of error to review a judgment is pending, or, if none is pending, then at any time within 12 months from the entry of such judgment, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony may make a motion in such court for leave to take the depositions, upon the same notice and service thereof as if the action were pending in such court. The motion shall show (1) the names and addresses of the persons to be examined and the substance of the testimony, so far as known, which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in trial courts.

Cross reference.—For discussion of rule, see Address no. 7 in appx. D.

Editor's note.—For cases construing former provisions as to perpetuation of testimony, see *Darrow v. People*, 8 Colo. 417, 8 P. 661, cited in notes, 21 Am. St. Rep. 785, 2 L. R. A. 579, 12 L. R. A. 708, 107 A. L. R. 219, 221; *Levy v. Dwight*, 12 Colo. 101, 20 P. 12.

Discovery before action is by deposition not interrogatories.—Under the rules there may be a discovery even though no action

has been commenced, but by deposition, not interrogatories. *Simonin's Sons v. American Can Co.*, 26 F. Supp. 420.

Petition held not to be a "petition to perpetuate testimony."—Petition of administrator of deceased employee who was killed while on board employer's tug, requesting inspection of tug, photographs, etc., was not a "petition to perpetuate testimony" within federal procedural rule authorizing such petition, and hence was required to be denied. *Egan v. Moran Towing, etc., Co.*, 26 F. Supp. 621.

Rule 28. Persons Before Whom Depositions May Be Taken.

(a) **Within the United States.** Within the United States or within a territory or possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of this state or of the United States or of the place where the examination is held. [Supplants Code Secs. 377 and 384.]

(b) **In Foreign Countries.** In a foreign state or country depositions shall be taken (1) on notice before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or (2) before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in [here name the country]."

C (c) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is financially interested in the action.

Committee Note.

If the designated notary is objectionable redress can be secured from the court. See Rules 30 (b) and 31 (d).

C (d) Outside Colorado. Upon proof that the notice to take a deposition outside the state of Colorado has been given as provided in these rules, the clerk shall issue a commission or letters rogatory in the form prescribed by the state in which the deposition is to be taken, such form to be presented by the party seeking the deposition. Any error in the form or in the commission or letters is waived unless objection thereto be filed and served on or before the time fixed in the notice. [New.]

Committee Note.

There is no Federal subdivision 28 (d). This subdivision is to meet the requirements of other states or countries.

Cross references.—As to officers empowered to administer oaths and take depositions, see vol. 4, ch. 115, § 3. For discussion of this rule, see Address no. 8, appx. D.

Editor's note.—Under § 384 of the Code of Civil Procedure supplanted by this rule, there was no known way by which depositions of witnesses living out of the state could be taken, except on due observance of the statutory course. Any deviation from the statutory provisions on this subject was held fatal, and the use of depositions erroneously taken constituted an error for which a cause had to be reversed. *Argentine Falls Silver Min. Co. v. Molson*, 12

Colo. 405, 21 P. 190, cited in notes, *Ann. Cas.* 1914B, 161, 164; *Gibbs v. Gibbs*, 6 *Colo. App.* 368, 371, 40 P. 781, cited in note, 59 *A. L. R.* 905.

In foreign countries.—As to depositions taken in foreign country, see *Gitto v. "Italia." Societa Anonima, etc.*, 28 *F. Supp.* 309.

It is the clear intention of the Federal Rules to eliminate the formality and the expense of commissions whenever possible. In the United States they cannot be employed in any case, and in foreign countries only when necessary or convenient. The occasion for the use of a commission or letters rogatory would normally be the un-

willingness of the witness to appear and testify without compulsory process. In such cases a notice would be ineffectual. See article entitled, "Discovery Before Trial Under the New Federal Rules" by Mr. Edson R. Sunderland, XV Tenn. Law Rev., no. 8, pp. 737, 746. But, as to Colorado, note subdivision C (d) for which there is no federal counterpart.

Employee of attorney is not disqualified ipso facto.—In small towns stenographers are scarce, and hiring an outside stenographer at folio rates is always costly.

Hence the committee felt that Federal Rule 28 (c) prohibiting the taking of depositions by an employee of an attorney was an unnecessary hardship to litigants, and that portion of the subdivision was stricken. Under Rule 30 (b) parties have plenty of protection and can secure an order for another stenographer if they believe the one designated will be incompetent or unfair. See article entitled, "The Federal Rules from the Standpoint of the Colorado Code" by Col. Philip S. Van Cise, Chairman of the Rules Committee, XVII Dicta, no. 7, pp. 170, 175.

Rule 29. Stipulations Regarding the Taking of Depositions.

If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

For discussion of this rule, see Address no. 8, appx. D.

Rule 30. Depositions Upon Oral Examination.

Committee Note.

For depositions on supplementary proceedings see Rule 69 (g). For depositions of witnesses in Colorado in actions pending outside the state see 4 C. S. A., Chap. 177, Secs. 11 and 12.

(a) **Notice of Examination: Time and Place.** A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action not in default. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion the court may for cause shown enlarge or shorten the time. [Supplants Code Secs. 376, 377 and 389.]

(b) **Orders for the Protection of Parties and Deponents.** After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be

taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

(c) **Record of Examination; Oath; Objections.** The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(d) **Motion to Terminate or Limit Examination.** At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

(e) **Submission to Witness; Changes; Signing.** When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or

refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32 (d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part. [Supplants Code Sec. 378.]

(f) Certification and Filing by Officer; Copies; Notice of Filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered mail to the clerk thereof for filing. [Supplants Code Sec. 378.]

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees. [Supplants Code Sec. 384.]

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

C (h) Notice to Absent or Unknown Parties. In the event any party not in default who has not made an appearance, is a non-resident, or cannot be found within the state, the court, upon a satisfactory showing of such non-residence or of a diligent effort to locate such party within the state and the failure of such effort, may order the giving of the notice described in Rules 30 (a) and 31 (a) by registered mail to the last known address of such party, or, if the court is satisfied that the party desiring to take the deposition does not know or cannot ascertain the address of such party, or if unknown persons

are made parties, the court may order the giving of notice to such party or unknown persons by the delivery of one copy thereof to the clerk. [New.]

Committee Note.

There is no Federal subdivision 30 (h). This is not based on any section of the Code or rules, but is simply to give a means of service of notice of the taking of the deposition on parties specified in the subdivision.

- I. General Consideration.
- II. Notice of Examination; Time and Place.
- III. Orders for the Protection of Parties and Deponents.
- IV. Record of Examination; Oath; Objections.
- V. Motion to Terminate or Limit Examination.
- VI. Submission to Witness; Changes; Signing.
- VII. Certification and Filing by Officer; Copies; Notice of Filing.
- VIII. Failure to attend or to Serve Subpoena; Expenses.
- IX. Notice to Absent or Unknown Parties.

Cross References.

As to order after service of interrogatories that deposition shall not be taken except upon oral examination, see Rule 31 (d). For discussion of this rule, see Address no. 8 in appx. D.

I. GENERAL CONSIDERATION

These rules should not be whittled away but are to be construed liberally. *Laverett v. Continental Briar Pipe Co.*, 25 F. Supp. 80.

The method of taking depositions by oral examination is the broadest and most effective method and would normally be employed where no special reasons exist for using any other. In this form of deposition there is a right of examination as complete as at the trial [Rule 26 (c)], and an unwilling or hostile witness may be interrogated by leading questions. [Rule 43 (b)]. See article entitled, "Discovery Before Trial Under the New Federal Rules" by Mr. Edward R. Sunderland. XV Tenn. Law Rev. no. 8, pp. 737, 747.

A municipality is subject to examination. —And a city, in order to be relieved from hardship which might result from examination before trial must make application for an order under this rule relating to orders for protection of parties and deponents and motion to terminate or limit examination. *Conneway v. New York*, 32 F. Supp. 54; *Joy Mfg. Co. v. New York*, 30 F. Supp. 403.

In action against city for purchase price of certain equipment, the taking of deposi-

tions of certain city officers would be allowed where rules amply protected the city from unnecessary annoyance, embarrassment, or oppression. *Joy Mfg. Co. v. New York*, 30 F. Supp. 403.

II. NOTICE OF EXAMINATION; TIME AND PLACE.

In general.—Party desiring to take testimony on oral examination is required only to serve notice in writing to every other party designating name of person before whom, the place where, and the time when, and the name and address of each person to be examined, and if name is unknown a general description sufficient to identify him. *Nekrasoff v. United States Rubber Co.*, 27 F. Supp. 953.

Neither this rule nor Rule 45 requires that the name of the person before whom examination is to be taken be stated but the inclusion of such statement is the better practice. *Norton v. Cooper Jarrett*, 1 F. R. D. 92.

And notice need not specify the matters as to which the deposition is to be taken, as a limitation of the scope of the examination may be sought. *Saviolis v. National Bank*, 25 F. Supp. 966; *Bennett v. The Westover*, 27 F. Supp. 10; *Madison v. Cobb*, 29 F. Supp. 881; *Goldberg v. Raleigh Manufacturers*, 28 F. Supp. 975.

A notice to take deposition served on former employee of defendant from which it was sought to recover for injuries allegedly caused by negligence of defendant, or its employees, was sufficient though not stating with particularity the matters on which examination was sought. *Bennett v. The Westover*, 27 F. Supp. 10.

But should state name or give general description of person to be examined.—The rule that notice of examination before trial should state name of person to be examined, or if such name is not available, person should be designated by sufficient description, was complied with by plaintiff's notice referring to the "superintendent or caretaker in charge of the premises" of the defendant. *Burris v. American Chicle Co.*, 1 F. R. D. 9.

In action for injuries allegedly caused by negligence of defendant, or its employees, where plaintiff affirmatively stated his desire to examine former employee as a witness, notice to take deposition was not defective for alleged ambiguity because it al-

legedly did not clearly appear whether examination was directed to defendant by former employee, or to former employee as a witness. *Bennett v The Westover*, 27 F. Supp. 10.

Notice to take deposition of corporate defendant by a named person as vice president and "such other officer or officers as may have knowledge of the facts" was defective as too general a statement to compel the plaintiff to produce any one except the named person for examination. *Cohen v Pennsylvania R. Co.*, 30 F. Supp. 419.

On defendant's application to examine plaintiff through named president and such other officers and persons as may have knowledge of various matters referred to, defendant was entitled to examine only person named as president, the designation of other officers being too general to compel plaintiff to produce anyone for examination. *Orange County Theatres v Levy*, 26 F. Supp. 416, 417.

In order to make effective Rule 45 relating to issuance of subpoena, it is necessary that notice of examination comply with this rule requiring that it shall state name and address of person to be examined, and a general description thereof if name is not known. *Freeman v Hotel Waldorf-Astoria Corp.*, 27 F. Supp. 303.

And place for taking may be changed by court order.—See Analysis line III, "Orders for the Protection of Parties and Deponents."

III. ORDERS FOR THE PROTECTION OF PARTIES AND DEPONENTS.

In general.—Under this rule authorizing court, after service of notice for taking of deposition, to make order for protection of party or witness, the court, guided by equitable considerations, may take such steps as will protect parties and deponents entitled to relief. *Finkelstein v Boylan*, 33 F. Supp. 657.

When depositions are taken upon oral examination, ample safeguards for protection of parties and deponents are provided in this rule concerning orders for protection of parties and deponents and motions to terminate or limit examination. *Goldberg v Raleigh Manufacturers*, 28 F. Supp. 975.

The powers given to the court to limit and terminate examinations are afforded for the protection of the parties and deponents, but it was not intended that they be made the basis of an application to the court in every case. It is only where bad faith, annoyance, embarrassment, oppression or the like are the purpose of the examination, or other special circumstances occur, that the court should be asked to intercede. *Lav-*

erett v Continental Briar Pipe Co., 25 F. Supp. 80, 82.

All phases of depositions on oral examination are subject to control by the court, to end, among others, that a witness may be immune from undue annoyance, embarrassment, or oppression. *Eastern States Petroleum Co. v Asiatic Petroleum Corp.*, 27 F. Supp. 121.

But the rules providing for the taking of depositions for discovery purposes should not be restricted at their inception by orders attempting to prescribe and define the activities of parties in their proper use. *Fox v House*, 29 F. Supp. 673, 674.

And defendant served with notice to appear for taking of deposition should not arbitrarily refuse in first instance to attend examination, but, if it is necessary to protect himself, should resort to provisions of this rule authorizing him, after notice, to move the court for good cause shown to limit scope of examination or time and manner of taking it or, during examination, to move the court to stop the examination or limit scope and manner thereof on a showing that examination is being conducted in bad faith or in an unreasonable or oppressive manner. *Madison v Cobb*, 29 F. Supp. 881.

This rule is for benefit of one who is to appear for examination.—This rule authorizing a motion by one who is to appear for deposition or examination to have the examination or deposition limited or to otherwise protect his rights is for the benefit of such party only, and party seeking the examination or deposition is not authorized to anticipate such a motion by himself seeking to have the examination limited. *Barrezueta v Sword S. S. Line*, 27 F. Supp. 935.

"Upon notice and for good cause shown."—Where defendants moved to vacate a notice to take their depositions, the attaching to notice of motion a copy of the notice sought to be vacated, and submitting the pleadings on argument was not in compliance with this rule which authorized entry of order by court only "upon notice and for good cause shown." *Zuckerman v Pilot*, 1 F. R. D. 130.

Where defendants did not make such a showing as was required by subdivision (b), defendants' motion would be denied without prejudice to application pursuant to subdivision (d). *French v Zalstem-Zalesky*, 1 F. R. D. 240.

Court may order that deposition be not taken.—Where notice for taking deposition for purpose of discovery or for use as evidence discloses the exact nature of information sought and it appears that the information is irrelevant, the case is one which should be dealt with under this rule permitting court to make order that deposition

should not be taken. *Rose Silk Mills v Insurance Co.*, 29 F. Supp. 504.

Knowledge of facts by plaintiff concerning which defendant is to be examined before trial does not justify refusal of examination. *Benevento v A. & P. Food Stores*, 26 F. Supp. 424.

In derivative suit by holder of voting trust certificates representing common stock, motion papers merely showing that plaintiff's interest was of such relative unimportance as to cast doubt on the merits did not authorize protective order against taking of deposition on oral examination on ground that examination was sought solely to embarrass and harass defendants, in view of court's power to deal with the situation if such purpose should be shown during the taking of the deposition. *Piccard v Sperry Corp.*, 30 F. Supp. 171.

In suit to recover damages for deceiving the public by causing a patent number to be affixed to articles which were not manufactured under patent designated by such number, motion by defendants to vacate a notice to take their depositions orally, on ground that examination subjected them to a penalty and might tend to incriminate them would not be granted, since defendants could plead their constitutional privilege upon the examination and secure a ruling under subdivision (d). *Zuckerman v Pilot*, 1 F. R. D. 130.

Where plaintiff did not appear at hearing on plaintiff's written motion that the court order that deposition of third party be not taken by defendant, and defendant did appear, the motion was denied. *Boynton v Reynolds Tobacco Co.*, 1 F. R. D. 452.

Place for taking may be changed by court order.—Where there was no doubt that officers of defendant corporation and records which would be required were in Algonac, Michigan, and corporation maintained that it canceled its certificate to do business in New York and terminated New York manager's employment, examination of corporation by its officers was authorized to be held at Algonac or Detroit at option of plaintiff's attorney instead of in New York City as specified in notice, and reasonable expenses of counsel for corporation would be allowed. *Fairwater Transp. Co. v Chris-Craft Corp.*, 1 F. R. D. 509.

Where Philadelphia was the most convenient and less expensive place for taking deposition of absent witness and where, if taken in Arizona in accordance with notice by defendant, expense would be that of transportation, maintenance, and fees of at least two counsel, decree would be entered directing that deposition be taken in Philadelphia instead of in Arizona with expenses of attending witness taxed as part of costs.

Clair v Philadelphia Storage Battery Co., 27 F. Supp. 777.

Depositions ordered to be taken at defendants principal place of business in *Cohen v Pennsylvania R. Co.*, 30 F. Supp. 419.

And under such order court has power to include terms. *Clair v Philadelphia Storage Battery Co.*, 27 F. Supp. 777.

Court may limit deposition to written interrogatories.—But a preference expressed by defendant in notice that it would take deposition of an absent witness, for oral examination in preference to written was reasonable, in view of fact that testimony of witness would cover a wide range which could not be adequately covered by written interrogatories. *Clair v Philadelphia Storage Battery Co.*, 27 F. Supp. 777.

Defendant is entitled to fair and complete general examination of, and production of necessary records by, plaintiff before trial, so as to require denial of plaintiff's motion to terminate deposition after examination was hardly begun or limit it to written interrogatories concerning specified matters. *Newcomb v Universal Match Corp.*, 27 F. Supp. 937.

And conversely may permit oral examination where written interrogatories have been inadequate. *Howard v States Marine Corp.*, 1 F. R. D. 499.

Where examination by interrogatories under Rule 33 has been inadequate, the court in its discretion may permit an oral examination, but it should be made to appear clearly that the relevant subject matter will not involve interrogation of witness with respect to those particulars on which he was examined by interrogatories. *Id.*

Under this rule, a defendant who was granted written cross-examination of witness whose direct testimony was to be taken in France on written interrogatories would be permitted to apply for order to cross-examine witness orally, if witness' answers to defendants' written cross-interrogatories were evasive, incomplete, unresponsive, or contained incompetent matters rendering answers inadmissible at trial. *United States v National City Bank*, 1 F. R. D. 367.

Scope of examination generally.—Unless limited by subdivisions (b) or (d) the defendant may under Rule 26 (b) be examined regarding any matter, not privileged, which is relevant to the subject matter involved. *Michels v Ripley*, 1 F. R. D. 332; *Nekrasoff v United States Rubber Co.*, 27 F. Supp. 953.

The purpose of the rules relating to depositions before trial is to liberalize greatly the scope of permissible examination by depositions for purpose of effecting just,

speedy and inexpensive termination of every action. *Maryland v. Pan-American Bus Lines*, 1 F. R. D. 213.

Scope of examination may be limited.—Where it appeared that plaintiff's examination of one of defendant's employees was being conducted for the purpose of discovering steps being taken by defendant in preparation for trial and not relevant matters and of making available to plaintiff the fruits of an investigation undertaken by defendant at its expense, defendant's motion for an order that the examination be limited was granted. *Schweinert v. Insurance Co.*, 1 F. R. D. 247.

The scope of an examination under court rules concerning the taking of testimony, by deposition, for purpose of discovery or use as evidence in an action, is very broad, although the court, upon proper showing, may limit the scope of examination. *Bough v. Lee*, 28 F. Supp. 673.

Plaintiff's motion to limit scope of oral examination on taking of his deposition concerning matters relevant to subject matter of personal injury suit by restricting testimony to manner of happening of accident complained of and omitting witnesses' names and addresses must be denied, where plaintiff presents no substantial reason for such action. *Stankewicz v. Pillsbury Flour Co.*, 26 F. Supp. 1003.

Where complaint alleged that plaintiff had been in business of manufacturing and selling special radio equipment for past four years, damages asked were high, and general evidence regarding growth, financial condition and relative position of plaintiff in the field was relevant, time limitation on examination before trial of officers of plaintiff would not be imposed. *Radio Receptor Co. v. General Motors Corp.*, 1 F. R. D. 167.

Order limiting scope was refused in *Chemo-Mechanical Water Imp. Co. v. Milwaukee*, 29 F. Supp. 45.

Such limitation is discretionary.—An order limiting scope of examination by deposition before trial is discretionary, the procedure for examination by deposition being flexible in discretion of the trial judge. *Maryland v. Pan-American Bus Lines*, 1 F. R. D. 213.

The scope of examination on taking of plaintiff's deposition may be limited by court in its discretion on proper showing. *Stankewicz v. Pillsbury Flour Mills Co.*, 26 F. Supp. 1003.

Protection against investigation of secret processes, development and research, see *Floridin Co. v. Attapulugus Clay Co.*, 26 F. Supp. 968; *Nekrasoff v. United States Rubber Co.*, 27 F. Supp. 953.

Trade secrets.—Where complaint alleged that former employees of plaintiff revealed to defendant certain trade secrets of plaintiff together with names and locations of various sources of supply and that the employees revealed to defendant plaintiff's figures and proposed bids on certain contracts, defendants were entitled to examine officers of plaintiff on those allegations even though the examination might involve disclosure of plaintiff's trade secrets. *Radio Receptor Co. v. General Motors Corp.*, 1 F. R. D. 167.

"Annoyance, embarrassment, or oppression."—That plaintiff would be required to absent himself from some of his usual business affairs during taking of deposition upon oral examination was insufficient to justify ruling that plaintiff would be subjected to "annoyance, embarrassment, or oppression," within this rule, and hence plaintiff's motion that he be not required to submit to taking of deposition could not be sustained upon such grounds. *Goldberg v. Raleigh Manufacturers*, 28 F. Supp. 975.

Undue expense to the non-moving party may under certain circumstances justify a denial of, or a qualified, oral examination by deposition. *Gitto v. "Italia", Societa Anonima, etc.*, 28 F. Supp. 309.

Taking a second deposition.—Rule 26 contains no specific restriction but the service of a notice for the taking of a second deposition of the same party or person is subject to an application for relief under subdivision (b). *McNally v. Simons*, 1 F. R. D. 254, 255.

IV. RECORD OF EXAMINATION; OATH; OBJECTIONS.

Transmittal of written interrogatories.—Where defendant was planning to take oral depositions of various persons in Italy, transmittal of written interrogatories by plaintiffs, if they should desire to use them, was directed to be without prejudice to their right to apply for permission to propose a further set of cross-interrogatories in event further questioning was necessary. *Gitto v. "Italia", Societa Anonima, etc.*, 28 F. Supp. 309.

An additional method, subsidiary to the oral examinations, is provided, whereby a party who has been served with a notice of oral examination may, in lieu of attending and interrogating the deponent orally, send written interrogatories to the officer, who will put them to the witness and record his answers. [Subdivision (c)]. This method is authorized as a means of saving time and expense, and it will be particularly useful in cases of depositions taken at distant points where a party does not care to engage in a general examination or cross-examination of the deponent but desires to obtain answers to certain specific and simple questions. See article entitled, "Discovery before Trial un-

der the New Federal Rules" by Mr. Edson R. Sunderland, XV Tenn. Law Rev., no. 8, pp. 737, 748.

V. MOTION TO TERMINATE OR LIMIT EXAMINATION.

Ample safeguards are provided.—When depositions are taken upon oral examination, ample safeguards for protection of parties and deponents are provided in this rule concerning orders for protection of parties and deponents and motions to terminate or limit examination. *Goldberg v. Raleigh Manufacturers*, 28 F. Supp. 975.

As all phases of depositions on oral examination are subject to control by court, to end, among others, that a witness may be immune from undue annoyance, embarrassment, or oppression. *Eastern States Petroleum Co. v. Asiatic Petroleum Corp.*, 27 F. Supp. 121.

A defendant served with notice to appear for the taking of depositions under procedural rule, if it is necessary to protect himself, should not arbitrarily refuse in the first instance to attend examination, but should resort to provisions of this rule authorizing him, after notice, to move the court for good cause shown to limit scope of examination or time and manner of taking it or, during examination, to move the court to stop the examination or limit scope and manner thereof on a showing that examination is being conducted in bad faith or in an unreasonable or oppressive manner. *Madison v. Cobb*, 29 F. Supp. 881.

Scope of examination generally.—Unless limited by subdivisions (b) or (d) the defendant may under Rule 26 (b) be examined regarding any matter, not privileged, which is relevant to the subject matter involved. *Michels v. Ripley*, 1 F. R. D. 332; *Nekrasoff v. United States Rubber Co.*, 27 F. Supp. 953; *Schweinert v. Insurance Co.*, 1 F. R. D. 247.

Suspension of examination to allow application to court.—Upon showing that examination is being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass or oppress plaintiff or physician, examination can be suspended to enable presentation of an application to the court to terminate or limit examination. *Krier v. Muschel*, 29 F. Supp. 482.

At any time during the examination, upon the demand of either party, the taking of the deposition may be suspended to permit an application to the court pursuant to this rule. *Michels v. Ripley*, 1 F. R. D. 332, 333.

Denial of motion under subdivision (b) does not preclude motion under subdivision (d).—Where the defendants did not make such a showing as is required by subdivision (b) the motion will be denied as to them,

but without prejudice, however, to an application pursuant to subdivision (d). *French v. Zalstem-Zalesky*, 1 F. R. D. 240.

Subdivision (d) clearly presupposes that the court will have before it some record of what has theretofore transpired in order to act, in that contingency, as authorized by subdivision (b). *Zuckerman v. Pilot*, 1 F. R. D. 130, 131.

No examination conducted in bad faith will be allowed to continue.—Although Civil Procedure Rules are designed to secure a just, speedy and inexpensive determination of every action, and court ordinarily allows considerable freedom in examination of witnesses and production and inspection of documentary evidence, no examination conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress either a witness or a party should be allowed to continue. *Cumberland Corp. v. McClellan Stores Co.*, 27 F. Supp. 994.

Determination of privilege.—In action to recover treble damages under the anti-trust laws for conspiring to prevent plaintiff from exhibiting motion pictures at its theater and from competing with others, motion to limit examination of defendant before trial respecting price paid for films procured from distributors and exhibited in motion picture theaters of defendant, its subsidiaries and affiliates would not be granted on ground that privileged matter would be disclosed, but whether matter was privileged would be determined on timely objection in course of examination. *Folley Amusement Holding Corp. v. Randiorce Amusement Corp.*, 1 F. R. D. 496.

Determination of admissibility.—Where it is difficult for court to pass on admissibility of evidence on pleadings and affidavits when a motion is made before examination to vacate and modify notices that depositions will be taken, the better procedure would be for objecting party to raise question of admissibility at examination by motion to terminate or limit examination or when deposition is used at time of trial pursuant to Rule 26 relating to objections to admissibility of evidence. *Union Cent. Life Ins. Co. v. Burger*, 27 F. Supp. 556.

"Law of the case."—Decisions on applications relating to examination already under way, to suppress certain depositions, and to halt further examination of certain parties were not binding as "law of the case," in determining whether application for taking of other depositions should be granted. *Bachrach v. General Inv. Corp.*, 31 F. Supp. 84.

VI. SUBMISSION TO WITNESS; CHANGES; SIGNING.

Waiver as to signature.—Under prior provisions a requirement that deposition be

signed by witness could be waived by the stipulation of counsel. *Chipley v Green*, 7 Colo. App. 25, 42 P. 493.

Under § 378 of the Code of Civil Procedure parties stipulated with respect to the taking of a deposition that "the caption and all formalities are expressly waived." The signature of the witness occurred on the last page but one of the document. The notary certified that after completion of the deposition, the questions put and answers given were read to the witness, who subscribed to the deposition in his presence and swore to it on the date named. It was held, that the irregularity as to the signature was waived by the stipulation. *Chipley v Green*, 7 Colo. App. 25, 42 P. 493.

Object of reading deposition to witness.—The object of the requirement of § 378 of the Code of Civil Procedure that the interrogatories and answers submitted to the witness on the taking of his deposition should be first carefully read to him before he signed it, was that the witness might know what the scrivener had written down, and that he might, before his deposition was complete, have an opportunity to correct any errors or inaccuracies of statement which might have occurred. *Cheney v Woodworth*, 13 Colo. App. 176, 178, 56 P. 979.

VII. CERTIFICATION AND FILING BY OFFICER; COPIES; NOTICE OF FILING.

Editor's note.—The requirement of § 378 of the Code of Civil Procedure that in taking depositions the interrogatories and answers should be carefully read to the witness before signing did not require the certificate of the officer to state that they were "carefully" read to the witness before signing. A certificate that certified simply that the deposition was read to the witness before signing was sufficient. It would be presumed that it was read with that care required. *Cheney v Woodworth*, 13 Colo. App. 176, 56 P. 979.

VIII. FAILURE TO ATTEND OR TO SERVE SUBPOENA; EXPENSES.

Editor's note.—For a discussion of this subdivision, see Address no. 8, appx. D.

Failure of party served to appear.—The remedy of plaintiff in case the defendant or his agent fails to appear pursuant to notice to have deposition taken on matters in issue is to obtain order having defendant's answer stricken out and judgment by default rendered. *Cohn v Annunziata*, 27 F. Supp. 805. See Rule 37 (d).

IX. NOTICE TO ABSENT OR UNKNOWN PARTIES.

See committee note under subdivision C (h).

Rule 31. Depositions of Witnesses Upon Written Interrogatories.

Committee Note.

For depositions of witnesses in Colorado in actions pending outside the state see 4 C. S. A., Chap. 177, Secs. 11 and 12.

C (a) Serving Interrogatories; Notice. A party desiring to take the deposition of any person upon written interrogatories shall serve them in the manner provided by Rule 30 upon every other party not in default with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within 5 days thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within 3 days after being served with redirect interrogatories, a party may serve recross interrogatories upon the party proposing to take the deposition. [Supplants Code Secs. 381, 384 to 386.]

Committee Note.

In line 2 the Federal subdivision reads "shall serve them upon every other party." That clause was restricted by substituting the words "in the manner provided by Rule 30 upon every other party not in default."

(b) **Officer to Take Responses and Prepare Record.** A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30 (c), (e), and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

(c) **Notice of Filing.** When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(d) **Orders for the Protection of Parties and Deponents.** After the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order specified in Rule 30 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination. [See Code Sec. 384.]

Cross reference.—For discussion of this rule, see Address no. 8, appx. D.

Taking depositions by written interrogatories is obviously a less effective method than oral examination in most cases, on account of the opportunity it affords for evasion. But for the proof of formal matters, or matters of a simple and objective character, where the deponent is not hostile, it may be very useful. It may be employed against parties or mere witnesses. This method is available for taking depositions anywhere, and it is particularly convenient for use in distant places because of the slight expense involved. See article entitled, "Discovery before Trial under the New Federal Rules," by Mr. Edson R. Sunderland, XV Tenn. Law Rev., no. 8, pp. 737, 747.

Order that deposition be taken only on oral examination.—An oral examination of witness in lieu of written interrogatories would be permitted on condition that defendants by whom the oral examination was requested in the event that plaintiff's motion for examination of witness before trial was granted would pay plaintiff's attorneys their reasonable expenses to attend the oral ex-

amination. Houghton Mifflin Co. v Stackpole Sons, 1 F. R. D. 506.

Under court rule permitting the court to require that deposition not be taken except on oral examination, where plaintiffs, for purpose of proving heirship, filed lengthy written interrogatories inquiring about children and other relations of numerous families and about the identity and kin of witness' wife before marriage, court was authorized in its discretion to require that deposition be taken on oral examination. Fall Corp. v Yount-Lee Oil Co., 24 F. Supp. 765.

Granting of leave to cross-examine orally witness whose direct testimony was to be taken on written interrogatories rests in the discretion of the court. United States v National City Bank, 1 F. R. D. 367.

The defendant would not be granted leave to cross-examine orally a witness whose direct testimony was to be taken on written interrogatories, where witness spoke English fluently, and examination was to take place in France, and defendant could use testimony of witness who was examined and cross-examined orally in another suit on same subject matter. Id.

Rule 32. Effect of Errors and Irregularities in Depositions.

(a) **As to Notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice. [Supplants part of Code Sec. 378.]

(b) **As to Disqualification of Officer.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) **As to Taking of Deposition.**

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time. [Supplants Code Sec. 388.]

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition. [Supplants Code Sec. 378.]

(3) Objections to the form of written interrogatories submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within 3 days after service of the last interrogatories authorized.

(d) **As to Completion and Return of Deposition.** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained. [Supplants Code Sec. 388.]

Objections to competency and materiality of proposed written interrogatories could be presented to court at trial and did not furnish basis for denying the right to take the interrogatories. *Houghton Mifflin Co. v. Stackpole Sons*, 1 F. R. D. 506.

Decision under supplanted Code of Civil Procedure provisions.—The objection that a question propounded to a witness examined upon commission was leading, could not be made at the trial. *Greenlaw Lbr., etc., Co. v. Chambers*, 46 Colo. 587, 588, 105 P. 1091.

Rule 33. Interrogatories to Parties.

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership, association, or body politic, by any officer or managing agent thereof competent to testify in its behalf. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the delivery of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Objections to any interrogatories may be filed with the clerk and served upon the party submitting the same within 10 days after service thereof, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party.

- I. General Consideration.
- II. Scope of Examination.

Cross References.

For a discussion of this rule, see Address no. 8, appx. D. As to failure to serve answers, see Rule 37 (d).

I. GENERAL CONSIDERATION.

"Rule 33 has a distinctive function separate and apart from the other rules, in the discovery of truth reposing in the mind of the defendant, bearing upon the issue in preparation for trial. It is peculiarly adapted to the use of parties in preparing for trial, in the interest of economy of time, for if admissions are made the fact is established, or if answers are adverse, and believed untrue, or the fact camouflaged in such a fashion as to becloud the truth, for use in cross-examination to clarify the answers, and uncover the truth." *Bailey v. New England Mut. Life Ins. Co.*, 1 F. R. D., 494, 495.

It contemplates that the interrogatories shall be addressed only to an adverse party in a pending action. *Simonin's Sons v. American Can Co.*, 26 F. Supp. 420.

This rule should be given a liberal rather than a strict interpretation. *Chandler v. Cutler-Hammer*, 31 F. Supp. 453.

The field which is embraced within the interrogatory procedure of the Rules of Civil Procedure and which is always open to a defendant, is broad and is liberally indulged. *Laugharn v. Zimmelman*, 28 F. Supp. 348.

"Undoubtedly the distinguished draftsmen who drew Rule 33, and the courts which

have construed it, meant to give it wide scope and eliminate technicalities which would unnecessarily limit its application." *Byers Theaters v. Murphy*, 1 F. R. D. 286, 288.

Its purpose is to obtain admissions and thereby limit the subjects of controversy that would have to be disposed of on trial. *Chandler v. Cutler-Hammer*, 31 F. Supp. 453; *Schwartz v. Howard Hosiery Co.*, 27 F. Supp. 443.

And to simplify the issues for trial. *Gaumont v. Spector Motor Service*, 1 F. R. D. 364.

And to provide ample facilities for discovery of facts before trial so that surprise at the trial and possible miscarriage of justice might be avoided. *Chandler v. Cutler-Hammer*, 31 F. Supp. 453.

And, hence, surprise at trial has now become almost impossible where careful use is made of the Rules of Civil Procedure dealing with interrogatories to parties and the consequences of refusal to make discovery. *Pearson v. Hershey Creamery Co.*, 30 F. Supp. 82.

Rule 12 providing for a bill of particulars distinguished from this rule.—Under Rule 12 providing for a bill of particulars, a party may properly seek disclosure only of matters which define the issues and become a part of the pleadings, as distinguished from this rule providing for interrogatories under which a party may properly seek disclosure of matters of proof which may later be made a part of the record as evidence. *Sure-Fit Products Co. v. Medvogue Corp.*, 28 F. Supp. 489.

Rule 12 (e) permits the moving party to require the other party to define the issues with as much particularity as necessary, and this rule, on the other hand, permits the moving party to ask for proofs. *Adams v. Hendel*, 28 F. Supp. 317.

Information necessary to enable party to reply to pleading may be obtained by motion for bill of particulars, but that necessary to present defense may be obtained only by interrogatories. *Smith v. Employers Fire Ins. Co.*, 1 F. R. D. 251.

Proof of allegations of bill, when appropriate before trial, may be obtained upon filing interrogatories under this rule. *United States v. Columbia Gas, etc., Corp.*, 1 F. R. D. 358.

Where moving party seeks information to enable him to prepare for trial, proper practice is to proceed by discovery after joinder of issue. *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 F. Supp. 389.

Interrogatories are not a preliminary step in the formation of pleadings but may be utilized for obtaining evidentiary matters after pleadings have been formulated, whereas information sought on evidentiary matters obtainable by interrogatories may not properly be obtained by bill of particulars. *United States v. Crescent Amusement Co.*, 31 F. Supp. 730.

And motions for more definite statement and for bill of particulars should be overruled if petition sets forth a cause of action and information requested can easily be ascertained by interrogatories unless question of jurisdiction is raised, in which case motions should be granted. *Southern Gro. Stores v. Zoller Brewing Co.*, 26 F. Supp. 858.

Defendant's motion for a more definite statement or bill of particulars would be denied, where defendants could obtain more definite or detailed information through the method of discovery provided by Rules of Civil Procedure. *Securities, etc., Comm. v. Timetrust*, 28 F. Supp. 34; *Brinley v. Lewis*, 27 F. Supp. 313. See also, *Massachusetts Bonding, etc., Co. v. Harrisburg Trust Co.*, 27 F. Supp. 987; *Tully v. Howard*, 27 F. Supp. 6.

Motions for more definite statement and bill of particulars were denied where defendants, after issue joined, could seek the desired information pursuant to Rules of Civil Procedure governing depositions and interrogatories. *Folly Amusement Holding Corp. v. Randforce Amusement Corp.*, 32 F. Supp. 361.

In action by receiver in possession of national bank against former directors where-in complaint alleged that directors paid out money of bank for obligations not those of bank, receiver was not required to furnish

in complaint or in response to motion for more definite statement or for bill of particulars full details concerning obligations upon which advancements were made, notwithstanding that information might have been properly requested under Rule of Civil Procedure for interrogatories. *Adams v. Hendel*, 28 F. Supp. 317.

In suit for fraud and conspiracy, allegations of amended complaint, when considered in connection with other allegations, were sufficient in "definiteness or particularity" to enable defendants to prepare a responsive pleading or to prepare for trial, within terms of Rule 12, and hence proper remedy for obtaining further information was interrogatories rather than bill of particulars. *Shultz v. Manufacturers, etc., Trust Co.*, 29 F. Supp. 38.

In action against moving picture producer for violation of right of privacy by identifying character in moving picture as portraying plaintiff, wherein complaint complied with Rule 8, motion for bill of particulars was denied in absence of showing that defendant was unable to make adequate answer, where information allegedly necessary to enable defendant to prepare for trial might be sought by depositions or interrogatories. *Moog v. Warner Bros. Pictures*, 29 F. Supp. 479.

The party sought to be examined on interrogatories may request the court for an oral examination or the court may, in proper case, so direct. *Du Pont De Nemours & Co. v. Byrnes*, 1 F. R. D. 34, 38.

Where the court finds that interrogatories are being used to discover matters which can be better or more conveniently discovered by oral examination, it may order that discovery be had only by taking objecting party's depositions upon oral examination. *New England Terminal Co. v. Graver Tank, etc., Corp.*, 1 F. R. D. 411.

And where it develops that examination by interrogatories has been inadequate, court has discretion to permit an oral examination under Rule 30. But, it should be made to clearly appear that the relevant subject matter will not involve the interrogation of the witness with respect to those particulars upon which he was examined by interrogatories. *Howard v. States Marine Corp.*, 1 F. R. D. 499, 500.

Defendant examining plaintiff under Rule 26 could not subsequently serve interrogatories on plaintiff under this rule without first obtaining leave of court, since taking of deposition under Rule 26 makes subsequent service of interrogatories to the same party under this rule analogous to the service of a second set of interrogatories. *McNally v. Simons*, 1 F. R. D. 254.

Discovery and inspection pursuant to Rule 34.—Defendant would not be required

to answer plaintiff's interrogatory where granting of plaintiff's motion for discovery would enable plaintiff to prepare its own statement of events with which interrogatory was concerned. *Campagne Continentale D'Importation v Pacific Argentine Brazil Line*, 1 F. R. D. 388.

Objections to Interrogatories should be filed within ten days.—Defendants' objections to plaintiff's interrogatories came too late when made over 10 days after service of interrogatories, in absence of application by defendants for appropriate protective order under Rule 31 (d). *Cary v Hardy*, 1 F. R. D. 355.

Where plaintiff failed to except to interrogatories addressed to him by defendant as authorized by Rules of Civil Procedure, plaintiff was required to answer the interrogatories. *Dann v Campagne Generale Trans-Atlantique Limited*, 29 F. Supp. 330.

And time for answering may be extended.—Where defendants were numerous, their agents were to some extent scattered and defendants' agents and their counsel were located in cities some distance apart, and allowed interrogatories called for considerable amount of information and would require careful conferences and study of files, defendants were allowed 30 days within which to obey order to produce documents and to answer interrogatories. *Byers Theaters v Murphy*, 1 F. R. D. 286.

Answers are prepared ex parte.—Interrogatories to parties in a strict sense do not result in depositions, because there is no cross-examination and the answers are prepared entirely ex parte. They can be directed only to adverse parties, and the answers are effective as proof only in so far as they amount to admissions. Beyond that, however, they have an important value as discovery. See article entitled, "Discovery before Trial under the New Federal Rules" by Mr. Edson R. Sunderland, XV Tenn. Law Rev., no. 8, pp. 737, 748.

And are no part of the pleadings.—Answers made by plaintiff to interrogatories under this rule were no part of the "pleadings" and could not be considered on motion to dismiss, the rule merely providing a less formal and less expensive method of examining adverse party before trial than the deposition method. *Dunleer Co. v Minter Homes Corp.*, 33 F. Supp. 242.

They do not become evidence in the case unless voluntarily introduced by the interrogator as admissions against interest on the part of the party interrogated. *Coca Cola Co. v Dixi-Cola Laboratories*, 30 F. Supp. 275; *New England Terminal Co. v Graver Tank, etc., Corp.*, 1 F. R. D. 411.

As, ordinarily, they will not be received over interrogator's objection.—Answers of

interrogated party, save for exceptional circumstances, may not be received over his adversary's objection. *F. & M. Skirt Co. v Wimpf-Heimer & Bro.*, 25 F. Supp. 898.

Where plaintiff in preparing his case for trial served upon defendant written interrogatories to be answered as provided by this rule, and after answering the interrogatories defendant, within 15 days, served a copy of the answers on plaintiff, defendant was not entitled to offer the answers to the interrogatories in evidence over plaintiff's objections. *Bailey v New England Mut. Life Ins. Co.*, 1 F. R. D. 494.

The answers, not because the rule so provides, but, under the general rule of evidence, may be used, as a confession, or for impeachment but not by the answering party as a self-serving statement free from the hazards of cross-examination. *Id.*

Such answers do not limit interrogated party's proof on trial as to subsequently secured information.—Defendants required by interrogatories to produce information would not be prevented on trial from offering further information which might come to defendants' knowledge between time of answers to interrogatories and trial, since it is not the function of interrogatories to limit defendants' proof. *RCA Mfg. Co. v Decca Records*, 1 F. R. D. 433.

II. SCOPE OF EXAMINATION.

Interrogatories are exploratory, intended to find out facts, witnesses, and documents so that the propounder may thereafter prepare to prove his case in an orderly manner, and they are not "depositions" to be considered on summary judgment under rule relating to the granting of summary judgment. *River Junction v Maryland Cas. Co.*, 110 F. (2d) 278.

And are not subject to attack on general ground that they constitute a "fishing expedition." *Boysell Co. v Hale*, 30 F. Supp. 255.

As the scope of discovery under this rule may be as broad as scope of examination by deposition as provided in Rule 26. *Kingsway Press v Farrell Pub. Corp.*, 30 F. Supp. 775.

The scope of discovery permitted under this rule relating to interrogatories is as broad as under Rule 26 relating to discovery by deposition. *Landry v O'Hara Vessels*, 29 F. Supp. 423; *Byers Theaters v Murphy*, 1 F. R. D. 286.

This rule should be read in connection with Rule 26 defining the scope of the examination of any person whose deposition is being taken. *Lanova Corp. v National Supply Co.*, 29 F. Supp. 119.

"It has been held that the scope of discovery by interrogatories is as broad as that by

deposition, and anything that may be asked on oral examination may also be inquired into by interrogatories." *Byers Theaters v. Murphy*, 1 F. R. D. 286, 288.

This rule has been interpreted by the courts as being just as broad in its implications as in the case of depositions. This means that the distinction between a search for evidentiary facts and an inquiry into ultimate facts has been abolished. *Schoeneman v. Brauer*, 1 F. R. D. 292, 293.

Evidence which would have been competent if sought by depositions was competent where sought by written interrogatories. *Id.*

So examination may be had as to any relevant matter not privileged.—The scope of discovery by means of written interrogatories, like the scope of discovery by deposition, is governed by Rule 26, under which the deponent may be examined regarding any matter not privileged, which is relevant to the subject matter involved in the pending action. *Dixon v. Phifer*, 30 F. Supp. 627.

Under this rule, the disclosure sought is not limited to material or ultimate facts, but extends to all facts, whether ultimate or evidentiary, which are relevant, except matters which are privileged. *Kingsway Press v. Farrell Pub. Corp.*, 30 F. Supp. 775.

Only matters that are relevant to the particular case can properly be the subject of interrogatories. *Coca Cola Co. v. Dixi-Cola Laboratories*, 30 F. Supp. 275; *Dixon v. Phifer*, 30 F. Supp. 627; *New England Terminal Co. v. Graver Tank, etc., Corp.*, 1 F. R. D. 411.

Under rule relating to interrogatories to parties, the scope of discovery like the scope of discovery by deposition is governed by rules permitting examination regarding any matter not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining parties or the claim or defense of any other parties including the existence, description, nature, custody, condition and location of any books, papers, documents, or other tangible things and identity and location of persons having knowledge of relevant facts. *Nichols v. Sanborn Co.*, 24 F. Supp. 908.

Party may be interrogated on any matter relevant to the issue, not shown by admissions in the pleading, and which could be produced in evidence at the time of trial. This theory would not, of course, include any matter of self-incrimination, hearsay or individual exemption or privilege. *Auer v. Hershey Creamery Co.*, 1 F. R. D. 14.

Both law and reason dictate that the scope of interrogatories should not be entirely without limitation. *Byers Theaters v. Murphy*, 1 F. R. D. 286.

And interrogatories may cover as broad a field of inquiry as when interrogated party is called as witness to testify orally at trial. *Chandler v. Cutler-Hammer*, 31 F. Supp. 453; *Landry v. O'Hara Vessels*, 29 F. Supp. 423.

Interrogatories should be limited in scope to the pending issues which in turn are limited by the particular claims in suit. *Stanley Works v. Mersick & Co.*, 1 F. R. D. 43; *Doucette v. Eastern States Transp. Co.*, 1 F. R. D. 66; *Doucette v. Howe*, 1 F. R. D. 18. See also, *Graver Tank, etc., Corp. v. Berry Sons Co.*, 1 F. R. D. 163; *O'Rourke v. RKO Radio Pictures*, 27 F. Supp. 996.

Defendant was not required to answer interrogatories which called for information that was not relevant to issues raised by the material allegations contained in the pleadings. *Sears, Roebuck & Co. v. Harrison*, 1 F. R. D. 135.

A party may obtain a disclosure of matters in controversy, if such disclosure is pertinent to the issues and will not affect the fixed right of the person interrogated on matters not wholly germane to the question in dispute. *Boysell Co. v. Colonial Coverlet Co.*, 29 F. Supp. 122.

The number of interrogatories should be relatively few and related to important facts rather than very numerous and concerned with relatively minor evidentiary details. *Coca Cola Co. v. Dixi-Cola Laboratories*, 30 F. Supp. 275; *New England Terminal Co. v. Graver Tank, etc., Corp.*, 1 F. R. D. 411.

Where a more comprehensive examination of the adverse party is desired, it should be ordinarily done by taking his deposition. *Graver Tank, etc., Corp. v. Berry Sons Co.*, 1 F. R. D. 163.

But an unlimited number may be propounded if the inquiries are pertinent. *Schoeneman v. Brauer*, 1 F. R. D. 292.

The scope of answers to interrogatories may vary with special circumstances of the case. *United States v. American Solvents, etc., Corp.*, 30 F. Supp. 107.

Where the United States permitted its case against a defunct corporation to rest for five years before instituting action, and case was not ready for trial after lapse of five more years, corporation and its codefendants were entitled to have the United States answer interrogatories propounded before answer filed concerning notice or information obtained by corporation's officers, agents, and employees. *Id.*

And court has wide discretion in determining whether plaintiff is entitled to have interrogatories answered. *Simonin's Sons v. American Can Co.*, 30 F. Supp. 901.

In determining whether plaintiff is entitled to have interrogatories answered, a

pretrial hearing may be had in order to help court determine whether there is reasonable ground to believe that a cause of action exists, and to enable court to exercise its discretion intelligently. *Id.*

It is immaterial whether matters are as much within knowledge of interrogating party as of adversary party. *Kingsway Press v. Farrell Pub. Corp.*, 30 F. Supp. 775. See also, *Nakken Patents Corp. v. Rabinowitz*, 1 F. R. D. 90.

And the party interrogated need only answer matters of fact within his knowledge, and interrogatories which merely seek to elicit opinions or which requires research and compilation of data and information not readily known to the parties interrogated are improper. *Coca Cola Co. v. Dixi-Cola Laboratories*, 30 F. Supp. 275.

As one party should not be allowed to require another to make investigation, research or compilation of data or statistics for him which he might equally as well make for himself. *Byers Theaters v. Murphy*, 1 F. R. D. 286.

Under this rule, the party interrogated need only answer matters of fact within his knowledge, and interrogatories which merely seek to elicit opinions, or which require research and compilation of data and information not readily known to the party interrogated, are improper. *New England Terminal Co. v. Graver Tank, etc., Corp.*, 1 F. R. D. 411.

Plaintiffs cannot properly be put to the expense of taking photographs through the device of an interrogatory, although they may be compelled to furnish existing photographs by such means. *Stanley Works v. Mersick & Co.*, 1 F. R. D. 43.

In action for infringement of trademark for phonograph records, defendants could not refuse to answer interrogatories which sought details of matters alleged in answer on ground that interrogatories would require extensive research, investigation and expense where plaintiff stipulated that if defendants did not have the material, plaintiff would be content that defendants answer the interrogatories by saying so. *RCA Mfg. Co. v. Decca Records*, 1 F. R. D. 433.

And party need not answer irrelevant or unnecessarily burdensome interrogatories.—Objections to defendant's interrogatories which were irrelevant or unnecessarily burdensome on plaintiff in requiring investigation or research or compilation of data or statistics were sustained. *Coca Cola Co. v. Dixi-Cola Laboratories*, 30 F. Supp. 275.

In action for injuries sustained on board defendant's fishing schooner, interrogatory relating to plaintiff's residences during preceding ten years was not relevant to issues involved and need not be answered by plain-

tiff. *Landry v. O'Hara Vessels*, 29 F. Supp. 423.

In action by garment manufacturer for damages from use of cloth which was not as represented by seller, seller was not required to answer interrogatory inquiring whether seller drew a report on manufacturer from any commercial reporting agency, where inquiry did not appear relevant. *F. & M. Skirt Co. v. Wimpf-Heimer & Bro.*, 25 F. Supp. 898.

Where interrogatories seeking evidence concerning ownership and control of motor vehicle which caused plaintiff's injury, particulars of the accident, and matters set up in defendant's answer related to matters which were relevant to subject matter and were inquiries concerning evidentiary facts relating to claims and offenses of the parties, the interrogatories were required to be answered directly and without evasion in accordance with information that defendant, after due inquiry, possessed. *Gaumont v. Spector Motor Service*, 1 F. R. D. 364.

Relevancy of particular interrogatories, see *Creden v. Central R. Co.*, 1 F. R. D. 168.

Nor interrogatories tending to incriminate, etc.—Any interrogatory pertinent to subject matter involved may be put, and should be answered except questions tending to incriminate or to express an opinion, a conclusion of law, or a contention. *Landry v. O'Hara Vessels*, 29 F. Supp. 423.

Nor interrogatories calling for conclusions of law.—A proposed interrogatory which would cast on defendant the duty and responsibility of determining questions of law with respect to relevancy of matters referred to in the questions was objectionable in form. *Slydell v. Capital Transit Co.*, 1 F. R. D. 15.

Defendant would not be required to answer plaintiff's interrogatories, where answers to one interrogatory could only be a conclusion of law and there was nothing in pleading which indicated relevancy of the other interrogatory. *Compagnie Continentale D'Importation v. Pacific Argentine Brazil Line*, 1 F. R. D. 388.

Defendant need not give legal conclusions. *Caggiano v. Socony Vacuum Oil Co.*, 27 F. Supp. 240.

Nor interrogatories calling for opinions. *French & Sons v. Carleton Venetian Blind Co.*, 30 F. Supp. 903; *Stanley Works v. Mersick & Co.*, 1 F. R. D. 43; *Doucette v. Eastern States Transp. Co.*, 1 F. R. D. 66; *Doucette v. Howe*, 1 F. R. D. 18; *Chandler v. Cutler-Hammer*, 31 F. Supp. 453; *Byers Theaters v. Murphy*, 1 F. R. D. 286; *Nakken Patents Corp. v. Rabinowitz*, 1 F. R. D. 90; *Lowe v. Greyhound Corp.*, 25 F. Supp. 643; *Lanova Corp. v. National Supply Co.*, 29 F. Supp. 119.

Plaintiff's interrogatory, calling on defendant for opinion, rather than merely answer as to facts, because plaintiff, with information given in response to other interrogatories, will be able to do exactly what he has required defendant to do, need not be answered. *Nakken Patents Corp. v. Rabinowitz*, 1 F. R. D. 90.

In action for injuries sustained on board defendant's fishing schooner, interrogatory requesting plaintiff to state what, in his opinion, was the nature and cause of alleged unsafe or defective condition of machinery or motor out of which accident arose, called for expression of opinion and need not be answered by plaintiff. *Landry v. O'Hara Vessels*, 29 F. Supp. 423.

In action for injuries sustained on board defendant's fishing schooner, answer to interrogatory relating to plaintiff's training, experience, and qualifications to perform duties at which plaintiff was employed should be limited to training and experience, since "qualifications" might possibly call for expression of opinion. *Id.*

Discovery should be confined to bare facts and not extended to any elaboration of explanation or comparison, proper for proof on the trial. *Boysell Co. v. Colonial Coverlet Co.*, 29 F. Supp. 122.

Interrogatories calling for mere opinions respecting validity of registered trade-mark and right to register plaintiff's alleged trade-mark would be stricken. *Schoeneman v. Brauer*, 1 F. R. D. 292.

Nor interrogatories calling for facts admitted in the pleadings.—Plaintiff's interrogatories which sought details of facts which had only been generally pleaded in answer were not objectionable. *RCA Mfg. Co. v. Decca Records*, 1 F. R. D. 433.

Nor all inclusive interrogatories.—An interrogatory which is too general and all inclusive need not be answered. *Auer v. Hershey Creamery Co.*, 1 F. R. D. 14.

In action for injuries sustained on board defendant's fishing schooner, answer to interrogatory relating to accidents, illnesses, diseases or operations sustained by plaintiff prior or subsequent to date of accident involved would be limited to period of five years next preceding the accident, and, since accident, to date of answer. *Landry v. O'Hara Vessels*, 29 F. Supp. 423.

In action for injuries sustained on board defendant's fishing schooner, answer to interrogatory as to how accident occurred and what plaintiff did and what acts the defendant did or neglected to do at time of accident constituting negligence would be confined to statement by plaintiff as to how accident occurred, stating what he did and what act or acts the defendant did at time of accident. *Id.*

Names and addresses of witnesses may be obtained.—Under this rule, interrogatories may obtain disclosure of names and addresses of witnesses. *Kingsway Press v. Farrell Pub. Corp.*, 30 F. Supp. 775.

In personal injury action, plaintiffs' interrogatories seeking to ascertain names of eyewitnesses to accident were allowed as relevant. *Creden v. Central R. Co.*, 1 F. R. D. 168.

And of persons having knowledge of relevant facts.—Parties may be interrogated as to the identity and location of persons having knowledge of relevant facts. *Nichols v. Sanborn Co.*, 24 F. Supp. 908; *Looper v. Colonial Coverlet Co.*, 29 F. Supp. 125.

In action by motion picture operator against competitors and distributors of motion pictures for illegally creating a monopoly, plaintiff operator was entitled to have answers made to interrogatories calling for names and addresses of designated agents of distributors who had or might have knowledge of transactions involved. *Byers Theaters v. Murphy*, 1 F. R. D. 286.

In action for slander, defendant was entitled to answers to interrogatories seeking names and addresses of plaintiff's employers before the date of the alleged slander, and dates and particulars concerning allegations in declaration that former employers shunned and ceased to employ plaintiff. *Whitkop v. Baldwin*, 1 F. R. D. 169.

But court has discretionary power to require that names of witnesses be disclosed in reply to interrogatories. *F. & M. Skirt Co. v. Wimpf-Heimer & Bro.*, 25 F. Supp. 898.

And such inquiry will not be allowed where public policy intervenes.—This rule, under which plaintiff would ordinarily be entitled to inquire as to names of defendants' witnesses and to interrogate them before trial, will not be applied literally where public policy intervenes. *Penn. v. Automobile Ins. Co.*, 27 F. Supp. 336.

Plaintiff's motion for order directing insurers to give to plaintiff names and addresses of all persons known to insurers who had information or knowledge supporting insurers' defense to action on fire policies, that plaintiff set fire to the insured premises, should be denied because of public policy, especially where district attorney of county wherein insured property was located appeared and stated that he expected to press criminal charge against plaintiff and asserted that public policy would not be served by requiring disclosure of evidence relating to arson. *Id.*

There is conflicting authority as to whether inquiry may be had into other party's case.—The Rules of Civil Procedure were designed to permit liberal examination and

discovery but they were not intended to be made the vehicle through which one litigant could make use of the opponent's preparation of his case. *Byers Theaters v. Murphy*, 1 F. R. D. 286.

It does not seem fair or proper to allow one party to pry into and discover the results of conferences and communications between counsel for and agents of a party, or parties similarly situated, after the institution of suit and in preparation for trial. *Id.*

In patent infringement suit, defendant's interrogatories calling for evidentiary matter obtained by plaintiffs since the bringing of the suit would not be allowed. *Stanley Works v. Mersick & Co.*, 1 F. R. D. 43.

In personal injury action, plaintiffs' interrogatory seeking the name of the person who took the statement from plaintiffs was allowed as possibly affording information not within plaintiffs' knowledge which would be important to them if their statements to defendant were used to impeach them as witnesses. *Creden v. Central R. Co.*, 1 F. R. D. 168.

In personal injury action, plaintiffs' interrogatory seeking the substance of statements made by witnesses and employees of the defendant to the defendant was disallowed, in absence of showing why plaintiffs could not secure the information from the witnesses themselves by deposition or otherwise. *Id.*

Whereas, to the contrary, it has been held that under this rule discovery may be had to ascertain facts relating not only to the party's own case but to his adversary's also. *Nichols v. Sanborn Co.*, 24 F. Supp. 908; *RCA Mfg. Co. v. Decca Records*, 1 F. R. D. 433. See also, *McInerney v. McDonald Const. Co.*, 28 F. Supp. 557; *United States v. American Solvents, etc., Corp.*, 30 F. Supp. 107.

"A defendant may be required to give his recollection of an oral conversation which is relevant to the issue. *F. & M. Skirt Co. v. Wimpf-Heimer & Bro.*, 25 F. Supp. 898."

Byers Theaters v. Murphy, 1 F. R. D. 286, 288.

Interrogatories directed to amount of damages are premature as the question of liability has not been determined. *O'Rourke v. RKO Radio Pictures*, 27 F. Supp. 996; *Boysell Co. v. Colonial Coverlet Co.*, 29 F. Supp. 122; *Looper v. Colonial Coverlet Co.*, 29 F. Supp. 125.

But should be answered where information is relevant to other issues.—In trademark infringement action, interrogatories were not objectionable on ground that they sought information relevant only on question of damages before issue of liability had been determined where information sought was also relevant to question of acquiescence in continued infringement raised by defendants to avoid liability. *RCA Mfg. Co. v. Decca Records*, 1 F. R. D. 433.

Or where the interrogatories relate to special damages, as in slander action. *Whitkop v. Baldwin*, 1 F. R. D. 169.

Sufficiency of answer.—Answer in reply to interrogatory, that "I believe" that a certain representative introduced manufacturer to seller, was not so defective because of the words "I believe" as to require striking it or a further answer. *F. & M. Skirt Co. v. Wimpf-Heimer & Bro.*, 25 F. Supp. 898.

Requirement that witness give "recollection" as opposed to "belief" or "understanding" applies to one answering interrogatories who has or purports to have personal knowledge of events stated, but not to one who depends on what others tell him. *Id.*

In action by garment manufacturer for damages from use of cloth which was not as represented by seller, answer beginning with "In substance, as I understand it:" in reply to interrogatory asking for conversations incident to negotiation for purchase, was not so defective because of use of words "as I understand it" as to require striking it or a further answer. *Id.*

Sufficiency of answers see *Lowe v. Greyhound Corp.*, 25 F. Supp. 643.

Rule 34. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.

Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by

or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, sampling, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. [Supplants Code Secs. 279, 280, 390 and 399.]

Committee Note.

See 4 C. S. A., Chap. 110, Sec. 211, for inspection of mines.

- I. General Consideration.
- II. Prerequisites of Order.

Cross References.

For a discussion of this rule, see Address no. 8 in appx. D. As to consequences of refusal to obey an order made under this rule, see Rule 37 (b). As to subpoena duces tecum, see Rule 45. As to form of motion under this rule, see Form 20, appx. A.

I. GENERAL CONSIDERATION.

This rule was adopted with a view to simplifying the issues, and it should be liberally interpreted. *Gielow v. Warner Bros. Pictures*, 26 F. Supp. 425.

A motion for leave to take the depositions of parties and witnesses after issue joined and for an order for the issuance of subpoenas and the production and copying of documents was denied. In reaching this conclusion the court said: "The new Federal Rules provide a clear and unambiguous method of taking depositions, compelling the attendance of parties and witnesses and the production and copying of documents. The plaintiff contends that by this omnibus motion, he will save the time and the effort of the court. After careful consideration, I think that what the plaintiff is attempting to do would result in confusion rather than assistance." *Brach v. Macfadden Publications*, 1 F. R. D. 445, 446.

And is to be liberally construed. *Bruhn v. Hanson*, 30 F. Supp. 602.

But it is not intended for use as a dragnet on any fishing expedition. *Sonken-Galamba Corp. v. Atchison, etc., Ry. Co.*, 30 F. Supp. 936.

This rule is to be construed broadly so that proper evidentiary matters may be brought out, but does not authorize "fishing expedition." *Welty v. Clute*, 29 F. Supp. 2.

It must be construed in *pari materia* with Rule 45 (b). *Connecticut Importing Co. v.*

Continental Distilling Corp., 1 F. R. D. 190, 192. See also, *Fox v. House*, 29 F. Supp. 673.

"Rule 34 defines the authority of the court. Rule 45 (b) defines the authority of the clerk. The two rules relate to the same subject. Obviously they must be construed in *pari materia*. Otherwise there would result the absurdity that the clerk is granted more power than the court. As I see it, in consequence it follows that, when a subpoena duces tecum issued by the clerk comes before the court on motion to quash, absence of a showing that the documents contain evidence which is or probably is material is ground for granting the motion." *United States v. Aluminum Co.*, 1 F. R. D. 57, 58, followed in *United States v. Aluminum Co.*, 1 F. R. D. 62.

Inspection of documents in possession of one who is not a party may be ordered as an adjunct to the deposition of the person who has the documents under Rules 26 and 45. *Eastern States Petroleum Co. v. Asiatic Petroleum Corp.*, 27 F. Supp. 121.

This rule, however, contemplates that the orders be addressed only to an adverse party in a pending action. *Simonin's Sons v. American Can Co.*, 26 F. Supp. 420. See also, *Federal Life Ins. Co. v. Holod*, 29 F. Supp. 852.

Under § 399 of the Code of Civil Procedure, supplanted by this rule, an order for the inspection or survey of a mine would not be made unless there was at the time an action pending in which the inspection or survey was necessary to protect the rights of the litigants. *People v. De France*, 29 Colo. 309, 68 P. 267, cited in notes, 111 Am. St. Rep. 965, Ann. Cas. 1914A, 613. See also, *Smuggler-Union Min. Co. v. Kent*, 47 Colo. 320, 112 P. 223.

And may be considered to have been invoked without having been specifically mentioned by plaintiff moving under Rule 12 (e). *Teller v. Montgomery Ward & Co.*, 27 F. Supp. 938. See also, *Sure-Fit Products Co. v. Med-Vogue Corp.*, 28 F. Supp. 489.

What is an action pending, see *Egan v. Moran Towing, etc., Co.*, 26 F. Supp. 621.

This rule has nothing to do with the pleadings, but it is a provision to enable either party to secure certain evidence which may be necessary in the trial of the cause. *United States v. Griffith Amusement Co.*, 1 F. R. D. 229.

Information can be obtained without formal injunction. *United States Process Corp. v. Fort Pitt Brewing Co.*, 29 F. Supp. 37.

II. PREREQUISITES OF ORDER.

General prerequisites of order.—To warrant an order for discovery of documents or things there must be a particular designation of the documents or objects which the applicant wants to examine, with a showing that such documents or things constitute or contain material evidence. In default of such designation and showing it was held in *Pierce v. Submarine Signal Co.*, 25 F. Supp. 862, that the order will be denied. See article entitled, "Discovery Before Trial Under the New Federal Rules" by Mr. Edson Sunderland, XV Tenn. Law Rev., no. 8, pp. 737, 750.

A motion for production of documents for inspection and copying or photographing must designate the documents and show that they contain material evidence. *Sonken-Galamba Corp. v. Atchison, etc., Ry. Co.*, 30 F. Supp. 936.

A discovery and inspection is granted only for cause shown. *Compagnie Continentale D'Importation v. Pacific Argentine Brazil Line*, 1 F. R. D. 388.

This rule requires that cause must be shown before an order for production will be made. *Piorkowski v. Socony Vacuum Oil Co.*, 1 F. R. D. 407, 408.

Party seeking production and inspection of documents must make a showing of "good cause" which means some adequate reason for the desired production and inspection. *Kenealy v. Texas Co.*, 29 F. Supp. 502.

A request to require defendant to produce statements of witnesses taken by defendant in preparation for trial should be predicated upon good cause shown. *Seals v. Capital Transit Co.*, 1 F. R. D. 133.

That plaintiff desired certain material in defendant's possession as an assurance that it would be available on trial was not "sufficient cause" for granting plaintiff discovery and inspection as to such material. *Compagnie Continentale D'Importation v. Pacific Argentine Brazil Line*, 1 F. R. D. 388.

Objection to a motion for discovery was sustained and the motion was denied where

good cause was not shown, documents were not in evidence except possibly as a means of contradicting one who in the trial might testify contrary to a previous written statement signed or approved by him, and motion was not timely. *Slydell v. Capital Transit Co.*, 1 F. R. D. 15.

Plaintiff's motion for production of four insurance policies, which formed basis of action, and which were in the hands of the defendant, would be granted, although an inspection of the pleadings did not disclose any reason why the motion for the production should be sustained. *Leimer v. State Mut. Life Assur. Co.*, 1 F. R. D. 386.

A defendant's motion for an order to inspect and copy certain documents, books, and records of plaintiff would be denied, where defendant's failure to disclose more than an opinion regarding nature and location of subject matter which it was desired to have produced for inspection. *Peltz v. Carolina Bagging Co.*, 1 F. R. D. 443.

And good cause must be shown by statements of facts, not mere conclusions.—A motion for production of documents for inspection and copying or photographing must show good cause by statements of facts, not mere conclusions, why order prayed should be made. *Sonken-Galamba Corp. v. Atchison, etc., Ry. Co.*, 30 F. Supp. 936.

A showing by affidavit of good cause and admissibility is clearly required by this rule. Where plaintiff's motion and affidavit simply states conclusions, without a statement of the grounds and basis for such conclusions it was denied. *Gill v. Col-Tex Refining Co.*, 1 F. R. D. 255, 256.

"The essential element of any demand for the production of documentary evidence is that it designates the documents with respect to which an inspection is desired." *Vendola Corp. v. Hershey Chocolate Corp.*, 1 F. R. D. 359, 360.

This rule unlike Rules 26, 30, 31 and 45 is limited to "designated" documents, etc. As a result, a party against whom a motion is directed will know just what document is sought by his opponent and may obtain all proper protection upon the hearing on a motion under this rule if the inspection sought is believed to constitute an undue invasion of his right to privacy. *Connecticut Importing Co. v. Continental Distilling Corp.*, 1 F. R. D. 190, 193.

Motions for discovery and production of documents, and for the issuance of subpoenas for production of documentary evidence on taking of depositions, which did not explicitly designate documents and papers intended nor show sufficiently that

such documents and papers were in possession of individuals involved, would not be granted until completion of taking of depositions. *Welty v. Clute*, 29 F. Supp. 2.

Omnibus language is insufficient designation.—Plaintiff's request for order compelling defendants to produce "all of their books, documents, papers and records" relating to subject matter of defendant's examination before trial for inspection by plaintiff will be denied because of its failure to designate documents desired to be inspected. *Vendola Corp. v. Hershey Chocolate Corp.*, 1 F. R. D. 359.

Documents described in general omnibus language are not "designated" within this rule. *Sonken-Galamba Corp. v. Atchison, etc., Ry. Co.*, 30 F. Supp. 936; *Pierce v. Submarine Signal Co.*, 25 F. Supp. 862.

"Designated" documents, papers, books and photographs within rule regarding order for production and inspection are those which can be identified with some reasonable degree of particularity, and the use of the word "designated" does not permit a roving inspection of a promiscuous mass of documents, etc., thought to be in the possession, custody or control of the opposing party. *Kenealy v. Texas Co.*, 29 F. Supp. 502.

A paragraph of a motion for the production of documents calling for a blanket inspection of copies of any and all statements furnished to any bank or credit agency over about five years was denied, where motion, even when read in light of pleadings, failed to show that information sought was material or relevant, or might reasonably be expected to become material on the trial, and motion was not confined to designated documents as required by this rule. *Connecticut Importing Co. v. Continental Distilling Corp.*, 1 F. R. D. 190.

A motion for production of specimens and documents was denied under this rule where notice of motion was not accompanied by affidavit showing good cause, it was not shown that things demanded were in possession and control of defendant, and papers sought were not designated except by words "any or all." *French & Sons v. Carleton Venetian Blind Co.*, 30 F. Supp. 903.

The document or object must be shown to be in existence. *Schoenberg v. Decorative Cabinet Corp.*, 27 F. Supp. 802.

If documents or papers described in plaintiff's interrogatory which was not required to be answered were found to be in existence after proper answers by defendant to other interrogatories, plaintiff might proceed to inspect such documents under

this rule. *Gaumont v. Spector Motor Service*, 1 F. R. D. 364.

And must be shown to be material.—A motion for order requiring party to produce document for inspection will not be granted unless moving party shows that such document is material. *Radtke Patents Corp. v. Rabinowitz*, 1 F. R. D. 126; *Floridin Co. v. Attapulugus Clay Co.*, 26 F. Supp. 968.

The only documents which the court may order produced for inspection are those which constitute or contain material evidence in the case. *Kenealy v. Texas Co.*, 29 F. Supp. 502; *Floridin Co. v. Attapulugus Clay Co.*, 30 F. Supp. 158.

All matters sought to be inspected should be shown to contain material evidence. *Pierce v. Submarine Signal Co.*, 25 F. Supp. 862.

It would be unduly technical to deny the pending motion under this rule because of a present uncertainty as to the materiality of tax returns when the only effect of such a ruling would be to relegate the defendant to the procedure for a discovery under Rule 26 which entitles it to a discovery of all relevant matter. *Connecticut Importing Co. v. Continental Distilling Corp.*, 1 F. R. D. 190, 192.

Defendants were entitled on motion to inspect plaintiff's retained copies of its federal income tax returns where plaintiff alleged that it had sustained damages and loss of profits as a result of unlawful acts by defendants beginning in January, 1937, since on that issue of damages plaintiff's income both before and after critical date was highly relevant. *Id.*

Where plaintiff claimed damages and loss of profits for period subsequent to January 1, 1936, data showing commercial results for period before that date were relevant and material as constituting the base on which the claimed subsequent loss could be computed, and therefore a motion for production of books and documents covering period before that date was granted. *Id.*

In action based on accident involving vessel, plaintiff was not entitled to production for inspection of statements of captain or any officer aboard vessel as to the accident, since statements did not constitute or contain material evidence. *Fluxgold v. United States Lines Co.*, 29 F. Supp. 506.

Employee suing for personal injuries allegedly sustained while employed as seaman on one of defendant's vessels was entitled to have log records in so far as they related to any issue in case produced for inspection. *Kenealy v. Texas Co.*, 29 F. Supp. 502.

In demand for production of specimens and documents, words "relating to" were insufficient to show that documents described were admissible. *French & Sons v. Carleton Venetian Blind Co.*, 30 F. Supp. 903.

The right to examine books and records of the opposing party under procedural rules should be limited to an examination of the material records pertaining solely to the parties bringing the action. *Fishman v. Marcouse*, 32 F. Supp. 460.

Original documents on which complainant's alleged story and musical compositions were written were "evidence material to any matter involved" within this rule and defendant's motion to compel complainant to produce documents was granted. *Gielow v. Warner Bros. Pictures*, 26 F. Supp. 425.

Where motion picture theater operator alleged that defendant competitors and distributors of motion pictures illegally created a monopoly but litigation involved only two towns, transaction of defendants or some of them in other towns were irrelevant in absence of showing of similarity of conditions so that plaintiff was not entitled to production of documents which related to the other towns. *Byers Theaters v. Murphy*, 1 F. R. D. 286.

Where plaintiff alleged that it became the victim of defendants' monopolistic practices in the year 1938 but plaintiff's counsel avowed that defendants' monopolistic practices had been in existence at least as far back as January 1, 1935, contracts between defendants as far back as that date were relevant and plaintiff was entitled to production thereof for purpose of showing knowledge, intent or purpose of defendants in their transactions during 1938. *Id.*

The requirement of materiality does not compel person seeking discovery to definitely prove materiality. *Belar v. Savarona Ship Corp.*, 26 F. Supp. 599.

It is sufficient that party seeking discovery establish that it is reasonably probable that the documents sought to be examined constitute or contain material evidence. *Id.*

Production of documents for inspection may be required if it is reasonably possible that the documents constitute material evidence. *Bruun v. Hanson*, 30 F. Supp. 602.

Nor to establish admissibility.—It is not necessary to establish admissibility of the document, but it is sufficient that there is reasonable probability that the document in question contains material evidence. *Mackerer v. New York Cent. R. Co.*, 1 F. R. D. 408.

In action for death of employee when a steam crane turned over, while plaintiff as part of her case was not entitled to establish repairs made by the employer subsequent to the accident, she was entitled under this rule to an examination of documents showing mechanical condition of, and repairs made to, the crane following the accident, where no injury could come to defendant by producing the documents and on the contrary great harm might be done to plaintiff. *Id.*

The rules contemplate a liberal discovery by all parties, and that test of relevancy in a motion for discovery is not as strict as that which governs admissibility of evidence upon a trial. *Compagnie Continentale D'Importation v. Pacific Argentine Brazil Line*, 1 F. R. D. 388.

But documents need not be produced on vague chance of materiality.—This rule was not intended to open all of a party's records to other party on vague chance that they might contain some material relevant to some theory advanced by the other party. *Floridin Co. v. Attapulugus Clay Co.*, 26 F. Supp. 968.

It cannot have been the intention that a motion under this rule should be sustained if only it should be suggested that an adversary party had in his possession and under his control documents which might constitute or contain material evidence. *Poppino v. Jones Stores Co.*, 1 F. R. D. 215, 218.

In personal injury action, plaintiff's motion for production of certain reports was denied where counsel preparing motion had no knowledge regarding contents of any of documents sought, but sought the documents so that counsel might ascertain contents thereof. *Id.*

A plaintiff before he is granted sweeping discovery under the Rules of Civil Procedure must somehow convince the court that there is at least reasonable ground to believe that a cause of action exists and that it can be proved if the necessary facilities are afforded him. *Fishman v. Marcouse*, 32 F. Supp. 460.

Nor on movant's conclusion of materiality.—Where there is no showing that documents called for by motion for production of documents contain material evidence, except statement of movant's conclusion, the allegation of materiality will be deemed erroneous. *Sonken-Galamba Corp. v. Atchison, etc., Ry. Co.*, 30 F. Supp. 936.

An affidavit in support of defendant's motion for order requiring plaintiff to produce copy of exhibit in patent interference action, stating that exhibit contained relevant and material matter which was of

prime importance in instant action, was a "conclusion" of defendant and was not in compliance with this rule. *Radtke Patents Corp. v Rabinowitz*, 1 F. R. D. 126.

Materiality is to be determined by trial judge.—The function of determining whether documents brought in under a subpoena in proceeding by government were material so as to entitle government to inspect them belonged to the trial judge. *United States v Aluminum Co.*, 26 F. Supp. 711.

The trial judge, in determining whether documents brought in under a subpoena in proceeding by government were material so that they might be inspected by government, was required to examine every document. *Id.*

Plaintiff's motion for discovery regarding certain documents was denied where because defendant had not answered, it was impossible to determine whether any of documents requested would be material to any issue. *Piest v Tide Water Oil Co.*, 26 F. Supp. 295.

And documents cannot be inspected until materiality is so determined.—In proceeding by government, it was without right to inspect documents brought in under a subpoena until determination that they constituted or contained evidence material to issues in case. *United States v Aluminum Co.*, 26 F. Supp. 711.

The government was not entitled to inspect that portion of documents brought in under a subpoena which were found upon examination thereof by court to contain nothing which would contribute toward solution of issues in proceeding by government. *Id.*

Where motion is made for production and inspection of documents, the materiality of the documents, if challenged, must first be passed on by the court before the documents are submitted for inspection to the opposing party. *Kenealy v Texas Co.*, 29 F. Supp. 502.

In suit by heirs against administrator and his attorney to establish trust in stock which administrator and attorney had improperly accepted in settlement of their claims against estate, heirs were entitled to production of records for inspection and photographing, except for personal books of account, as to which court reserved ruling pending determination of their materiality. *Bruun v Hanson*, 30 F. Supp. 602.

Waiver of materiality requirement.—Where parties stipulated for production of certain documents they must be deemed to have waived any showing of reasonable probability of materiality or else be deemed to have concluded that requirement of materiality had been met. *Belser v Savarona Ship Corp.*, 26 F. Supp. 599.

Materiality under amended complaint.—Where it appears that the documents sought may be material to the issues already joined, production should be ordered even though the rule in terms does not seem to countenance production of data which might be necessary for an amended cause of action. *United States v Doudera*, 28 F. Supp. 223.

"Matter involved in the action."—In an action for declaratory judgment concerning validity of infringement of defendant's patents, relationship and transactions between plaintiff and other companies involved in prior litigation involving the same patents, constituted "matter involved in the action," with respect to which defendant was entitled to production and inspection of documents, since it was not a mere "fishing expedition." *Bliss Co. v Cold Metal Process Co.*, 1 F. R. D. 193.

Plaintiff was not entitled to examine defendants and compel them to produce their books relating to defense of the suit by third parties, to enable plaintiff to determine whether activities of third parties were sufficient to enable plaintiff to invoke doctrine of estoppel as res judicata in any subsequent suit between plaintiff and third parties, such fact not being "matter involved in the action" since judgment could not bind third parties even if they defended suit. *Lip Lure v Bloomingdale*, 27 F. Supp. 811.

In suit for breach of license agreement with respect to patent devices, where special master reported that inspection should not be made of certain exhibit covered by plaintiff's motion for leave to inspect but defendant produced documents from among such exhibits and caused them to be introduced in evidence, other documents offered by plaintiff from the same class of exhibits was properly admitted as relating to matter "involved in the action." *Stentor Elec. Mfg. Co. v Klaxon Co.*, 30 F. Supp. 425.

Only documents in possession or control of a party to the action may be reached. *Eastern States Petroleum Co. v Asiatic Petroleum Corp.*, 27 F. Supp. 121. See *Bough v Lee*, 26 F. Supp. 1000.

On defendant's application, plaintiff was required to produce books, papers, documents, etc., of third person for inspection only if such books, papers, documents, etc., were in its possession, custody or control. *Orange County Theatres v Levy*, 26 F. Supp. 416.

"If the documents and things sought to be produced are not in defendants' custody or under their control, a statement to that effect is sufficient to excuse it from compliance with an order for their production." *RCA Mfg. Co. v Decca Records*, 1 F. R. D. 433, 436.

But if defendants know where and under whose control they presently are then defendants shall so state in detail. *Id.*

An alleged director and secretary of defendant corporation would not be ordered to appear and produce corporate books and documents and correspondence on plaintiff's motion where director submitted an affidavit stating that so far as he knew he never was the secretary and that he did not have custody or possession of books, documents, or correspondence which he was called on to produce. *Flynn v. Magraw*, 27 F. Supp. 936.

A motion for production of documents, which alleged that documents were in possession of attorney for defendant on a certain date which was prior to date of motion, was defective in that it did not allege that documents were ever in possession of defendant, or that the documents were in possession of attorney for defendant by reason of his representation of defendant. *Poppino v. Jones Store Co.*, 1 F. R. D. 215.

Control of document, rather than location, is the test. In *re Harris*, 27 F. Supp. 480. See also, *Galanos v. United States*, 27 F. Supp. 298.

Privileged matter need not be produced.—Communications between plaintiff and its own counsel concerning its private interests, rights, and liabilities, are privileged, but letters and documents between counsel of one party and counsel of another party, or between plaintiff and other parties or their counsel, bearing upon participation in prior and pending litigation, are "matter involved in the action" within terms of this rule and are not privileged. *Bliss Co. v. Cold Metal Process Co.*, 1 F. R. D. 193.

This rule cannot be so construed as to compel production of documents which by law are placed beyond process of courts. *Federal Life Ins. Co. v. Holod*, 30 F. Supp. 713.

Where plaintiff, operating motion picture theater, alleged that defendant competitors and distributors of motion pictures illegally created a monopoly and requested production of contracts between defendants, the prices, as shown by contracts, did not partake of the nature of trade secrets and were not confidential to such an extent as to preclude plaintiff from obtaining their production. *Byers Theaters v. Murphy*, 1 F. R. D. 286.

Drawings of military apparatus may be privileged documents.—Drawings of military apparatus which constituted governmental military secrets were "privileged documents" within federal rule authorizing Federal District Court to order production of documents which are not privileged.

Pollen v. Ford Instrument Co., 26 F. Supp. 583.

But retained income tax returns are not.—A defendant was entitled to inspect plaintiff's retained copies of its federal income tax returns, even though they constituted "communications" from the taxpayer to the government, since such returns are without privilege either at common law or under statute. *Connecticut Importing Co. v. Continental Distilling Corp.*, 1 F. R. D. 190.

Secret processes, development and research need not be divulged. *Floridin Co. v. Attapulgas Clay Co.*, 26 F. Supp. 968.

Motion for discovery may not be used by one party to secure results of preparation for trial of another party. *Piorkowski v. Socony Vacuum Oil Co.*, 1 F. R. D. 407.

The Civil Procedure Rules relating to discovery and production of documents were not intended to permit a party to pry into the details of other party's preparation for trial. *Floridin Co. v. Attapulgas Clay Co.*, 26 F. Supp. 968.

This rule cannot be interpreted so broadly that a party plaintiff may obtain from his adversary not only that evidence which will aid plaintiff to make out his case, but also that evidence which his adversary might use to make out his defense. *Poppino v. Jones Store Co.*, 1 F. R. D. 215.

See note as to conflict of authority on this point under Rule 33.

Production of documents may not be refused because documents relate to matters already made known in a bill of particulars. *Bruun v. Hanson*, 30 F. Supp. 602.

Party producing material will be protected from undue burden.—Where material sought to be inspected under plaintiff's motion for discovery and inspection was voluminous, order to be entered on motion would protect defendant from undue burden in complying with it, and inspection would be held at defendant's convenience and, if desired, at its place of business. *Compagnie Continentale D'Importation v. Pacific Argentine Brazil Line*, 1 F. R. D. 388. See also, *Floridin Co. v. Attapulgas Clay Co.*, 26 F. Supp. 968.

And from undue invasion of privacy.—The amount of protection properly required against an undue invasion of privacy will rest largely on the discretion of the court. *Connecticut Importing Co. v. Continental Distilling Corp.*, 1 F. R. D. 190, 193.

And from production at great cost.—This rule does not authorize the court to require production of documents, which could be produced only after weeks of labor and at great cost. *Sonken-Galamba*

Corp. v. Atchison, etc., Ry. Co., 30 F. Supp. 936.

This rule would be violative of the Fifth Amendment to the extent that it might be construed as authorizing the court to require production of documents when compliance would require weeks of labor and great cost. *Id.*

A plaintiff cannot compel a defendant to come into court and subject him to great costs, before there is any judgment against him, by requiring production of documents at great cost. *Id.*

Plaintiffs cannot properly be put to the expense of taking photographs through the device of an interrogatory although they may be compelled to furnish existing photographs by such means. *Stanley Works v. Mersick & Co.*, 1 F. R. D. 43.

Time within which documents to be produced may depend on circumstances.—

Where defendants were numerous, their agents were to some extent scattered and defendants' agents and their counsel were located in cities some distance apart, and allowed interrogatories called for considerable amount of information and would require careful conferences and study of files, defendants were allowed 30 days within which to obey order to produce documents. *Byers Theaters v. Murphy*, 1 F. R. D. 286.

An order of this nature is interlocutory and not appealable. *Apex Hosiery Co. v. Leader*, 102 F. (2d) 702.

Order staying proceeding until plaintiff complied with previous order to plaintiff to consent to exhumation of insured's body was interlocutory. *Zalatuka v. Metropolitan Life Ins. Co.*, 108 F. (2d) 405.

Rule 35. Physical and Mental Examination of Persons.

(a) **Order for Examination.** In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) **Report of Findings.** If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

I. Order for Examination.

II. Report of Findings.

Cross References.

For discussion of this rule, see Address no. 8 in appx. D. As to consequences of refusal to obey order, see Rule 37 (b).

I. ORDER FOR EXAMINATION.

This rule relates exclusively to the obtaining of evidence and is procedural. *Beach v. Beach*, 114 F. (2d) 479.

It is not unconstitutional.—In *Sibbach v. Wilson & Co.*, 61 S. Ct. 422, it was held that this rule and Rule 37 were not unconstitu-

tional. See also, *Countee v. United States*, 112 F. (2d) 447.

And is not limited to actions for personal injuries. *Beach v. Beach*, 114 F. (2d) 479.

However, it has been held that this rule contemplates a situation in which the mental or physical condition is immediately and directly in controversy. *Wadlow v. Humbert*, 27 F. Supp. 210. But see criticism of this holding in 2 *Moore's Fed. Prac.*, ch. 35, § 35.01 (1940 Supplement), wherein it is maintained that this adopts a far more restricted application of the rule than was intended.—Ed. note.

In libel action based on alleged defamatory statements concerning plaintiff's mental or physical condition, plaintiff's condition was not immediately or directly in controversy, and defendant was not entitled to have plaintiff examined by medical specialists before trial. *Wadlow v. Humbert*, 27 F. Supp. 210.

Whether physical examination will be ordered is in discretion of the court. The "*Italia*," 27 F. Supp. 785.

The court has the right under this rule to make an order requiring plaintiff in action involving personal injuries to submit to physical examination by a physician, but motion to compel plaintiff to submit to examination need not be sustained under all circumstances and conditions. *Strasser v. Prudential Ins. Co.*, 1 F. R. D. 125.

Even if court was empowered on motion for new trial to require plaintiff in personal injury action to submit to mental and physical examination by physician, court acted within its discretion in denying request therefor. *Teche Lines v. Boyette*, 111 F. (2d) 579.

As to the power of the court to order the physical or mental examination of a party before or during trial, see article entitled, "Physical and Mental Examinations of Parties under New Federal Rule 35 (a)", 34 *Illinois Law Rev.*, p. 103.

Court may select physician.—The defendant seeking physical examination of a plaintiff has no absolute right to choice of his own physician, but court, after determining that physical or mental examination is advisable, may determine physician who shall conduct the examination. The "*Italia*," 27 F. Supp. 785.

The court may in its discretion appoint physician chosen by defendant for physical examination of plaintiff if interest of justice will best be served in such manner, and no serious objection arises. *Id.*

And may designate place of examination.—In action for injuries arising out of automobile accident, defendant's motion that

plaintiffs be required to submit to a physical and mental examination was granted on condition that examination take place at Galveston, Texas, on some Saturday, where one plaintiff was employed as a superintendent of schools at a place about 80 miles from Galveston. *Randolph v. McCoy*, 29 F. Supp. 978.

In action for injuries, order requiring plaintiff to submit to physical examination at designated physician's office was authorized. *Sibbach v. Wilson & Co.*, 108 F. (2d) 415.

Characteristics expressed in terms of blood grouping are part of "physical condition" in action by infant wife for maintenance wherein husband counterclaimed for divorce on ground of adultery, and wife, though suing by next friend, and child would be regarded as parties within this rule, so that court had jurisdiction to order wife and child to submit to a blood grouping test for comparison of their blood with that of husband. *Beach v. Beach*, 114 F. (2d) 479.

Plaintiff who voluntarily submitted to physical examination "waived" his right to an order requiring an examination under subdivision (a). *Rutherford v. Alben*, 1 F. R. D. 277.

Refusal to submit to examination is contempt of court.—Where plaintiff in action for injuries refused to submit to physical examination as required by court's order, court's action in committing plaintiff to jail for contempt of court was not error. *Sibbach v. Wilson & Co.*, 108 F. (2d) 413. See Rule 37 (b).

Order is interlocutory.—In insurer's suit for a declaratory judgment that insurer was entitled under policy involved to have an examination made of insured and that insured was not totally and permanently disabled as the result of an accident within policy, an order directing that insured submit to a physical examination was an "interlocutory order" and not a "final order", and an appeal from order was required to be dismissed. *Bowles v. Commercial Cas. Ins. Co.*, 107 F. (2d) 169.

II. REPORT OF FINDINGS.

Cross reference.—For suggestion that additional paragraph under Federal subdivision (f) should be restored to this rule, see discussion of this rule in Address no. 8, appx. D.

Voluntary submission does not waive right to copy.—In voluntarily submitting to physical examination, plaintiff did not waive his right to "a copy of a detailed written report of the examining physician setting out his findings and conclusions" as provided in this subdivision. *Rutherford v. Alben*, 1 F. R. D. 277, 278; *Kelleher v. Cohoes Trucking Co.*, 25 F. Supp. 965.

Rule 36. Admission of Facts and of Genuineness of Documents.

(a) **Request for Admission.** At any time after the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. Copies of the documents shall be delivered with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.

(b) **Effect of Admission.** Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

I. Request for Admission.

II. Effect of Admission.

Cross References.

For discussion of this rule, see Address no. 8 in appx. D. As to expenses on refusal to admit, see Rule 37 (c). As to form of request for admission, see Form 21, appx. A.

I. REQUEST FOR ADMISSION.

Editor's note.—It should be noted that the Federal Rule uses the phrase "or of the truth of any relevant matters of fact set forth therein." The word "therein" was construed as not limited to facts contained in the documents, but as including all facts relevant to the pleadings and set forth in the request. See *Unlandherm v Park Contracting Corp.*, 1 F. R. D. 122; *Walsh v Connecticut Mut. Life Ins. Co.*, 26 F. Supp. 566. The Colorado rule by use of the phrase "as set forth in the request" eliminates any possible ambiguity.

The committee believed the last word "therein" in the first sentence of Rule 36 (a) referred to the request, so it changed "therein" to "in the request." See article entitled, "The Federal Rules from the Standpoint of the Colorado Code" by Col. Philip S. Van Cise, Chairman of Rules Committee, *Dicta XVII*, no. 7, pp. 170, 175.

The purpose of this rule is to expedite trial, and to relieve parties of the cost of proving facts which will not be disputed on

trial and the truth of which can be ascertained by reasonable inquiry. *Hanauer v Siegel*, 29 F. Supp. 329; *Van Horne v Hines*, 31 F. Supp. 346.

And it is intended to operate extrajudicially, without burdening the court with applications for relief from improper requests to admit. *Modern Food Process Co. v Chester Packing, etc., Co.*, 30 F. Supp. 520.

And is self-sufficient, and clearly defines its purpose, and limits its effect. *Bailey v New England Mut. Life Ins. Co.*, 1 F. R. D. 494, 495.

This rule relates to the admission of facts as well as genuineness of documents. *Nekrasoff v United States Rubber Co.*, 27 F. Supp. 953.

This rule authorizes filing of requests for admissions of truth of statements having no connection with documents. *McCrate v Morgan Packing Co.*, 26 F. Supp. 812.

Under this rule a matter of fact not related to any document may be presented to the other party for admission or denial. *Smyth v Kaufman*, 114 F. (2d) 40.

Neither the request nor the statement are pleadings in the case.—Where plaintiff made a request that defendant admit the truth of specified matters of fact, and defendant served upon plaintiff a sworn statement admitting in part and denying in part the truth of matters set out in request, neither plaintiff's request nor defendant's sworn statement could be regarded as pleadings in the

case, since procedure concerning request and sworn statement pertained only to the manner or necessity of proof of matters of fact set forth in request. *Van Horne v. Hines*, 31 F. Supp. 346.

This rule requires an answer after service of request, regardless of what may have been previously asserted by the pleadings, and party making request is entitled to a direct and unequivocal answer without being required to search the record for possible denials lurking in papers or instruments previously filed in the record. In *re Independent Distillers of Kentucky*, 34 F. Supp. 724.

Where plaintiff makes a request for admissions under this rule, defendant must answer if means of information are within his power, even though he has no personal knowledge, or does not know if he can obtain knowledge, or though plaintiff is acquainted with the facts of which admission is sought. *Hanauer v. Siegel*, 29 F. Supp. 329.

As burden of affirmative action is upon party upon whom notice is served to avoid the admission, rather than upon the party seeking the admission. *Kraus v. General Motors Corp.*, 29 F. Supp. 430.

And party called on to admit must either do so or serve a sworn statement that he is unwilling and detail the reasons therefor. *Nekrasoff v. United States Rubber Co.*, 27 F. Supp. 953.

On plaintiff's propounding interrogatories under this rule, defendant must either admit or deny such facts under oath, or show that he has no information on the subject and cannot secure such information. *Hanauer v. Siegel*, 29 F. Supp. 329.

Or the failure to make an answer will be taken as an admission for purposes of trial or of a motion for summary judgment, but the party served with requests for admissions is not forced to an election between admitting and denying, and may challenge the right of the other party to ask for any particular admission of fact by setting forth in a sworn statement the reasons why he cannot truthfully either admit or deny any matter of fact. *Modern Food Process Co. v. Chester Packing, etc., Co.*, 30 F. Supp. 520.

A bankruptcy trustee, objecting to claims against bankrupt corporation under corporation's contracts to purchase stock issued by another corporation, was not required to authenticate minute book of the other corporation, where trustee served on claimants a written request that they admit that minute book was kept in regular course of business, and claimants did not make written denial under oath. In *re Independent Distillers of Kentucky*, 34 F. Supp. 724.

In action by trustee in bankruptcy to recover back the amount of alleged preferential payments by bankrupt, the fact of bankrupt's insolvency at time of payments was admitted by defendants' failure to deny it after being served by trustee with a notice to admit that fact. *Smyth v. Kaufman*, 114 F. (2d) 40.

If the facts involved are relevant, any party served is deemed to have admitted the matters requested unless he serves sworn statement pursuant to the rule. *Walsh v. Connecticut Mut. Life Ins. Co.*, 26 F. Supp. 566, 567.

Failure to serve a sworn statement either denying matters of which admissions are requested or setting forth in detail the reasons why party cannot either admit or deny such matters, resulting in admission of facts alleged in the complaint, in compliance with this rule, authorizes summary judgment. *Id.*

What is admitted.—Where notice requested defendants to admit genuineness of, truth of and receipt by one of the defendants of, a certain letter and report, and letter was a compound of statements of facts, self-serving declarations, and opinions, and defendants took no action, genuineness of and receipt of letter and report would be deemed admitted, but truth of facts contained in letter and report would not be deemed admitted. *Kraus v. General Motors Corp.*, 29 F. Supp. 430.

A request to admit genuineness of document and truth of contents thereof should specifically set forth the relevant matters of fact on which an admission of truth is sought, and person called upon to make admission should not be required to go through document and assume responsibility of determining what are relevant matters of fact and then decide what admissions he should make. *Kraus v. General Motors Corp.*, 29 F. Supp. 430.

Where document is a compound of statements of facts, self-serving declarations, and opinions, a request to admit truth of document should specifically designate the relevant facts which are to be admitted as true. *Id.*

All necessary facts not admitted must be proved.—Whether defendant's sworn statement made in response to plaintiff's request for admission of facts relieves plaintiff of the necessity for proof of all or some of the matters of fact deemed necessary to plaintiff's recovery is for trial court's determination, and all necessary facts not admitted must be proved at trial. *Van Horne v. Hines*, 31 F. Supp. 346.

It is obvious that in using this rule the facts should be stated in as simple and direct a way as possible, so that each may be admitted without too many qualifications and

limitations. There are no restrictions on the number of admissions of fact which may be asked for, and each may be reduced to a single or at least a very simple item. See article entitled, "Discovery before Trial under the New Federal Rules" by Mr. Edson R. Sunderland, XV Tenn. Law Rev., no. 8, pp. 737, 751.

And party served with request is not required to make admission if pleadings show that facts requested are not relevant. Walsh v. Connecticut Mut. Life Ins. Co., 26 F. Supp. 566, 567.

Request for admission need not set any time limit.—Request in patent infringement suit for admission of certain facts would not be dismissed on ground that request did not set any time limit for compliance therewith. French & Sons v. Carleton Venetian Blind Co., 1 F. R. D. 178.

The plaintiff's notice requiring defendants to admit genuineness of document was not defective for failure to designate the time within which admission or denial was to be made. Kraus v. General Motors Corp., 29 F. Supp. 430.

And such a request is not subject to a motion to strike. Unlandherm v. Park Contracting Corp., 1 F. R. D. 122; Nekrasoff v. United States Rubber Co., 27 F. Supp. 953.

Requests by plaintiff for admissions with respect to facts contained in defendant's answers to plaintiff's interrogatories were not subject to a motion to strike on ground that requests constituted a second set of interrogatories filed without leave of court, and that requests for admissions were to be limited to relevant matters of fact set forth in relevant documents which had been made the subject of requests. Modern Food Process Co. v. Chester Packing, etc., Co., 30 F. Supp. 520.

Request for admission of certain facts in patent infringement suit would not be dismissed on ground that this rule covered facts only within special and specific knowledge of party requested to make the admission, since if party is unable to deny or admit the facts in question, the remedy is a sworn statement to that effect. French & Sons v. Carleton Venetian Blind Co., 1 F. R. D. 178.

As power of court is limited to extending time to comply.—On motions of defendants to vacate, modify or limit notice of plaintiff to admit, power of court was limited to extending time to comply. Nekrasoff v. United States Rubber Co., 27 F. Supp. 953.

Defendants' motions to vacate, modify, or limit notice to plaintiff to admit served on attorneys for defendant pursuant to court rule were denied with allowance of five days

after service of copy of order and notice of entry thereof to comply with rule. Id.

And proper remedy is to serve sworn statement either denying matters or giving reasons for inability to either admit or deny. Walsh v. Connecticut Mut. Life Ins. Co., 26 F. Supp. 566.

In action on life policy for double indemnity for accidental death, plaintiff was not excused from responding to request for admissions that particular exhibit was a correct copy of correct record of physician's treatment of insured on ground that exhibit was not properly identified. Id.

Statement of reasons for inability to admit or deny is in nature of suspended demurrer.—A statement by a party who has been served with requests for admissions setting forth in detail the reasons why he cannot truthfully either admit or deny any matter of fact is a sort of suspended or postponed demurrer. Modern Food Process Co. v. Chester Packing, etc., Co., 30 F. Supp. 520.

And statement of legal objection is sufficient to prevent summary judgment.—The refusal of one, who is served with request for admission, to answer, accompanied by a statement of legal objection, is sufficient to prevent summary judgment and cannot be used as an admission against him at the trial. Modern Food Process Co. v. Chester Packing, etc., Co., 30 F. Supp. 520.

What constitutes good reason.—The fact that a request is directed to irrelevant private matters or violates constitutional rights is a good reason why the party cannot admit or deny it. Modern Food Process Co. v. Chester Packing, etc., Co., 30 F. Supp. 520.

Statement need not set out evidence by which statement is to be supported.—A party need not respond to a request under this rule by setting out the evidence by which he intends to support the sworn statement, nor give the names of witnesses to be called by him. Van Horne v. Hines, 31 F. Supp. 346.

Personal knowledge on part of affiant is not required, and, if means for information are within affiant's power and he avails himself thereof, the requirement of the rule is met. Van Horne v. Hines, 31 F. Supp. 346.

If the sworn statement is made by one who knows or upon information believes the truth of matters stated therein, the statement is sufficient for purpose and spirit of this rule. Id.

And defendant's sworn statement admitting in part and denying in part the truth of matters set out in plaintiff's request is not subject to a motion to strike. Van Horne v. Hines, 31 F. Supp. 346.

Statement must be served within ten days.—Where notice requesting the other party

to admit genuineness of document does not designate time within which admission or denial is to be made, sworn statement denying matters of which admission is requested or setting forth reasons why admission or denial cannot be made must be served within 10 days, unless time is extended by court on motion. *Kraus v. General Motors Corp.*, 29 F. Supp. 430.

Unless the time is extended by the court.—Defendant would be allowed ten days after service of a copy of order denying motion to vacate and disallow the notice of plaintiff to defendant, to comply with this rule. *Securities, etc., Comm. v. Payne*, 1 F. R. D. 118.

In action on war risk policy, plaintiff's motion to strike defendant's answer, filed in response to plaintiff's written request for admission of certain facts sought to be used by plaintiff in pretrial conference, on ground that answer was not timely filed, was properly overruled where defendant had filed one answer within time fixed by rule and, on plaintiff's objection, court granted extension of time to file another answer because, though procedure was not strictly in accordance with the rule, there was no claim of defendant's bad faith and no prejudice to plaintiff resulted. *Countee v. United States*, 112 F. (2d) 447, 448.

The form of an "answer to request for admissions," stating that plaintiff was not required to deny or admit the statements because some statements concerned confidential communications between husband and wife, others did not involve genuineness of relevant documents, and others referring to attached exhibit did not properly identify

the exhibit, did not comply with court rule. *Walsh v. Connecticut Mut. Life Ins. Co.*, 26 F. Supp. 566, 567.

Cost of proof may be imposed on party answering by sworn statement.—Where a party who is served with requests for admissions, serves a sworn statement, party who has served requests may endeavor to prove the facts at trial, and if he is able to do so, the court may, in its discretion, impose the extra expense of the proof, including an attorney's fee, upon the party who has created the extra expense by unjustified avoidance of admission. *Modern Flood Process Co. v. Chester Packing, etc., Co.*, 30 F. Supp. 520.

The effect of provision permitting party who is served with requests for admissions to refuse answers, accompanying refusal by statement of reasons why he cannot truthfully either admit or deny any matter of fact, is to require the party served with requests to decide for himself whether there are good reasons for refusing either to admit or deny, and to impose on him the risk of having to pay the costs incurred in proving them, instead of having the court advise him in advance as to what course he ought to take. *Id.*

II. EFFECT OF ADMISSION.

In wife's action on life policy for double indemnity for husband's accidental death, wife must respond to request for admissions indicating that insured had been treated for personal injuries and alcoholism, since admission thereunder was effective only for purposes of the action and was not testimony. *Walsh v. Connecticut Mut. Life Ins. Co.*, 26 F. Supp. 566.

Rule 37. Refusal to Make Discovery: Consequences.

(a) **Refusal to Answer.** If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in which the action is pending for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court may require the refusing party or deponent and the

party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court may require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees. [Supplants Code Secs. 387 and 390.]

(b) Failure to Comply With Order.

(1) Contempt. If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in which the action is pending, the refusal may be considered a contempt of that court. [Supplants part of Code Sec. 356.]

Committee Note.

See also Rule 107.

(2) Other Consequences. If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; [Supplants Code Sec. 390.]

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(c) Expenses on Refusal to Admit. If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses in-

curred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) **Failure of Party to Attend or Serve Answers.** If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or wilfully fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

Cross reference.—For a discussion of this rule, see Address no. 8 in appx. D.

Constitutionality.—In *Sibbach v. Wilson & Co.*, 61 S. Ct. 422, it was held that this rule and Rule 35 were not unconstitutional.

Surprise at trial has now almost become impossible where careful use is made of the Rules of Civil Procedure dealing with interrogatories to parties and the consequences of the refusal to make discovery. *Pearson v. Hershey Creamery Co.* 30 F. Supp. 82.

Deponent should be compelled to answer questions propounded unless matters involved are privileged. *Lewis v. United Air Lines Transport Corp.* 31 F. Supp. 617.

Failure to answer interrogatories may result in pleading being struck.—Where plaintiff failed to answer interrogatories addressed to him by defendant and failed to except to the interrogatories or to otherwise move the court after expiration of time for answering interrogatories in exercise of discretion granted by this rule authorizing dismissal or entry of default judgment for failure to answer interrogatories would deny motion to dismiss action and enter judgment by default on condition that plaintiff answer the interrogatories within fixed time. *Dann v. Campagne Generale Trans-Atlantique Limited*, 29 F. Supp. 330.

But a defendant should not be deprived of its right to rely upon the invalidity of a patent, the infringement whereof the plaintiff alleges, just because he can not state wherein it is inoperative or lacking in utility.

Dunlop Tire, etc., Corp. v. Firestone Tire, etc., Co., 1 F. R. D. 335, 336.

As may failure to attend.—The remedy of plaintiff in case the defendant or his agent fails to appear pursuant to notice to have deposition taken on matters in issue is to obtain order having defendant's answer stricken out and judgment by default rendered. *Cohn v. Annunziata*, 27 F. Supp. 805.

Where plaintiff had failed to appear at time set for his examination on defendant's motion, examination of defendant would not be deferred until plaintiff had submitted himself to examination, since defendant had remedy against plaintiff if there was willful refusal to appear after service of proper notice. *Kenealy v. Texas Co.*, 29 F. Supp. 502.

Parties over whom court has acquired jurisdiction and who fail to respond to notice for examination may be penalized by striking out the pleading. *French v. Zalestem-Zalessky*, 1 F. R. D. 240.

But subdivision (d) does not apply to employees of party.—This rule providing remedies in case of a party's failure to appear before officer who is to take his deposition applies to a party or an officer or managing agent of a party who willfully fails to appear, but not to an employee of a party. *Freeman v. Hotel Waldorf-Astoria Corp.*, 27 F. Supp. 303.

Subdivision (c), expenses on refusal to admit, does not prevent entry of summary judgment. *Walsh v. Connecticut Mut. Life Ins. Co.*, 26 F. Supp. 566.

CHAPTER V

TRIALS

Rule 38. Jury Trial.

C (a) Where Jury Right Exists. Upon demand, in actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due on contract, or as damages for breach of contract, or for injuries to person or property, an issue of fact must be tried by a jury, unless a jury trial is thereafter waived. [From Code Sec. 191.]

Committee Note.

Parker vs. Plympton, 85 Colo. 87, holds that "under our constitution, trial by jury in a civil action or proceeding is not a matter of right."

(b) Demand. Any party may demand a trial by jury of any issue triable by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 C (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties. [This subdivision and Rule 39 (a) supplant Code Sec. 196.]

- I. Where Jury Right Exists.
 - A. In General.
 - B. Distinction Between Jury and Nonjury Actions.
 - C. Illustrative Cases.
- II. Demand.
 - A. Necessity and Time of Filing.
 - B. Specification of Issues.
- III. Waiver.

3, ch. 95, § 22 et seq. As to fees of jurors, see vol. 3, ch. 66, § 45. As to persons exempt from jury service see vol. 3, ch. 95, § 3 et seq. As to qualifications of jurors, see vol. 3, ch. 95, § 1. As to selecting and summoning of jurors, see vol. 3, ch. 95, § 10 et seq. For a discussion of this rule see Address no. 9, appx. D.

I. WHERE JURY RIGHT EXISTS.

A. In General.

Editor's note.—Since subdivision C (a) of this rule is taken from § 191 of the Code of Civil Procedure, which was substantive law (see discussion of this rule in Address no. 9, appx. D), cases construing said section 191 are included in this note, and should be read

Cross References.

See generally the chapter on Jurors, vol. 3, ch. 95. As to penalty for bribing juror, see vol. 2, ch. 48, § 130. As to jury commissioners for selecting jurors, see vol.

in determining the right to jury trial under the Rules of Civil Procedure.

Under our constitution trial by jury in a civil action is not a matter of right.—Parker v Plympton, 85 Colo. 87, 95, 273 P. 1030, cited in note, 108 A. L. R. 1316, 1317, 1319, citing Kahm v People, 83 Colo. 300, 303, 264 P. 718, cited in note, 85 A. L. R. 1099; Miller v O'Brien, 75 Colo. 117, 118, 223 P. 1088; Londoner v People 15 Colo. 557, 570, 26 P. 135, cited in notes, 90 Am. St. Rep. 86, 125 Am. St. Rep. 640, 24 L. R. A. (N. S.) 641, Ann. Cas. 1913C, 909, Ann. Cas. 1918A, 41, 59; Corthell v Mead, 19 Colo. 386, 388, 35 P. 741, cited in note, 98 Am. St. Rep. 894.

The right to have an issue of fact tried by a jury is not determined by the nature of the issue. Cree v Lewis 49 Colo. 186, 190, 112 P. 326.

But by the character of the action in which the issue is joined. Neikirk v Boulder Nat. Bank, 53 Colo. 350, 355, 127 P. 137, cited in notes, Ann. Cas. 1914C, 853, 89 A. L. R. 1392; Cree v Lewis, 49 Colo. 186, 190, 112 P. 326; Plains Iron Works Co. v Haggott, 72 Colo. 228, 230, 210 P. 696.

Generally in purely equitable cases, the trial must be to the court. Sieber v Frink, 7 Colo. 148, 2 P. 901, cited in notes, 28 L. R. A. 622, 30 L. R. A. 266, 390, 46 L. R. A. 323, 23 L. R. A. (N. S.) 46.

This defense was equitable and its determination was for the court. Under a state of facts very similar we said: "The issue upon the legal cause of action alleged in the complaint should have been submitted to the jury, if there was any dispute concerning it. At the trial, however, defendants conceded that the legal title was in plaintiffs, and there was no evidence at all contradicting it, so there was no legal question to try or submit, and the only evidence was that pertaining to the equitable defense. This evidence might have been submitted to the jury for their finding upon it, but if so, their verdict thereon would be merely advisory to the court. * * * This being true, it was entirely competent for the court, at the close of defendants' testimony, if satisfied that the equitable defense had not been sustained, to take the case from the jury and enter judgment for the plaintiffs." Davis v Holbrook, 25 Colo. 493, 495, 55 P. 730; Weir v Welch, 71 Colo. 66, 68, 203 P. 1100.

In the trial of chancery cases, the court may, on its own motion, invoke the aid of a jury to determine specific questions of fact. Such findings are, however, no more binding now on the chancellor's conscience than they were when the old chancery practice prevailed. Conclusions of the jury are with us in such cases simply advisory; they may be accepted and form the basis of decree or judgment, or they may be entirely disregarded. When the Code of Civil Procedure

was first adopted, the contrary suggestion on this subject in the note on page 376 of Adams' Equity may have been applicable. But the enactment in 1879 (from which this provision is derived) clearly established the practice of trying chancery cases to the court without a jury; and the court does not think it can now be correctly claimed that special findings of a jury in such cases are as binding as verdicts in actions in law. Hall v Linn, 8 Colo. 264, 267, 5 P. 641, cited in notes, 39 L. R. A. (N. S.) 923, L. R. A. 1916B, 182, 35 A. L. R. 307.

Court may direct a verdict where action is for equitable relief.—The action was for equitable relief, and therefore the court could direct a verdict even if the evidence was conflicting, and enter judgment, as was done in this instance, upon its own findings. Continental Trust Co. v Knight, 27 Colo. App. 257, 258, 147 P. 1091, citing Abbott v Monti, 3 Colo. 561; Kellogg v Kellogg, 21 Colo. 181, 183, 40 P. 358, cited in notes Ann. Cas. 1917A, 174, 49 A. L. R. 122; Cree v Lewis 49 Colo. 186, 112 P. 326; Weiss v Ahrens, 24 Colo. App. 531, 536, 135 P. 987.

But where a controverted issue of fact is involved in a suit on an accident insurance policy, the case should be submitted to the jury. Rex v Continental Cas. Co., 96 Colo. 467, 44 P. (2d) 911; Estate of Boze, 96 Colo. 309, 42 P. (2d) 470.

And in such circumstances directing a verdict by the court is error. Estate of Boze, 96 Colo. 309, 42 P. (2d) 470.

Facts are to be determined by the court from the evidence, and not settled by conclusions of witnesses. Royal Tiger Mines Co. v Ahearn, 97 Colo. 116, 47 P. (2d) 692.

Where judgment on the pleadings is proper.—Where, after the pleadings in a case are settled, there is no issue of law or fact left for determination, judgment on the pleadings is properly entered. Atterbury v National Union Fire Ins. Co., 94 Colo. 516, 31 P. (2d) 489.

B. Distinction Between Jury and Nonjury Actions.

References.—For an able discussion of jury trial and the inter-relations of this and Rules 2 and 10 (b), see article entitled, "Jury Demands in The New Federal Procedure" by Professor O. L. McCaskill, 88 University of Penn. Law Rev., p. 315. See also article entitled, "Trial by Jury and the New Federal Rules of Civil Procedure" by Mr. Fleming James, Jr., 45 Yale Law Journ., p. 1022.

The Rules of Civil Procedure have abolished the distinction in procedure between law and equity. Williams v Collier, 32 F. Supp. 321; Fraser v Geist, 1 F. R. D. 267, 268.

But they have not abolished the distinction between legal and equitable remedies.—Williams v Collier, 32 F. Supp. 321; Fraser v Geist, 1 F. R. D. 267, 268.

And a distinction still remains between jury actions and nonjury actions; what was, before the adoption of the new rules, an action at law is a jury action, and what was a suit in equity is a nonjury action. Bellavance v Plastic-Craft Novelty Co., 30 F. Supp. 37. See Pacific Indemnity Co. v McDonald, 25 F. Supp. 522, 529.

The distinction between legal and equitable relief only becomes important when a party desires a jury trial and demands it pursuant to this rule. Grauman v City Co., 31 F. Supp. 172, 174.

The rules do not enlarge the right of trial by jury, notwithstanding that distinction between law and equity is abolished. Bellavance v Plastic-Craft Novelty Co., 30 F. Supp. 37.

The Rules of Civil Procedure respecting the right to jury trials create no rights to a jury trial which a party did not have before their adoption. Id.

Right to jury trial depends on whether action in its essence is one of law or equity.—Williams v Collier, 32 F. Supp. 321.

In determining whether plaintiff is entitled to jury trial as of right, it is not the form of complaint alone, or even the plaintiff's view of the nature of his complaint, that is determinative whether an action is in its essence, one at law or in equity. Fraser v Geist, 1 F. R. D. 267.

Whether plaintiff, suing executors for specific performance of contract allegedly entered into with decedent, was entitled to a jury trial as of right, depended on whether action in its essence was one at law or in equity, notwithstanding distinction in procedure between law and equity has been abolished. Id.

The burden of such question being on the court.—In determining whether a plaintiff is entitled to jury trial as of right, burden is placed on court to determine from within four corners of the complaint whether or not action is one at law or in equity. Fraser v Geist, 1 F. R. D. 267.

The granting of a jury trial upon an equitable issue is discretionary with the court. Missouri Pac. Trans. Co. v George, 114 F. (2d) 757, 758.

In action by bus company for an injunction to enjoin one, who recovered judgment in state court for injuries allegedly caused by company's bus, and his attorneys from collecting judgment in state court, or, in alternative, for damages, trial court did not abuse its discretion in refusing jury trial

upon issue of injunction, especially where it did not appear that company served its demand for jury trial upon other parties to the suit or that it indorsed such demands upon its pleadings as provided in Rule 38 (b). Id.

C. Illustrative Cases.

The foreclosure of a mortgage is an equitable proceeding, and the issues joined are to be tried by the court. Neikirk v Poulter Nat. Bank, 53 Colo. 350, 355, 127 P. 137, cited in notes, Ann. Cas. 1914C, 853, 85 A. L. R. 1392, citing Danielson v Gude, 11 Colo. 87, 17 P. 283; United Coal Co. v Canon City Coal Co., 24 Colo. 116, 48 P. 1045, cited in note, 7 A. L. R. 928; Selfridge v Leonard-Heffner Co., 51 Colo. 314, 117 P. 158, Ann. Cas. 1913B, 282, cited in notes, Ann. Cas. 1913B, 283, Ann. Cas. 1917C, 665.

As is a suit for specific performance.—A suit for specific performance is an equitable action, and being such, it is triable to the court without a jury. Plains Iron Works Co. v Haggott, 72 Colo. 228, 230, 210 P. 696, citing Johnson v First Nat. Bank, 24 Colo. App. 23, 131 P. 284; Cree v Lewis, 49 Colo. 186, 112 P. 326; McClelland v Bullis, 34 Colo. 69, 79, 81 P. 771.

If issue of fact involves a trust it is triable to the court. Cree v Lewis, 49 Colo. 186, 190, 112 P. 326, citing United Coal Co. v Canon City Coal Co., 24 Colo. 116, 48 P. 1045, cited in note, 7 A. L. R. 928; Danielson v Gude, 11 Colo. 87, 17 P. 283.

The fact that plaintiff asked for a money judgment is by no means decisive that the action was one at law. If he established the trust upon which he relied, then he was entitled to recover from the defendant the money which he had received on account of the stock held in trust for the plaintiff. Courts of equity do not, however, try cases by piecemeal. It has been settled by repeated decisions, that when a court of equity has jurisdiction of a cause for one purpose, it may retain such jurisdiction for the purpose of deciding the whole controversy, and determining the rights of the parties before it, notwithstanding that for a part of such relief the complainant might have a remedy at law, and thus establish purely legal rights and grant legal remedies, which would otherwise be beyond the scope of its authority. Cree v Lewis, 49 Colo. 186, 190, 112 P. 326, citing Packard v King, 3 Colo. 211, cited in note, 35 Am. St. Rep. 419; Schilling v Rominger, 4 Colo. 100, cited in notes, 10 L. R. A. 487, 30 L. R. A. 670; Whitsett v Kershow, 4 Colo. 419, cited in notes, L. R. A. 1916B, 43, 81, 195, 250, 338, 5 A. L. R. 488, 23 A. L. R. 1504, 1524, 1538; United Coal Co. v Canon City Coal Co., 24 Colo. 116, 48 P. 1045, cited in note, 7 A. L. R. 928.

Suit not "for the recovery of specific personal property."—The plaintiffs in error claim that the suit, in so far as the stock is concerned, is an action for the recovery of specific personal property, and therefore must be tried by a jury. While the recovery of specific personal property may result from the successful prosecution of a suit for specific performance of a contract to transfer such personal property, the suit, nevertheless, is not one "For the recovery of specific personal property," within the meaning of this section. *Plains Iron Works Co. v. Haggott*, 72 Colo. 228, 230, 210 P. 696.

Right of trustee.—Where, in addition to a money judgment for fair market value of merchandise allegedly transferred in fraud of creditors, trustee in bankruptcy sought to have transferees account for all the merchandise obtained by them from or through bankrupt, to have one of them declared a trustee ex maleficio, and to have all the funds deposited in her name impressed with the trust and and to have her enjoined from withdrawing any funds from bank accounts involved, complaint stated case formerly cognizable in equity so as to preclude trustee from demanding jury trial as of right, although court in its discretion could try any issue with an advisory jury. *Williams v. Collier*, 32 F. Supp. 321. See Rule 39 (c).

In action against executors for specific performance of contract allegedly executed by decedent for creation of a trust fund, income from which was to be given to plaintiff for life, wherein plaintiff in the alternative sought lump-sum payment in lieu of specific performance as damages for failure to perform the contract, only relief available to plaintiff was equitable in nature and action was one in equity, and hence plaintiff was not entitled to jury trial as of right. *Fraser v. Geist*, 1 F. R. D. 267.

In automobile liability insurer's action for declaratory judgment regarding liability to insured motorist and his injured guest and for cancellation of policy as to any liability growing out of an accident, insured and his guest were entitled to jury trial on issue as to whether insured had made false statements to insurer regarding accident and on issue regarding breach of co-operation clause, since in action against insurer such matters would be legal defenses triable by jury. *Pacific Indemnity Co. v. McDonald*, 25 F. Supp. 522.

A complaint involving solely a claim for money damages might be regarded as stating a legal cause of action alone, but a prayer for additional remedies of an equitable nature precludes plaintiff from obtaining a trial by jury as of right, notwithstanding distinction in procedure between law and equity has been abolished. *Williams v. Collier*, 32 F. Supp. 321.

Fraud cases pertaining to releases.—"Un-
til Radio Corp. v. Raytheon Mfg. Co., 296

U. S. 459, 56 S. Ct. 297, 80 L. Ed. 327, which explicitly states that some fraud cases pertaining to releases are triable solely in equity, is reversed or modified, we shall continue to follow the established practice of this court of trying fraud in consideration cases without a jury." *Hollingsworth v. General Petroleum Corp.*, 26 F. Supp. 917.

II. DEMAND.

A. Necessity and Time of Filing.

In general.—If a party wants a jury trial and demands it pursuant to this rule, he must be accorded that right, if he was entitled to it at common law, or if it has been granted to him by statute. *Commonwealth Trust Co. v. Reconstruction Finance Corp.*, 28 F. Supp. 586, 590.

Failure to demand jury trial within 10 days amounts to waiver.—Plaintiff which failed to demand jury trial within 10 days after service of last pleading directed to the fact issue in the case waived right to trial by jury. *Hofmann v. Textile Mach. Works*, 27 F. Supp. 431. See *(American) Lumbermen's Mut. Cas. Co. v. Timms*, 108 F. (2d) 497.

But court may allow jury trial where timely demand is not made.—The failure to make timely demand for a jury trial because of unfamiliarity with court rules for month or two after their adoption would be considered to be the result of "excusable neglect," so that the court could, in its discretion, allow plaintiff jury trial although court was not required to do so. *Hofmann v. Textile Mach. Works*, 27 F. Supp. 431. See *Buggeln v. Standard Brands*, 27 F. Supp. 399; *Gunther v. Gossard Co.*, 27 F. Supp. 995.

Plaintiff's failure to demand jury trial not later than ten days after service of last pleading, as provided by this rule, would be excused, where demand was only two days late, and last pleading had not been filed by defendant until four days after it was served, due to fact that there were three succeeding holidays after pleading was served. *Rogers v. Montgomery Ward & Co.*, 26 F. Supp. 707.

Where plaintiff's attorney in personal injury action within time provided by this rule directed his law clerk to serve and file demand for jury trial and did not ascertain that demand had not been made until case was assigned for trial, and amount of damages, if any, was principal issue, and affidavit of plaintiff's attorney showed that he did not intend to waive jury trial and that defendant could not be prejudiced by demand, plaintiff's demand for jury trial would be granted, although demand had not been made as provided by this rule. *Peterson v. Southern Pac. Co.*, 31 F. Supp. 29.

And where failure of plaintiff's counsel, in personal injury action, to demand jury

at time case became fully at issue, was due to a misunderstanding between counsel and, as soon as it was learned that a jury had not been demanded, plaintiff's counsel were prompt in filing motion for jury trial, plaintiff's motion would be granted. *Arnold v. Trans-American Freight Lines*, 1 F. R. D. 380.

Parties who have waived jury right may agree to advisory verdict.—See Rule 39, analysis line III.

Time of demand where petition amended.—Where original petition sought rescission of contract on ground of fraud, but amended petition abandoned claim for rescission and asked solely for damages suffered by reason of the fraud, plaintiff was entitled to jury trial and request for jury trial made at time when plaintiff was first entitled to make such request, was timely. *Glauber v. Agee Dept. Stores*, 1 F. R. D. 137.

Demand filed with reply to answer pleading counterclaims.—A plaintiff's demand, filed along with reply to answer pleading counterclaims, for jury trial of all issues raised by complaint, answer, and reply, was timely filed in respect to issues raised by reply to counterclaims pleaded in answer. *Gunther v. Gossard Co.*, 27 F. Supp. 995.

Prayer for damages held insufficient to require demand within 10 days.—In action for injunction under Sherman Anti-Trust Act, allegation that is restraining order were not granted plaintiff would suffer damage in stated amount, and prayer for treble damages, were insufficient to notify defendants that damages for prior acts would be claimed so as to require defendants, if they wanted jury trial, to make demand within 10 days. *Columbia River Packers Ass'n. v. Hinton*, 34 F. Supp. 970.

B. Specification of Issues.

Paragraph (b) of the Federal Rule states that a party may demand a trial by jury "of any issue triable of right by a jury" by serving a demand therefor in writing at any time after the commencement of the action, and not later than 10 days after the service of the last pleading directed to such issue. Paragraph (c) provides that a party in his demand may specify the issues "he wishes so tried," and that in default of specification he shall be deemed to have demanded jury trial for "all the issues so triable." The rule does not purport to state what issues are properly triable to a jury. It is assumed that this is known. A party knowing the extent of his right is given the privilege of claiming the whole part or any part of it. A party who does not know whether he has a right, or who is uncertain of its extent, is permitted to experiment, demanding what he wishes. Presumably what he will get will be meas-

ured by what he should have, if the trial court can determine it any better than he can, unless what he may have is more than what he has wished for, in which event the wish governs. If he does not want to run the risk of asking for too little, and this seems to be characteristic of careful practitioners, he may gamble on the court's knowledge. If the court is in doubt, and wishes to play safe, he may get more than he is entitled to. See article entitled, "Jury Demands In the New Federal Procedure" by Professor O. L. McCaskill, 88 *University of Penn. Law Rev.*, pp. 315, 317.

That the trial of a claim was required to be to the court without a jury and an action by the United States for breach of contract had been claimed for jury trial did not prevent consolidation of the actions under the procedural rules, since under these rules the form of trial is determined for each issue and not for the action as a single unit. *Sherwood v. United States*, 112 F. (2d) 587.

III. WAIVER.

Editor's note.—For cases construing § 196 of the Code of Civil Procedure, which is supplanted by this rule, see *Leahy v. Dunlap*, 6 Colo. 552, 554; *Parker v. Plympton*, 85 Colo. 87, 273 P. 1030; *Frank v. Bauer*, 19 Colo. App. 445, 450, 75 P. 930; *Cerussite Min. Co. v. Anderson*, 19 Colo. App. 307, 75 P. 158; *Hiner v. Cassidy*, 92 Colo. 78, 79, 18 P. (2d) 309; *Estate of Eder*, 94 Colo. 173, 29 P. (2d) 631.

Under our constitution trial by jury in a civil action is not a matter of right.—See this catchline in the notes to this rule appearing under analysis line I, A.

Jury trial as a matter of right is waived by failure to serve demand. *Suffin v. Springer*, 1 F. R. D. 245. See *United States v. Green*, 107 F. (2d) 19.

Under this rule, litigant, in a civil action, who does not seasonably demand a jury may not have one, whether he consents or not. *United States v. Strewl*, 99 F. (2d) 474.

Plaintiff who brought his personal injury action to the federal District Court in October, 1938, after new procedural rules had become effective could not withdraw the waiver under rules of his right to demand a jury trial on ground that November, 1938 when pleadings were closed, plaintiff's attorney was not familiar with relevant provisions of rules and that rules themselves were not readily available to him in published form, since one who invokes the jurisdiction of a federal court is charged with notice of the plain language of the rules regulating its procedure. *MacDonald v. Central Vermont Ry.*, 31 F. Supp. 298.

But court may grant such trial despite waiver.—No demand for a jury trial was served, and was therefore waived as a matter of right, but authority is given under Rules 42 (b) and 39 (b) when the right has been waived. It is, however, wholly a matter of discretion. *Suffin v. Springer*, 1 F. R. D. 245.

Facts not constituting a waiver.—In action for injunction where first notice defendants had that damages for prior acts were claimed was when amendment to complaint to include allegations of prior damage was allowed on same day as judgment for plaintiff was entered awarding treble damages, the immediate entry of judgment deprived defendants of right to demand, within ten days, rule, a jury trial, and defendants therefore did not "waive" right to

jury trial; hence award of treble damages in the judgment would be stricken. *Columbia River Packers Ass'n. v. Hinton*, 34 F. Supp. 970.

Demand may not be withdrawn.—"The last sentence of subdivision (d) safeguards reliance upon a demand for jury made by another party. Thus, if the defendant should make a general demand for jury, the plaintiff, even though jury trial is most important to him, need make no demand. He may rely with safety upon defendant's demand. Without the last sentence, a party, such as the defendant, might withdraw his demand after the time for demanding a jury had run and thus deprive the opposing party of jury trial. Sharp practice is avoided." 3 Moore's Fed. Prac., 3022.

Rule 39. Trial by Jury or by the Court.

(a) **By Jury.** When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless, (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist, or (3) either party to the issue fails to appear at the trial. [This subdivision and Rule 38 (d) supplant Code Sec. 196.]

(b) **By the Court.** Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made, the court in its discretion may order a trial by a jury of any or all issues. [Supplants part of Code Sec. 191.]

(c) **Advisory Jury and Trial by Consent.** In all actions not triable by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the state of Colorado when a statute provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury.

C (d) **Issue of Law Disposed of First.** When there are issues both of law

and fact to the same complaint the issues of law shall be first disposed of, unless the court otherwise orders. [Code Sec. 192.]

Committee Note.

There is no Federal subdivision 39 (d). For reservation of decision on motion for directed verdict see Rule 50 (b).

- I. Trial by Jury.
- II. By the Court.
- III. Advisory Jury and Trial by Consent.
- IV. Issue of Law disposed of First.

Cross Reference.

For a discussion of this rule, see Address no. 9, appx. D.

I. TRIAL BY JURY.

A distinction still remains between jury actions and nonjury actions.—See notes to Rule 38, analysis line I, B.

Court must decide prior to trial whether or not action is one at law or in equity.—It is apparent that this rule makes it incumbent upon the court to decide from the pleadings and prior to trial whether or not the action is one at law or in equity. *Fraser v. Geist*, 1 F. R. D. 267, 269.

Discretion of judge to await verdict of jury before hearing evidence on equitable issues.—Whether presiding judge would await verdict of jury on legal issues before hearing evidence on equitable issues was in the judge's discretion. *Ford v. Wilson & Co.*, 30 F. Supp. 163.

When motion to strike off demand for jury trial denied.—In action for breach of royalty contract and injunction against refusing plaintiff's agent access to defendant's plant, motion to strike off defendant's demand for jury trial on ground that remedy sought is equitable must be denied, as as information needed for trial purposes may be obtained by plaintiff without formal injunction. *United States Process Corp. v. Fort Pitt Brewing Co.*, 29 F. Supp. 37.

Illustrative cases of legal and equitable issues.—See notes to Rule 38, analysis line I, C.

Where complaint alleged that bank upon making an additional loan to buyer took over as security the buyer's assets and control of its operation, keeping such transaction secret from seller, the court was required to assume as contended by seller, for purposes of motion to determine issues triable by jury, that allegation stated a case of actionable fraud, and, it being clear that the essential elements entering into such cause of action involved purely legal issues, was required to hold that seller was entitled to trial thereof by jury. *Ford v. Wilson & Co.*, 30 F. Supp. 163.

II. BY THE COURT.

Court may allow jury trial where timely demand is not made.—See notes to Rule 38, analysis line II, A.

Procedure where fraudulent transfer involved.—The inclusion in complaint of a fraudulent transfer cause of action would not deprive defendants of their right to trial by jury as to other causes of action, and to obviate necessity of two trials where evidence relating to all causes of action was practically the same, the District Court will impanel a jury, take such evidence as was germane to causes of action other than fraudulent transfer cause, submit those causes to jury, and then decide issue of fraudulent conveyance itself or, if necessary, take such additional testimony as might be necessary on fraudulent transfer cause, in absence of jury. *Elkins v. Nobel*, 1 F. R. D. 357.

In action for accounting, for conversion, and to rescind settlement and vacate and set aside release executed by plaintiff, court would not order submission to jury before trial of issues involving validity of release, where demand for jury trial was not served, no reason was given why court should not be able to decide the question, and issue could not be passed upon without introducing proof pertinent to other issues, which would confuse jury. *Suffin v. Springer*, 1 F. R. D. 245.

III. ADVISORY JURY AND TRIAL BY CONSENT.

Court has power to submit to an advisory jury any subsidiary issue of a purely legal nature.—The court in trying equitable cause of action has power to submit to an advisory jury any subsidiary issues of a purely legal nature, if such there be. *Ford v. Wilson & Co.*, 30 F. Supp. 163, wherein it was ruled that none of issues on equitable cause would be submitted to an advisory jury.

Where, in addition to a money judgment for fair market value of merchandise allegedly transferred in fraud of creditors, trustee in bankruptcy sought to have transferees account for all the merchandise obtained by them from or through bankrupt, to have one of them declared a trustee ex maleficio, and to have all the funds deposited in her name impressed with the trust and to have her enjoined from withdrawing any funds from bank accounts involved, complaint stated case formerly

cognizable in equity so as to preclude trustee from demanding jury trial as of right, although court in its discretion could try any issue with an advisory jury. *Williams v. Collier*, 32 F. Supp. 321.

However, if this is to be done the parties are entitled to advance notice.—*Ford v. Wilson & Co.*, 30 F. Supp. 163.

Parties who have waived jury right may agree to advisory verdict, with approval of the judge. (*American*) *Lumbermens Mut. Cas. Co. v. Timms*, 108 F. (2d) 497, wherein on page 500, note 2 it is stated: "Rule 39 (c) authorizes an advisory jury 'in all actions not triable of right by a jury.' This might be thought to limit its use to those actions which are not within Rule 38 (a). 'jury trial of right,' and thus exclude jury-waived actions. Cf. 3 Moore's Fed. Prac. 3031, note 2. But it is not believed that this rule was intended to, or does, restrict the right of the parties to agree to such a verdict; and if the court takes the parties at their word and gives the verdict only

such weight as they wished, its action seems no more reviewable than in the equity cases cited hereinafter."

The judge has discretion to set aside an advisory verdict in equity, but his exercise of discretion is not reviewable. (*American*) *Lumbermens Mut. Cas. Co. v. Timms*, 108 F. (2d) 497.

IV. ISSUE OF LAW DISPOSED OF FIRST.

Cross reference.—See committee note under subdivision C (d).

Editor's note.—Prior to the adoption of these rules it was held that demurrers to pleadings had to be disposed of before proceeding to trial upon the merits. See *Fischer v. Hanna*, 8 Colo. App. 471, 47 P. 303, cited in notes, 123 Am. St. Rep. 281, 290, 291, Ann. Cas. 1918B, 4, 60 A. L. R. 1274; *Byers v. Tritch*, 12 Colo. App. 377, 55 P. 622. Rule 7 (c) provides that demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

Rule 40. Assignment of Cases for Trial.

C Trial courts shall provide by rule for the placing of actions upon the trial calendar in such manner as they deem expedient. Precedence shall be given to actions entitled thereto. [From Federal Rule 40 and Code Secs. 193 and 194.]

Cross references.—For a discussion of this rule, see Address no. 9, appx. D. As to precedence of motions for temporary injunctions, see Rule 65 (b).

Editor's note.—The cases below construe § § 193, 194 of the Code of Civil Procedure, from which this rule derives.

In the interests of justice, trials must be expedited. *Benster v. Bell*, 83 Colo. 587, 591, 267 P. 792; *Scofield v. Scofield*, 89 Colo. 409, 414, 3 P. (2d) 794, cited in note, 89 A. L. R. 53.

Under the Code of Civil Procedure no notice was required to bring a cause to a trial or hearing. See *Cochrane v. Parker*, 12 Colo. App. 169, 54 P. 1027, cited in notes, 3 L. R. A. (N. S.) 305, L. R. A. 1918D, 472; *Wallace v. Heitler*, 52 Colo. 620, 622, 123 P. 954.

If it may be said that the setting of the cause for trial by the court of its own motion without notice to defendant was er-

roneous, the appellant in this case has failed to show wherein he was prejudiced by such action. *Lux v. McLeod*, 19 Colo. 465, 467, 36 P. 246, cited in notes, L. R. A. 1915A, 852, Ann. Cas. 1916C, 1226, 1231.

Where defendant's counsel were present at the time a cause was set for trial and made no objection to the setting of the case, all irregularities in the notice of such setting and the service thereof were waived. *Cerussite Min. Co. v. Anderson*, 19 Colo. App. 307, 75 P. 158.

Example of statute given preference.—vol. 2, ch. 46, § 119 provides: "All cases in matters of probate appealed to the District Court from the County Court of any county shall be given preference in trial over all other civil causes at every term of said District Courts, and if the appellant does not promptly take advantage of such preference, the appeal shall be dismissed on motion of the appellee, for failure to prosecute such appeal, and at the costs of the

appellant, and a procedendo ordered, if desired or necessary, to the County Court from which such appeal was taken." This statute was adopted in 1885 and has never been expressly repealed. Its wise and beneficent purpose is so clearly stated as practically to exclude all serious doubt. It first declares that such cases shall, upon appeal to the District Court, have preference in trial over all other civil causes. It then makes appellant responsible for the prompt assertion of such preference, and finally, upon his failure in this regard, it directs a dismissal of the appeal at his costs. In re Estate of Shapter, 44 Colo. 547, 99 P. 35, 37.

Effect of failure to attend trial.—The fact that an attorney has other cases set for trial in the County Court at the same time, does not excuse him or his client from being in attendance at the trial of a case regularly reached on the calendar of the District Court, where no motion for a continuance or showing is made why the case should not proceed to trial, and under such circumstances there is no abuse of discretion in the refusal of the trial court to set aside a judgment regularly entered. Diebold v Diebold, 79 Colo. 7, 243 P. 630.

Rule 41. Dismissal of Actions.

(a) Voluntary Dismissal: Effect Thereof.

(1) **By Plaintiff; By Stipulation.** Subject to the provisions of Rule 23 (c) and of any statute, an action may be dismissed by the plaintiff upon payment of costs without order of court (i) by filing a notice of dismissal at any time before filing or service of the answer or (ii) by filing a stipulation of dismissal signed by all the parties who have appeared generally in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim. [Supplants Supreme Court Rule 5 and Code Sec. 184.]

(2) **By Order of Court.** Except as provided in paragraph (1) of this subdivision, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice. [Supplants Code Sec. 184.]

(b) Involuntary Dismissal:

(1) **By defendant:** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has

shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

Committee Note.

This is Federal subdivision (b).

C (2) By the Court: Actions not prosecuted or brought to trial with due diligence may, on notice, be dismissed with prejudice by the court pursuant to rules adopted by it. [From Supreme Court Rule 13.]

Committee Note.

There is no Federal subdivision (b) (2).

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is filed or served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

- I. Voluntary Dismissal.
 - A. By Plaintiff.
 - B. By Order of Court.
- II. Involuntary Dismissal.
 - A. By Defendant.
 - B. By the Court.
- III. Dismissal of Counterclaim, Cross-Claim, or Third Party Claim.
- IV. Costs of Previously Dismissed Action.

Cross Reference.

For a discussion of this rule, see Address no. 9, appx. D.

I. VOLUNTARY DISMISSAL.

A. By Plaintiff.

Editor's note.—Under § 184 of the Code of Civil Procedure, which is supplanted by this rule, the plaintiff, where no counterclaim had been set up in the answer was entitled to dismiss his action. See *Doll v. Slaughter*, 39 Colo. 51, 88 P. 848, cited in note, 71 A. L. R. 1001; *Tabor v. Sullivan*, 12 Colo. 136, 145, 20 P. 437, cited in notes, 16 Am. St. Rep. 387, 91 Am. St. Rep. 863, 865, 866, 4 L. R. A. (N. S.) 1127, Ann. Cas. 1913D, 169, 63 A. L. R. 1363; *Colorado Utili-*

ties Corp. v. Pizor, 99 Colo. 294, 62 P. (2d) 570; *Long v. McGowan*, 16 Colo. App. 540, 66 P. 1076. Under that section payment of costs was a condition to a dismissal by plaintiff. See *Scofield v. Scofield*, 89 Colo. 409, 3 P. (2d) 794, cited in note, 89 A. L. R. 53. And it was within the discretion of the court to dismiss the plaintiff's suit without prejudice, where motion for dismissal was made before trial and no counterclaim has been filed. See *Denver, etc., Ry. Co. v. Copley*, 9 Colo. 152, 153, 10 P. 669. A plaintiff was not entitled to dismiss his action as a matter of right after the trial had begun, but only as a matter of favor. *Reagan v. Dyrenforth*, 87 Colo. 126, 285 P. 775, cited in note, 89 A. L. R. 53. See also, *Scofield v. Scofield*, 89 Colo. 409, 3 P. (2d) 794, cited in note, 89 A. L. R. 53; *Schuler v. Oberto*, 84 Colo. 534, 271 P. 622, cited in note, 71 A. L. R. 1001. A judgment of nonsuit, or mere dismissal, was no bar to another action for the same cause. See *Hallack v. Loft*, 19 Colo. 74, 80, 34 P. 568, cited in notes, 132 Am. St. Rep. 162, 164, 36 L. R. A. (N. S.) 984, 46 L. R. A. (N. S.) 752, L. R. A. 1918B, 527, 66 A. L. R. 108, 120. See also, *First Nat. Bank v. Mulich*, 83 Colo. 518, 266 P. 1110, cited in notes, 60 A. L. R. 1055, 66 A. L. R. 887; *Martin v. McCarthy*, 3 Colo. App. 37, 32 P. 551; *Charles v. People's Ins. Co.*, 3 Colo. 419, 421, cited in note, 42 L.

R. A. (N. S.) 667; Smith v. Cowell, 41 Colo. 178, 92 P. 20, cited in notes, Ann. Cas. 1913A, 541, Ann. Cas. 1914A, 1112, 13 A. L. R. 1104; Gallup v. Lichter, 4 Colo. App. 296, 35 P. 985, cited in notes, Ann. Cas. 1913A, 543, 13 A. L. R. 1104, 1114. Where for a long period of time no action was taken by the parties in a suit pending in justice court, and no sufficient reason appeared therefor, a discontinuance occurred without formal dismissal. See McCaffrey v. Mitchell, 98 Colo. 467, 56 P. (2d) 926, 57 P. (2d) 900, citing Yentzer v. Thayer, 10 Colo. 63, 14 P. 53, 3 Am. St. Rep. 563.

Prior to the adoption of these rules it was provided by Supreme Court Rule 5 that "Every dismissal of an action, whether by the court or otherwise, shall be held to be 'with prejudice,' unless differently ordered by the court." See Lehr v. Guild, 71 Colo. 349, 206 P. 803; Greene v. Wilson, 90 Colo. 562, 11 P. (2d) 225; Rumsey v. New York Life Ins. Co., 59 Colo. 71, 147 P. 337.

Subject to the provisions of Rule 23 (c).—See Delahanty v. Newark Morning Ledger Co., 26 F. Supp. 327, wherein it was held that under this rule and Rule 23 (c) a representative suit by and on behalf of minority stockholders for fraud by majority stockholders and directors, and mismanagement by directors, could not be dismissed except on notice to minority stockholders and approval of the court.

Plaintiff has right without order of court to dismiss action by filing motion of dismissal at any time before service of answer. Baker v. Sisk, 1 F. R. D. 232.

Where, for all practical purposes plaintiffs had notified defendant of their intention to voluntarily dismiss their first cause of action prior to service of defendant's answer with a counterclaim, plaintiffs were entitled to dismiss that cause of action, though notice thereof was not served until after service of the answer. Kohloff v. Ford Motor Co., 29 F. Supp. 843.

Plaintiff was entitled to dismiss action by filing notice of dismissal before answer was filed notwithstanding defendant's previous motion to dismiss the complaint, as against contention that the previous motion amounted to a general appearance, and that under this rule after there has been an appearance by defendant, a voluntary dismissal can be had only by stipulation of the parties. Sachs v. Italia Societa Anonima Di Navigazione, 30 F. Supp. 442.

Or by filing stipulation.—This rule is to the effect that a plaintiff may have voluntary dismissal as of course by filing notice prior to service of answer or by filing stipulation signed by all parties. Russo-Asiatic Bank v. Guaranty Trust Co., 27 F. Supp. 382, 384.

Where, on return day of motion for dismissal of action and complaint without prej-

udice and costs, only bankruptcy matters were heard and motion did not appear on calendar, and defendant did not have opportunity to be heard, the action was to be disposed of on stipulation or could be brought on regular motion calendars. Bloomfield v. Measuring Device Corp., 1 F. R. D. 200.

Such a dismissal on the part of the plaintiff is without prejudice unless otherwise stated in the notice.—Baker v. Sisk, 1 F. R. D. 232, 237.

The voluntary discontinuance by plaintiffs of their first cause of action for alleged patent infringement would not prevent them from bringing a similar action at some future date. Kohloff v. Ford Motor Co., 29 F. Supp. 843.

Except that a notice of dismissal operates as an adjudication on the merits when filed by plaintiff who has once dismissed in any court an action based on or including the same claim. See Cleveland Trust Co. v. Osher, 31 F. Supp. 985; American Electrotape Co. v. Kerschbaum, 105 F. (2d) 764.

The purpose of this exception is to prevent the delays in litigations by numerous dismissals without prejudice. Cleveland Trust Co. v. Osher, 31 F. Supp. 985.

The voluntary dismissal by executor of action on war risk policy to which actually beneficially interested plaintiff in a subsequent action on policy was a party would not be considered an adjudication on the merits under this rule and a bar to subsequent action where such a construction of rule would deny plaintiff a right under terms of policy and applicable statutes, and plaintiff was entitled under rule to maintain action under such reasonable terms as might be imposed by the court. Huspey v. United States, 29 F. Supp. 283.

Where, prior to effective date of rule providing that dismissal is without prejudice, except that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed, plaintiff had dismissed on action for infringement of a patent, plaintiff's motion, made after rule went into effect, for leave to withdraw or dismiss as to the same patent was considered as made under the rule and was granted as an adjudication on the merits. Cleveland Trust Co. v. Osher, 31 F. Supp. 985.

But after the service of an answer, the plaintiff has not the right to dismiss save upon order of court and upon such terms and conditions as the court deems proper. Baker v. Sisk, 1 F. R. D. 232, 237. See Russo-Asiatic Bank v. Guaranty Trust Co., 27 F. Supp. 382, 384.

A pleading filed by defendant which was designated as a motion to dismiss, and

raised defense of statute of limitations was an "answer" and not a "motion to dismiss," as respects right of plaintiff subsequently to dismiss action without prejudice. *Baker v Sisk*, 1 F. R. D. 232.

Acting within its discretion.—The right of plaintiff to dismiss an action without prejudice after service of an answer is a matter within the discretion of the court. *Baker v Sisk*, 1 F. R. D. 232.

Where the federal District Court advised the parties that ultimate rulings of court would be that the action was barred by limitation and before formal order was entered plaintiff filed motion to dismiss without prejudice, and stated that purpose of dismissal was to refile cause in state court and submit the issue to that court, plaintiff's motion was denied as matter of discretion of the District Court. *Id.*

This rule does not accord the right to dismiss without prejudice after judgment.—*Western Union Tel. Co. v Dismang*, 106 F. (2d) 362, 364.

It was not intended as a cloak whereby a client might settle or discontinue a lawsuit and disregard entirely the interest of his attorney in the lawsuit, but was intended for purpose of setting forth and curbing right of plaintiff to discontinue actions, and to simplify a practice which theretofore had never been clearly outlined. *Ingold v Ingold*, 30 F. Supp. 347.

An attorney for plaintiff claiming a lien should have every opportunity of asserting his lien and protecting the rights which the law gives him, and his lien should not be defeated by discontinuance of action by parties without notice to him. *Id.*

B. By Order of Court.

Editor's note.—As to right of court to dismiss under former practice, see *Miller v East Denver Municipal Irrigation Dist.*, 83 Colo. 406, 266 P. 211; *Teller v Sievers*, 20 Colo. App. 109, 77 P. 261; *Schechter v Denver, Lakewood, etc., R. Co.*, 8 Colo. App. 25, 28, 44 P. 761, cited in notes, 48 L. R. A. 433, 440.

After issue is joined the action may not be dismissed at the plaintiff's instance save upon order of the court. *Evans v Teche Lines*, 112 F. (2d) 933; *Baker v Sisk*, 1 F. R. D. 232; *Russo-Asiatic Bank v Guaranty Trust Co.*, 27 F. Supp. 382.

"I consider that paragraph (2) of Rule 41 (a) is one of the most valuable improvements over the old law accomplished by the new rules. Before the effective date of that rule it not infrequently happened (it was permissible under Missouri laws) that is a case either removed or originally brought here, which had come to issue, perhaps after disposition of preliminary

motions, which had gone to trial, in the trial of which plaintiff had introduced all his testimony, for the trial of which defendant had called witnesses from great distances and incurred great expense, the plaintiff would dismiss, just at the moment the court was about to direct a verdict for defendant. The next day he might bring the same suit again. And the process might be repeated time after time. It was an outrageous imposition not only on the defendant but also on the court. Rule 41 has done much to put an end to that evil." *McCann v Bentley Stores Corp.*, 34 F. Supp. 234.

Upon such terms and conditions as the court deems proper.—*Evans v Teche Lines*, 112 F. (2d) 933; *Lawson v Moore*, 29 F. Supp. 175.

"When the Supreme Court promulgated this rule and provided that the court might permit a dismissal without prejudice 'upon such terms and conditions as the court deems proper' what sort of 'terms and conditions' was contemplated? I have found nothing in the books upon which to base an answer, but no 'terms and conditions' are conceivable except such as are calculated to compensate the defendant for the expense to which he has been put." *McCann v Bentley Stores Corp.*, 34 F. Supp. 234.

Where action which was instituted in state court was removed to federal court, and motion to remand was overruled, plaintiff's subsequent motion to dismiss without prejudice would be granted only on condition that plaintiff compensate defendant for the expense to which it had been put. *Id.*

Granting of motion is within court's discretion.—A motion by plaintiffs for voluntary nonsuit, after motion for directed verdict had been made and argued and the court had announced its intention to direct a verdict for defendant, was addressed to the court's sound discretion and refusal to permit a nonsuit after trial had progressed that far was not an abuse of such discretion. *Evans v Teche Lines*, 112 F. (2d) 933.

In suit for infringement of three patents, plaintiff's motion at opening of trial to dismiss third patent from suit with prejudice would be granted and defendants would be allowed costs for service fees of process and attendance fees of witnesses, if such costs were incurred by defendants referable only to cause of action dismissed. *Hawkinson Co. v Goodman*, 32 F. Supp. 732.

Where plaintiff brought suit and required defendant to answer and prepare its defense at great expense, defendant was entitled to have controversy finally adjudicated so that it could definitely know its rights and court, within its discretion,

would deny motion to dismiss suit without prejudice. *Cincinnati Traction Bldg. Co. v. Pullman-Standard Car Mfg. Co.*, 25 F. Supp. 322.

And where receivers had been appointed to take charge of and manage property pendente lite, and had been in charge ever since their appointment, plaintiff's motion to dismiss, which was made at same time as petition for intervention, would be dismissed under the rules; plaintiff not being entitled to dismiss as a matter of right. *Chandler Bldg. Corp. v. Shannon*, 1 F. R. D. 105.

Which should make that decision which seems best under all the circumstances.—Under Rules of Civil Procedure on motion to dismiss without prejudice, court should weigh the equities and should make that decision which to the court seems best under all of the circumstances. *Lawson v. Moore*, 29 F. Supp. 175.

Where it was represented at hearing of defendant's motion to dismiss action for want of prosecution that delay in filing a declaration was because of negotiations for settlement, thereafter plaintiff filed its declaration, and case was pleaded to issue, action was dismissed without prejudice, on plaintiff's motion under court rule for dismissal by order of the court, and without special terms and conditions in absence of showing requiring dismissal upon special terms and conditions. *United States v. Commercial Solvents Corp.*, 25 F. Supp. 653.

In action to recover \$10,000 damages for injuries received in automobile accident which was commenced in state court and removed to federal court, plaintiff's motion to dismiss without prejudice was granted as against contention that condition should be imposed that further litigation must be in federal court, where it appeared that granting motion to dismiss without prejudice would work least hardship on parties in view of fact that decision could be reached more quickly in state court, and that filing of suit for less than \$3,000 in state court would involve manifest advantage to defendant in reduction of damages claimed. *Lawson v. Moore*, 29 F. Supp. 175.

Pleading of counterclaim.—Under this rule which terminates right to withdraw suit upon the filing of an answer, a counterclaim which serves only to restate the controversy initiated by the complaint is redundant and should be stricken out. *Stanley Works v. Mersick & Co.*, 1 F. R. D. 43.

In suit for infringement of two patents wherein defendant filed counterclaim for declaratory judgment that one patent was invalid, defendant was entitled to declaratory judgment as prayed where evidence

showed that such patent did not disclose invention, notwithstanding plaintiff's withdrawal of claim of infringement of such patent. *Knaust Bros. v. Goldschilag*, 28 F. Supp. 188.

This rule does not prevent a dismissal in patent infringement suit solely on ground of noninfringement, thereby leaving issue as to validity unsettled in absence of counterclaim. *Gregory v. Royal Typewriter Co.*, 27 F. Supp. 808.

II. INVOLUNTARY DISMISSAL.

A. By Defendant.

Editor's note.—Under § 184 of the Code of Civil Procedure it was provided that an action could be dismissed or a judgment of nonsuit entered, by the court, upon motion of the defendant, when the plaintiff failed to prove sufficient case for the jury. Under this provision it was held that a nonsuit claimed on the motion of the defendant was equivalent in its operation on the action to a dismissal with the consent of the defendant. See *Norton's Estate v. McAlister*, 22 Colo. App. 293, 300, 123 P. 963, cited in note, Ann. Cas. 1918A, 913, quoting from *Wood v. Ramond*, 42 Cal. 643, 645. And that the motion admitted the truth of the evidence produced by the plaintiff, in the sense most unfavorable to defendant, and every inference of fact legitimately deducible therefrom. See *Whitehead v. Valley View Consol. Gold Min. Co.*, 26 Colo. App. 114, 141 P. 138, cited in note, Ann. Cas. 1918B, 951; *Mulford v. Nickerson*, 76 Colo. 404, 232 P. 674; *Allen v. Florence, etc., Ry. Co.*, 15 Colo. App. 213, 61 P. 491.

It was only where there was an entire absence of testimony tending to establish the case that a nonsuit could be properly ordered or a verdict directed. Where the question depended on a state of facts from which different minds could honestly draw different conclusions on that issue, the question must have been submitted to the jury for determination. See *Robinson v. Belmont-Buckingham Holding Co.*, 94 Colo. 534, 31 P. (2d) 918; *Longmont v. Swearingen*, 81 Colo. 246, 250, 254 P. 1000; *Arps v. Denver*, 82 Colo. 189, 257 P. 1094; *Whitehead v. Valley View Consol. Gold Min. Co.*, 26 Colo. App. 114, 141 P. 138, cited in note, Ann. Cas. 1918B, 951. See also, *Schwenke v. Union Depot, etc., R. Co.*, 12 Colo. 341, 345, 21 P. 43; *Buffington v. Sussex Real Estate, etc., Co.*, 48 Colo. 1, 108 P. 970; *De St. Aubin v. Marshall Field & Co.*, 27 Colo. 414, 62 P. 199; *Posten v. Denver Consolidated Tramway Co.*, 11 Colo. App. 187, 53 P. 391, cited in note, 45 L. R. A. (N. S.) 971; *Lesser v. Porter*, 94 Colo. 348, 30 P. (2d) 318; *Denver Tramway Corp. v. Ancker*, 88 Colo. 49, 291 P. 1019; *Wal-smith v. Hudson*, 77 Colo. 326, 236 P. 783. A nonsuit could not be granted or a per-

emptory instruction for defendant given where there was evidence tending to show a right of recovery in plaintiff, although the court believed that the weight of evidence was with defendant. See *Stocker v Newcomb*, 91 Colo. 479, 15 P. (2d) 975. But where it was apparent upon the whole record that a verdict if returned for plaintiff could not be permitted to stand, a motion for nonsuit was properly sustained. See *Stotts v Carney*, 78 Colo. 472, 242 P. 675; *Brown v Republican Mountain Silver Mines*, 17 Colo. 421, 426, 30 P. 66, 16 L. R. A. 426, cited in notes, 136 Am. St. Rep. 913, 924, L. R. A. 1917F, 322, 323, 29 L. R. A. 100. And it was the duty of the court to grant a nonsuit when plaintiff's evidence did not warrant a verdict in his favor. See *King Powder Co. v Dillon*, 42 Colo. 316, 96 P. 439, cited in note, L. R. A. 1917B, 630; *O'Malley-Kelley Oil, etc., Co. v Gates Oil Co.*, 73 Colo. 140, 214 P. 398, cited in note, 86 A. L. R. 222. See also, *Goodstein v Silver Plume Mines Co.*, 79 Colo. 269, 245 P. 714; *Tripp v Fiske*, 4 Colo. 24.

A defendant could waive error in refusing motion by proceeding with trial. See *Colorado Life Co. v Winegarner*, 95 Colo. 261, 35 P. (2d) 860. See also, *Gilligan v Blakesley*, 93 Colo. 370, 26 P. (2d) 808; *Yelloway v Garretson*, 89 Colo. 375, 3 P. (2d) 292, cited in note, 96 A. L. R. 750; *Colorado, etc., Ry. Co. v Lauter*, 21 Colo. App. 101, 121, P. 137, cited in notes, Ann. Cas. 1914A, 537, 1 A. L. R. 213; *Estate of Staats*, 97 Colo. 91, 46 P. (2d) 900.

Defendant is permitted to move for dismissal of action for failure of plaintiff to prosecute. *Carnegie Nat. Bank v Wolf Point*, 110 F. (2d) 569.

The dismissal of action removed to federal court for plaintiff's failure to proceed following denial of remand was not error if federal court had jurisdiction. *Dudley v Community Public Service Co.*, 108 F. (2d) 119.

An equity court has general authority, independently of statute or rule, to dismiss cause, in exercise of sound judicial discretion, for failure of or want of diligence in prosecution. *Carnegie Nat. Bank v Wolf Point*, 110 F. (2d) 569.

Where plaintiff failed to appear at a pre-trial hearing ordered by court after attorneys of record for both parties had been notified in writing in advance of such hearing, and defendant moved that action be dismissed on ground of plaintiff's failure to prosecute action and to comply with rules of procedure, action was dismissed. *Wisdom v Texas Co.*, 27 F. Supp. 992.

And unless court otherwise specifies such order of dismissal operates as an adjudication upon the merits.—The court's dismissal of equity suit for want of prosecution was on merits, in absence of contrary provision

in order of dismissal. *Carnegie Nat. Bank v Wolf Point*, 110 F. (2d) 569.

The awarding of a nonsuit or its equivalent under these rules operates as an adjudication on the merits or in other words as a judgment for defendant. *Southwell v Robertson*, 27 F. Supp. 944.

In action against employee and non-resident employer, dismissal of the cause by court as against both defendants on the merits disposed of the controversy, and plaintiff could not obtain dismissal on jurisdictional grounds, without showing grounds why the previous judgment should be set aside, by subsequent presentation of affidavit asserting that employee was a citizen. *Kataoka v May Dept. Stores Co.*, 30 F. Supp. 346.

Dismissal of action on war risk policy tried before court without jury was on the merits, and hence sufficiency of evidence to make jury question was not reviewable. *Young v United States*, 111 F. (2d) 823.

And is appealable.—A judgment dismissing action removed to federal court following plaintiff's refusal to proceed on denial of remand was "final" and "appealable," and brought under review refusal to remand. *Dudley v Community Public Service Co.*, 108 F. (2d) 119.

Motion to dismiss for failure to show right to relief.—In action for personal injuries, where plaintiff failed to show negligence, a motion to dismiss, which takes place of a motion for nonsuit, was granted. *Kataoka v May Dept. Stores Co.*, 28 F. Supp. 3.

Right of court to set aside judgment of dismissal.—Under Rule 60 (b) providing that a party may be relieved on motion from a judgment taken against him through his excusable neglect if motion is made within six months after judgment, court had power to act on plaintiff's petition to vacate order of dismissal for want of prosecution, and, where plaintiff's petition showed sufficient excuse for failure to prosecute to make it proper to set aside the judgment of dismissal. *Dauphinee v American Range Line*, 1 F. R. D. 437.

Where member of crew, who was placing a gangplank which led from vessel to wharf, stepped upon a piece of pipe lying on wharf and fell, and ship's officer who was stationed on rail of ship above level of wharf allegedly should have seen pipe and should have given warning of danger, evidence regarding negligence of employer was insufficient for jury, and hence motion to set aside order of dismissal was denied. *O'Brien v Calmar S. S. Corp.*, 25 F. Supp. 752.

B. By the Court.

Cross reference.—See committee note under subdivision C (2).

Power of courts in general.—Courts of record have power to make and enforce rules for the transaction of their business, the only restriction upon such power being that the rule shall be reasonable and shall not contravene a statute. A rule of court providing for the dismissal of cases for want of prosecution can only be enforced against a party for a failure to perform, within the prescribed time, some act required of him by law. *Hoy v McConaghy*, 14 Colo. App. 372, 60 P. 184, citing *Cone v Jackson*, 12 Colo. App. 461, 55 P. 940.

A rule of the trial court providing for the dismissal of causes for failure of prosecution is valid and the court has power to enforce it. And where the facts to which the court applied the rule in dismissing a case are not before the appellate court it cannot say that the trial court abused its discretion or violated the law in applying the rule. *Carnahan v Connolly*, 17 Colo. App. 98, 99, 68 P. 836.

III. DISMISSAL OF COUNTERCLAIM, CROSS-CLAIM OR THIRD-PARTY CLAIMS.

In general.—Where stipulation postponing defendant's motion for leave to serve an amended answer to interveners' cross-claim with counterclaim or set-off provided that it should be deemed made and heard when notice of motion was served, fact that intervenor some 17 months later sought to abandon his claim and withdraw from case did not bar defendant's right to relief sought by motion. *Russo-Asiatic Bank v Guaranty Trust Co.*, 27 F. Supp. 382.

Counterclaim raising issues which would go beyond issues raised by complaint and answer would be dismissed even assuming that counterclaim was filed for purpose of preventing plaintiff from withdrawing his cause of action after filing of answer, since action could not be withdrawn with-

out court's consent. *Forstner Chain Corp. v Gemex Co.* 1 F. R. D. 115.

Pending motion for summary judgment is not "introduction of evidence at the trial or hearing."—The plaintiff's submission of an affidavit on motion for summary judgment on one of defendant's counterclaims was not the equivalent of the "introduction of evidence at the trial or hearing" within provision of this rule authorizing a voluntary dismissal of a counterclaim, cross claim or third party claim by claimant at any time before a responsive pleading is served or, if there is none, before the "introduction of evidence at the trial or hearing," so as to preclude defendant from voluntarily dismissing its counterclaims. *Tar Asphalt Trucking Co. v Fidelity, etc., Co.*, 1 F. R. D. 330.

IV. COSTS OF PREVIOUSLY DISMISSED ACTION.

This provision applies only to second suits for the same cause of action. *Clair v Philadelphia Storage Battery Co.*, 29 F. Supp. 299.

Costs are within court's sound discretion.—A motion to require plaintiff to pay costs of voluntarily dismissed prior action between same parties on same cause is addressed to court's sound discretion. *Ayers v Conser*, 26 F. Supp. 95.

A suit between same parties on same cause of action as prior action, voluntarily dismissed because of defendants' interposition of fact questions affecting service of process for apparent purpose of delaying, if not preventing the bringing in of defendants, should not be abated until costs of prior action are paid. *Id.*

And are not required where plaintiff is without funds.—A plaintiff would not be required to pay costs of a previously dismissed action on war risk policy under procedural rule as a condition to the maintenance of a subsequent action on policy where it appeared that beneficially interested plaintiff was without means and could not procure funds to meet the condition. *Huskey v United States*, 29 F. Supp. 283.

Rule 42. Consolidation; Separate Trials.

(a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions

consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. [Supplants Code Sec. 20.]

(b) **Separate Trials.** The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. [Supplants part of Code Sec. 103.]

C (c) Court Sessions Public; When Closed. All sessions of court shall be public, except that when it appears to the court that the action will be of such character as to injure public morals, or when orderly procedure requires it, it shall be its duty to exclude all persons not officers of the court or connected with such case. [From Code Secs. 462 and 463.]

Committee Note.

There is no Federal subdivision C (c).

- I. Consolidation.
- II. Separate Trials.
- III. Court Sessions Public—When Closed.

Cross Reference.

For a discussion of this rule, see Address no. 9, appx. D.

I. CONSOLIDATION.

Editor's note.—Under § 20 of the Code of Civil Procedure, which is supplanted by this rule, causes could be consolidated only when the different actions were between the same plaintiff and the same defendants. See *Smith v. Smith*, 22 Colo. 480, 46 P. 128, 55 Am. St. Rep. 142, 34 L. R. A. 49, cited in notes, 84 Am. St. Rep. 629, 92 Am. St. Rep. 429, 122 Am. St. Rep. 162, 3 L. R. A. (N. S.) 775, 64 A. L. R. 467, 482. See also, *Putnam v. Lyon*, 3 Colo. App. 144, 148, 32 P. 492, cited in note, Ann. Cas. 1918A, 206.

"Actions involving a common question of law or fact" may be consolidated.—The power to consolidate is given the court whenever "actions involving a common question of law or fact" are pending before it. *Sherwood v. United States*, 112 F. (2d) 587, 595.

Where complaints in civil action and in equity action were based upon the same allegations of fraud and conspiracy, parties in the actions were the same, and sole effect of consolidation would be to add parties, they involved a "common question of law or fact" authorizing consolidation under this rule, notwithstanding unusual nature of facts presented as basis for consolidation. *Shultz v. Manufacturers, etc., Trust Co.*, 29 F. Supp. 37.

Actions by members of same family, residing in same house, against public service corporation for injuries caused by electricity

escaping from defendant's transmission line into house, may be consolidated for trial under this rule. *Cecil v. Missouri Public Service Corp.*, 28 F. Supp. 649.

And fact that additional expense would be imposed upon certain defendants is not a valid objection.—That consolidation of actions, which added additional parties to one action, would impose additional expense upon certain defendants, was not a valid objection where the suit was in equity and court could consider the facts in allowing costs. *Shultz v. Manufacturers, etc., Trust Co.*, 29 F. Supp. 37.

But motion denied where joint trial would substantially prejudice plaintiffs' rights.—In five separate actions by workmen for lung injuries allegedly sustained in gypsum mine because of employer's fault or neglect regarding working conditions, where motion papers showed that each plaintiff worked in the same mine but in a different location, so that exposure to dust was different in each case and extent of injuries was different, plaintiffs' rights would be substantially prejudiced by joint trial, and consolidation of actions and joint trial would be denied. *Michalek v. United States Gypsum Co.*, 1 F. R. D. 244.

And consolidation will be denied where trial would overburden jury.—*Klager v. Inland Power, etc., Co.*, 1 F. R. D. 114, wherein it was held that thirty-two actions against power company for damages allegedly caused by increased and accelerated flow of water of river could not be consolidated for trial on issues regarding whether negligence, if any, of power company was sole proximate cause of injury, whether, if not sole proximate cause, it was proximate cause of some part of injury, and amount of recovery, but hearings could be had concerning propriety of consolidating the causes for hearing upon all matters preliminary to trial.

Consolidation for limited purpose.—Where, in separate contract actions, defendant presented issue of insanity, the actions were consolidated for limited purpose of determining the issue of insanity and mental capacity of defendant to make valid contract. *Hotel George V. v. McLean*, 1 F. R. D. 241.

Motion before joinder of issue held not premature.—A motion to consolidate actions before the joinder of issue involving a "common question of law or fact" was not premature where it appeared what the issues were. *Shultz v. Manufacturers, etc., Trust Co.*, 29 F. Supp. 37.

II. SEPARATE TRIALS.

Cross reference.—As to separate judgments, see Rule 54 (b) and the notes thereto.

Whether there should be separate trials rests in the sound discretion of the trial judge. *Society of European Stage Authors, etc. v. WCAU Broadcasting Co.*, 35 F. Supp. 460; *Seagram-Distillers Corp. v. Manos*, 25 F. Supp. 233; *Seaboard Terminals Corp. v. Standard Oil Co.*, 30 F. Supp. 671.

"The trial judge has a practical discretion to dispose of them together, but when the natural course of trial indicates that one claim can be disposed of quickly and summarily while the other will require a considerable trial, separation should be possible save in cases where the facts are so inextricably interwoven that it is impossible or at least manifestly unfair." *Collins v. Metro-Goldwyn Pictures Corp.*, 106 F. (2d) 83, 87, concurring opinion.

The Rules of Civil Procedure would permit separate trial, in action for infringement, of issue respecting whether continuity furnished by defendants in response to interrogatory was a reasonably fair synopsis in words of allegedly infringing motion picture. *Eisman v. Samuel Goldwyn*, 30 F. Supp. 436.

And the determining factors are the doing of justice, the avoidance of prejudice and the furtherance of convenience.—*Society of European Stage Authors, etc. v. WCAU Broadcasting Co.*, 35 F. Supp. 460; *Seagram-Distillers Corp. v. Manos*, 25 F. Supp. 233.

If it appears to trial justice that trial of issues of complaint will likely be refused, complicated, or lengthened because of counterclaim, trial justice is authorized in furtherance of convenience to order separate trial of counterclaim. *Michigan Tool Co. v. Drummond*, 33 F. Supp. 540.

In action on fidelity suretyship bond, answers of indemnity company and plaintiff's alleged agent, which denied the alleged dishonesty and alleged that money in question was used for plaintiff's benefit and for reim-

bursements due alleged agent, and alleged agent's counterclaim for compensation and reimbursements due from plaintiff, involved the same issues, which would likely involve same witnesses and which should in the interest and convenience of economy be decided by a single trial, hence plaintiff's motion for separate trials of issues would be denied. *Commercial Banking Corp. v. Indemnity Ins. Co.*, 1 F. R. D. 380.

The purpose of the rule being to further convenience and avoid delay.—The purpose of rule permitting separate trial of any claim, cross-claim, counterclaim, or of any separate issue is to further convenience and to avoid delay. *Eisman v. Samuel Goldwyn*, 30 F. Supp. 436.

Rule 18 authorizes unlimited joinder of claims where there is only one plaintiff and one defendant. It is evident that the court must be given extensive discretionary powers in order to expedite a determination of the issues and avoid delay and inconvenience. Paragraph (b) of this rule conferring power to order a separate trial of any claim or any separate issue, and Rule 54 (b) conferring power to enter separate judgments at various stages, appear to have been designed to meet the difficulties arising from these liberal joinder provisions. *Collins v. Metro-Goldwyn Pictures Corp.*, 106 F. (2d) 83, 85.

Where the pleadings in a copyright infringement action were before the court for more than two years on various motions, and further delay would be avoided by granting separate trials of the claim and cross-claim, plaintiffs' motion for separate trials was granted. *Society of European Stage Authors, etc. v. WCAU Broadcasting Co.*, 35 F. Supp. 460.

Hearing in advance of main trial.—In 3 Moore's Fed. Prac., p. 3051, it is said: "It may also be desirable in many situations to hold a hearing in advance of the main trial on certain defenses, especially those going to jurisdiction and venue * * *". *Seaboard Terminals Corp. v. Standard Oil Co.*, 30 F. Supp. 671, 672.

On issues of statute of limitations.—In action for injury to business resulting from alleged conspiracy of defendants in violation of anti-trust laws, separate trial of issues of statute of limitations would be granted, where determination of such issues would end the entire litigation. *Seaboard Terminals Corp. v. Standard Oil Co.*, 30 F. Supp. 671. See *Schenley Distillers Corp. v. Renken*, 34 F. Supp. 678.

And issue of release of damages.—In action for damages resulting from an accident, wherein plaintiff, in reply to defense of release of damages incurred, confessed the release and attempted to avoid it and parties were at issue concerning whether release

was fraudulently obtained, the court, pursuant to this rule, ordered separate trial of issue of release, which would be disposed of before trial upon the merits. *Ross v Service Lines*, 31 F. Supp. 871.

Plaintiff may seek separate trial.—"While it is true that ordinarily it is the defendant who seeks a separate trial, I see nothing in the rules which precludes the plaintiffs from making such application." *Seaboard Terminals Corp. v Standard Oil Co.*, 30 F. Supp. 671, 672.

Right of third-party defendant.—An automobile liability insurer, if brought in as a third-party defendant by the defendant insured, is entitled to a hearing and trial of any defenses that it may set up against its

liability, and would probably be granted a separate trial of its controversy with its insured. *Tullgren v Jasper*, 27 F. Supp. 413.

Waiver of jury trial.—No demand for a jury trial was served and was therefore waived as a matter of right, but authority is given under this rule and Rule 39 (b) when the right has been waived. It is, however, wholly a matter of discretion. *Suffin v Springer*, 1 F. R. D. 245. See notes to Rule 38, analysis line III.

III. COURT SESSIONS PUBLIC— WHEN CLOSED.

See committee note under subdivision C (c).

Rule 43. Evidence.

C (a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of this state or under the rules of evidence heretofore applied in the trial of actions in the courts of this state. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner. [Supplants Code Secs. 391 and 392.]

C (b) Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association or body politic which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

Committee Note.

This subdivision gives the same rights on cross-examination as 4 C. S. A., Chap. 177, Sec. 16. The words "or body politic" were inserted so that in a suit by or against any municipality, county, or state agency, its officers and agents could be interrogated.

(c) Record of Excluded Evidence. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove

by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(d) **Affirmation in Lieu of Oath.** Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

C (e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, or the court may direct that the matter be heard wholly or partly on oral testimony or depositions. This shall include applications to grant or dissolve an injunction and for the appointment or discharge of a receiver. [Supplants parts of Code Secs. 169, 170 and 181.]

C (f) Secondary Evidence. There shall be no evidence of the contents of a writing other than the writing itself, except in the following cases:

(1) When the original has been lost or destroyed, in which case proof of the loss or destruction shall first be made.

(2) When the original is in possession of the party against whom the evidence is offered, and he fails to produce it after a reasonable notice.

(3) When the original is a record or other document in the custody of a public officer.

(4) When the original has been recorded, and a certified copy of the record is made evidence by statute.

(5) When the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time and the evidence sought from them is only the general result of the whole. [Code Sec. 391.]

(6) When the original is not within the state of Colorado and the party offering such evidence has been unable, after the exercise of due diligence, to obtain such original. [New.]

Committee Note.

There are no Federal subdivisions 43 (f) or (g).

C (g) Explaining Alterations in Documents. The party producing the writing as genuine which has been altered, or appears to have been altered after its execution, in a part material to the question in dispute, and such alteration is not noted on the writing, shall account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, or was made with the assent of the parties affected by it,

or otherwise properly or innocently made. If he do that he may give the writing in evidence, but not otherwise. [Code Sec. 392.]

- I. Form and Admissibility.
- II. Scope of Examination and Cross-Examination.
- III. Record of Excluded Evidence.
- IV. Affirmations in Lieu of Oath.
- V. Evidence on Motions.
- VI. Secondary Evidence.
- VII. Explaining Alterations in Documents.

Cross Reference.

For a discussion of this rule, see Address no. 9, appx. D.

I. FORM AND ADMISSIBILITY.

A document produced by defendant after demand and inspected by plaintiff is admissible on behalf of defendant even though plaintiff refuses to place document in evidence. *McCarthy v. Palmer*, 29 F. Supp. 585.

Testimony of deceased witness is inadmissible.—Subdivision (a) of this Rule requires peremptorily that testimony in all trials shall be taken orally in open court except as otherwise provided in these rules. Nowhere else in the District Court rules is there any provision having any bearing whatever upon the admissibility of the testimony of deceased or inaccessible witnesses, save what is there prescribed for taking depositions. Of course, the taking of depositions, upon any one of the several grounds contained in the rules, has no application here. If, therefore, this rule be literally applied, it itself renders the testimony of the deceased witness inadmissible. *United States v. Aluminum Co.*, 1 F. R. D. 48, 50.

Ordinarily an examination under Rule 26 should conform to general rules of admissibility.—An examination under Rule 26 is "for the purpose of discovery or for use as evidence in the action or for both purposes" and ordinarily should conform to the general rules of admissibility as tested by subdivision (a) of this rule. *Union Cent. Life Ins. Co. v. Burger*, 27 F. Supp. 556; *Schweinert v. Insurance Co.*, 1 F. R. D. 247, 248.

However, in view of the liberality and freedom of action which were intended to be achieved under rules (See *Laverett v. Continental Briar Pipe Co.*, 25 F. Supp. 80), the court should not limit an examination on a motion to vacate and modify notices, unless the information sought upon the examination is clearly privileged or ir-

relevant. *Union Cent. Life Ins. Co. v. Burger*, 27 F. Supp. 556, 557.

Judicial notice of foreign law.—Federal court cannot take judicial notice of German law. *United States v. District Director of Immigration, etc.*, 106 F. (2d) 14.

II. SCOPE OF EXAMINATION AND CROSS-EXAMINATION.

Cross reference.—See committee note under subdivision C (b).

In general.—"The provision that a party may interrogate any unwilling or hostile witness by leading questions states a universal practice. The provision . . . to the effect that a party may call an adverse party or an officer, etc., of a corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him is a necessary rule because such persons may in many instances be possessed of much material evidence." 3 Moore's Fed. Prac. 3074.

Proceedings before a master are more flexible with respect to time of taking testimony than in the case of a final hearing in open court. *National Bondholders Corp. v. McClintic*, 99 F. (2d) 595.

"Managing agent."—Rule 43 (b) provides that the "managing agent" of a party may be called for cross examination. But that phase is not defined and hence is uncertain. Under *London Guarantee, etc., Co. v. Officer*, 78 Colo. 441, 444, 242 P. 989, it was held that the term "managing agent" meant just one party, which is too narrow a construction. Hence, the committee defined the term in Rule 110 by stating "a superintendent, overseer, foreman, sales director, or person occupying a similar position, may be considered a managing agent for the purposes of these rules." See article entitled, "The Federal Rules from the Standpoint of the Colorado Code" by Col. Philip S. Van Cise, Chairman of Rules Committee, *Dicta XVII*, no. 7, pp. 170, 176.

III. RECORD OF EXCLUDED EVIDENCE.

Making a formal offer of proof is not an absolute condition upon appellant's availing himself of error in exclusion of evidence. *Meaney v. United States*, 112 F. (2d) 538.

IV. AFFIRMATION IN LIEU OF OATH.

This is former practice. See Address no. 9, appx. D.

V. EVIDENCE ON MOTIONS.

Editor's note.—Under § 181 of the Code of Civil Procedure, which is supplanted by this section, it was said that as a general rule, a receivership should not be created unless upon notice. If there be exceptional cases that require ex parte action, they are limited to momentous emergencies. The drastic remedy of receivership among partners should be avoided whenever possible. See *Oberto v. Moore*, 93 Colo. 93, 23 P. (2d) 578.

Courts have always reserved to themselves the power to refer to a master a disputed issue of fact arising upon a motion, the Rules of Civil Procedure are no innovation in that regard. *Hyman v. Pottberg*, 101 F. (2d) 262, 265.

VI. SECONDARY EVIDENCE.

Cross references.—As to admissibility of copies of lost instruments and records, see vol. 4, ch. 135, §§ 1 and 11. As to admissibility of copies of documents kept by county officers, see vol. 2, ch. 45, § 181. As to admissibility of evidence of lost instruments, see vol. 3, ch. 63, § 14.

In actions involving the examination of voluminous book accounts, a summary prepared by a competent person is the only practicable way of presenting such evidence. *McDonald v. McFerson*, 80 Colo. 4, 249 P. 496, construing § 391 of the Code of Civil Procedure from which subdivision C (i) (1) to (5) derives.

Parol proof of contents of agreement.—Where the plaintiffs alleged and the de-

fendant denied the execution in duplicate of an agreement for the sale of a mine, and on the trial the plaintiff proved that the agreement in duplicate had been duly executed and delivered to defendant at the time of the original transaction, it was held, that the admission of parol proof of its contents, without first requiring plaintiff to serve notice to produce the document was, if error, an error without prejudice. *Gilpin County Min. Co. v. Drake*, 8 Colo. 586, 9 P. 787, cited in notes, 7 L. R. A. (N. S.) 856, 870, 872, 875, L. R. A. 1918F, 627, 52 A. L. R. 1527, construing § 391 of the Code of Civil Procedure from which subdivision C (i) (1) to (5) derives.

VII. EXPLAINING ALTERATIONS IN DOCUMENTS.

Cross reference.—See committee note under subdivision C (i) (6).

This provision should be accepted as declaratory of the policy of the state with respect to the effect of changed or altered instruments of writing, and although the provision is a rule of evidence merely, and not substantive law, it would present a novel situation if the court should receive a changed instrument in evidence, when the preliminary proof required by the code is made, and reject it finally because under the decisions of other states it would be declared void. *Whitehead v. Emmerich*, 38 Colo. 13, 16, 87 P. 790, cited in notes, 46 L. R. A. (N. S.) 1044, Ann. Cas. 1917D, 335, 9 A. L. R. 1089, construing § 392 of the Code of Civil Procedure, from which subdivision C (g) of this rule derives.

Rule 44. Proof of Official Record.

(a) **Authentication of Copy.** An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may

be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office. [Supplants Code Secs. 393, 394 and 395.]

(b) **Proof of Lack of Record.** A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) **Other Proof.** This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

C (d) **Certified Copies of Records Read in Evidence.** All copies of any record, or document, or paper, in the custody of a public officer of this state, or of the United States, certified by the officer having custody thereof, or verified by the oath of such officer to be a full, true and correct copy of the original in his custody, may be read in evidence in an action or proceeding in the courts of this state, in like manner and with like effects as the original could be if produced. [From Code Sec. 459.]

Committee Note.

There are no Federal subdivisions 44 (d), (e) or (f).

C (e) **Seal Dispensed With.** In the event any office or officer, authenticating any documents under the provisions of this rule, has no official seal, then authentication by seal is dispensed with. [From Code Sec. 395.]

C (f) **Statutes and Laws of Other States and Countries.** A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance by the executive power thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the judicial tribunals thereof, is presumptive evidence of the statute, law, proclamation, edict, decree or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of reports of cases adjudged in the courts thereof must also be admitted as presumptive evidence of the unwritten or common law thereof. The law of such state or territory or foreign country is to be determined by the court or master and included in the findings of the court or master or instructions to the jury, as the case may be. Such finding or instruction is subject to review. In determining such law, neither the trial court nor the supreme court shall be limited to the evidence produced on the trial by the parties, but may consult any of the written authorities above named in this subdivision.

with the same force and effect as if the same had been admitted in evidence [From Sec. 391, New York Civil Practice Act. Supplants Code Sec. 396.]

Committee Note.

See Rule 264 for copies of printed laws in Supreme Court Library.

Cross reference.—For a discussion of this rule, see Address no. 9, appx. D.

Editor's note.—For cases construing §§ 393, 394 of the Code of Civil Procedure, which are supplanted by subdivision (a) of this rule, see *Thalheimer v. Crow*, 13 Colo. 397, 22 P. 799, cited in notes, 38 Am. St. Rep. 708, 718, 719, 18 L. R. A. (N. S.) 602, L. R. A. 1915A, 847, Ann. Cas. 1913B, 388, 390, Ann. Cas. 1916C, 1229, 1230; *Terry v. Gibson*, 23 Colo. App. 273, 128 P. 1127; *Henry Inv. Co. v. Seimonian*, 45 Colo. 260, 100 P. 425; *Hammitt v. Porter*, 71 Colo. 511, 208 P. 452.

For cases construing § 396 of the Code of Civil Procedure, which is supplanted by subdivision [C (f)] of this rule, see *Atchison, etc., R. Co. v. Betts*, 10 Colo. 431, 15 P. 821, cited in notes, 13 Am. St. Rep. 738, 113 Am. St. Rep. 869, 870, 4 L. R. A. 42, 25 L. R. A. 162, 67 L. R. A. 44; *Eubanks v. Gonder*, 90 Colo. 44, 6 P. (2d) 3; *Mosko v. Matthews*, 87 Colo. 55, 284 P. 1021; *Bruckman v. Taussig*, 7 Colo. 561, 5 P. 452, cited in notes, 91 Am. St. Rep. 736, 737, 94 Am. St. Rep. 533, 20 L. R. A. 678, 78 A. L. R. 1064.

Scope and purpose of rule.—This rule providing that authenticity of official record may be evidenced by an official publication thereof does not interfere with any method of proving documents prescribed by prior statutes, and merely adds another method for authenticating departmental documents, the purpose of rule being to reduce delay and expense in obtaining from government department documents intended to be offered in evidence. *United States v. Aluminum Co.*, 1 F. R. D. 71.

There is no requirement that the original record be open to examination by the public.

—Under this rule providing that an "official record" or an entry therein when admissible for any purpose may be evidenced by an official publication thereof or a copy attested by the officer having the legal custody of the record, and its statutory corollary, there is no requirement that the original must be open to examination by the public. *Banco De Espana v. Federal Reserve Bank*, 114 F. (2d) 438.

Proper authentication.—Where secret decree and ministerial orders, whereby former Spanish government allegedly acquired title to silver sold to United States, attached to affidavit of ambassador of Spanish government were evidenced by copies certified by Undersecretary of Ministry of Finance of the Spanish government, the Undersecretary's certificate and officer were certified by Subsecretary of Ministry of State, whose signature and office were certified by the Vice Consul of the United States, the certificates effected a substantial compliance with this rule regarding authentication of official records. *Banco De Espana v. Federal Reserve Bank*, 114 F. (2d) 438.

Papers which were work of persons in employment of government in course of performance of duties of their positions, were "official papers" and which were published by government printing office upon order of the senate was an "official publication" evidencing an "official record," within this rule providing that authenticity of an official record may be evidenced by an official publication thereof. *United States v. Aluminum Co.*, 1 F. R. D. 71.

Rule 45. Subpoena.

C (a) For Attendance of Witnesses; Form; Issuance. Every subpoena, except for the taking of depositions as provided in subdivision C (d) of this rule, shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

Committee Note.

The exception was made so that the issuance of a subpoena should not be limited to the clerk, but that the party authorized to take a deposition could likewise issue a subpoena.

(b) **For Production of Documentary Evidence.** A subpoena may also command the person to whom it is directed to produce the books, papers, or documents designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, or documents.

(c) **Service.** Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the state of Colorado, or an officer or agency thereof, fees and mileage need not be tendered. Proof of service shall be made as in Rule 4 (i). [Supplants Code Sec. 477.]

C (d) Subpoena for Taking Depositions: Place of Examination.

(1) Presentation of a notice to take a deposition (either before or after service thereof) as provided in Rules 30 (a) and 31 (a), or of a stipulation for the taking thereof, constitutes a sufficient authorization for the issuance by the judge or clerk of any court of record in the county where the deposition is to be taken, or by the notary public or other officer authorized to take the deposition, of subpoenas for the persons named or described therein. A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be issued without an order of the court. [Supplants Code Sec. 382.]

(2) A resident of the state in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person. A nonresident of the state in which the deposition is to be taken, may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other place as is fixed by an order of court.

C (e) Subpoena for a Hearing or Trial.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the court in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the state.

C (2) Subpoena to any county other than that in which the trial is held shall be issued only on the order of the court, upon affidavit showing that it is necessary that the witness be personally present at the trial. [From Code Sec. 380.]

(f) [This Federal subdivision was stricken as covered by Rule 107 (a).]

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| I. For Attendance of Witnesses. | III. Service. |
| II. For Production of Documentary Evidence. | IV. Subpoena for Taking Depositions: Place of Examination. |

Cross Reference.

For a discussion of this rule, see Address no. 9, appx. D.

I. FOR ATTENDANCE OF WITNESSES.

Defendants served with process need not be served with subpoenas.—Where service of process was made on defendants within district wherein action had been commenced, and defendants appeared and answered, it was not essential to secure their presence that they should be served with subpoena pursuant to this rule which is applicable to witnesses. *French v. Zalstem-Zalessky*, 1 F. R. D. 240.

A motion for leave to take the depositions of parties and witnesses after issue joined and for an order for the issuance of subpoenas and the production and copying of documents was denied in view of new Federal Rules providing a clear and unambiguous method for taking depositions, compelling the attendance of parties and witnesses, and the production and copying of documents. *Brach v. MacFadden Publications*, 1 F. R. D. 445.

II. FOR PRODUCTION OF DOCUMENTARY EVIDENCE.

This and Rule 34 must be construed in *pari materia*.—Rule 34 defines the authority of the court. Rule 45 (b) defines the authority of the clerk. The two rules relate to the same subject. Obviously they must be construed in *pari materia*. Otherwise there would result the absurdity that the clerk is granted more power than the court. *United States v. Aluminum Co.*, 1 F. R. D. 57, 58. See *Connecticut Importing Co. v. Continental Distilling Corp.*, 1 F. R. D. 190; *United States v. Aluminum Co.*, 1 F. R. D. 62.

In this rule a right to move to quash the subpoena is reserved to the person to whom it is addressed.—*United States v. Aluminum Co.*, 1 F. R. D. 57, 58.

A subpoena duces tecum requiring defendant and witness to produce complete file of newspapers in defendant's possession should be obeyed, notwithstanding that newspapers might be incompetent, irrelevant and immaterial, particularly where defendant and witness failed to take advantage of opportunity to quash subpoena by method provided by this rule. *Allen Bradley v. Local Union No. 3, etc.*, 29 F. Supp. 759.

The rule also specifies as a sufficient ground for quashing it that it is unreasonable and oppressive.—*United States v. Aluminum Co.*, 1 F. R. D. 57, 58.

Paragraph of subpoena duces tecum commanding production at an examination

before trial, of corporation's employee, of all documents, books and papers in possession of corporation relating to business of other corporate defendants was required to be quashed because too broad and because unreasonable. *403-411 East 65th Street Corp. v. Ford Motor Co.*, 27 F. Supp. 37.

Such motion will be granted unless it appears that documents contain material evidence.—A motion by defendant to quash an item of a subpoena duces tecum would be granted unless it appeared that the documents, called for, constituted or contained evidence which was material. *United States v. Aluminum Co.*, 1 F. R. D. 62.

In *Nelson v. United States*, 201 U. S. 92, 26 S. Ct. 358, 50 L. Ed. 673, it appears that the court found as a fact that all the documents called for were material evidence. *United States v. Aluminum Co.*, 1 F. R. D. 57, 58.

Paragraph of subpoena duces tecum commanding production at an examination before trial, of corporation's employee, of all books, papers, records, memoranda, checks, correspondence, cancelled vouchers and all other documents and papers relating to leasing and/or subleasing of garage located at certain place sufficiently designated documents required to be produced and was not unreasonable, where materiality of the documents was shown by complaint and answer. *403-411 East 65th Street Corp. v. Ford Motor Co.*, 27 Supp. 37.

Or evidence that is probably material.—*United States v. Aluminum Co.*, 1 F. R. D. 57, citing *Brown v. United States*, 276 U. S. 134, 48 S. Ct. 288, 72 L. Ed. 500.

If this rule were interpreted as warranting issuance by the clerk of a subpoena duces tecum which when brought before the court, would survive a motion to quash, though no showing were made of the materiality or probable materiality of the documents as evidence, it either would be invalid under the provisions of the Constitution or, at least, would raise a serious question as to whether or not it was invalid under the Constitution. *United States v. Aluminum Co.*, 1 F. R. D. 57, 58.

"I agree with Judge Caffey's observation in *United States v. Aluminum Co.*, 1 F. R. D. 57, that Rule 34 must be construed in *pari materia* with Rule 45 (b). And further, in my view, both these rules should be construed in *pari materia* with Rule 26. To be sure, the precise language of Rule 34 is addressed to evidence material to any matter involved in the action; Rule 26 has to do with the discovery of items relevant to the subject matter involved in the pending action. But Judge Caffey, in the case just above cited, makes the right to a subpoena duces tecum depend upon the probable materiality of the document called for.

And I cannot bring myself to believe that it was intended that a right to procedural relief should turn upon a technical distinction between probable materiality and relevancy. Surely it would be unduly technical to deny the pending motion under Rule 34 because of a present uncertainty as to the materiality of tax returns when the only effect of such a ruling would be to relegate the defendant to the procedure for a discovery under Rule 26 which entitles it to a discovery of all relevant matter." *Connecticut Importing Co. v. Continental Distilling Corp.*, 1 F. R. D. 190, 192.

The usefulness of a document for purpose of refreshing the memory of a witness is not ground for requiring its production by means of a subpoena duces tecum. *United States v. Aluminum Co.*, 1 F. R. D. 62.

In dealing with a statutory provision somewhat broader in its phraseology than the Rules of Civil Procedure Mr. Justice Cardozo, when Chief Judge of the New York Court of Appeals (*People v. New York*, 245 N. Y. 24, 29, 156 N. E. 84, 85, 52 A. L. R. 200), said: "Documents are not subject to inspection for the mere reason that they will be useful in supplying a clue whereby evidence can be gathered. Documents to be subject to inspection must be evidence themselves." *United States v. Aluminum Co.*, 1 F. R. D. 62, 64.

When subpoena is proper.—Where during taking of defendant's deposition he testified that he had given signed statement regarding details of automobile accident to his insurer's investigator and that he was present when photographs of automobile were exhibited to plaintiff, plaintiff could serve notice to take deposition of the insurer or defendant's attorney and procure and serve subpoena duces tecum. *Bough v. Lee*, 26 F. Supp. 1000.

III. SERVICE.

As respects designation by court of some person to make service of process, an attorney stands in the same relationship as a party and so cannot be designated under Federal Civil Procedure Rules. *In re Evanishyn*, 1 F. R. D. 202.

IV. SUBPOENA FOR TAKING DEPOSITIONS: PLACE OF EXAMINATION.

Compliance with Rule 30 (a) is essential to make this rule effective.—Rule 30 (a) requires that the notice of examination shall state the "name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs." This is essential to make Rule 45 effective. *Freeman v. Hotel Waldorf-Astoria Corp.*, 27 F. Supp. 303.

Inspection of documents in possession of one who is not a party may be ordered.—Rule 45 deals with subpoenas, and in paragraph (d) it provides: "A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be used without an order of the court." This is the same as saying that on order of the court the production of documents on the taking of a deposition may be compelled by appropriate subpoena. There is no express restriction to documents in possession of a party, and no reason exists for implying such a restriction. It necessarily follows that where a witness has documents with him at the deposition, in obedience to subpoena duces tecum, and a controversy arises whether he must reveal them, the court has power to compel the witness to permit inspection. *Eastern States Petroleum Co. v. Asiatic Petroleum Corp.*, 27 F. Supp. 121, 122.

Motion to quash.—Rule 45 (b) provides that upon motion the court may quash a subpoena issued by the clerk for the reasons that it is unreasonable and oppressive or may condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, or documents. It is the court's opinion that the same conditions are applicable to a subpoena duces tecum sought under the provisions of Rule 45 (d) (1). *Fox v. House*, 29 F. Supp. 673, 677.

Residence of persons is immaterial where they may be reached by process of court.—So long as persons sought to be examined before trial may be reached by the process of the court in which the action is brought, it is immaterial where they reside. *Norton v. Cooper Jarrett*, 1 F. R. D. 92.

Name of person before whom examination before trial is to be taken need not be stated.—Neither Rule 30 dealing with depositions on oral examination nor this rule dealing with subpoena requires that the name of the person before whom examination before trial is to be taken be stated. *Norton v. Cooper Jarrett*, 1 F. R. D. 92.

But such statement is better practice.—*Norton v. Cooper Jarrett*, 1 F. R. D. 92.

Illustration.—The defendant corporation's president who resided in county in which it had its principal office and place of business could not properly be required to attend examination for taking of his deposition in another county, but could only be examined in county wherein he resided and transacted his business. *Laverett v. Continental Briar Pipe Co.*, 25 F. Supp. 80.

Where plaintiff's assignor, formerly employed by defendant, was engaged in competitive business, and the production of books and records of defendant might re-

sult in a disclosure of information and be used to defendant's injury, order directing issuance of subpoena duces tecum for production of books and records of defendant would contain safeguard provision which would fully protect defendant. *Cooney v. Guild Co.*, 1 F. R. D. 246.

On examination before trial of defendants to ascertain correct motor number and ownership of tractor and trailer which ran

into automobile in which plaintiffs in negligence action were riding, whether tractor and trailer were operated under control of defendants and their agents, and whether tractor and trailer had defective brakes, windshield wiper, and defroster, defendants could be required to produce shipping documents which accompanied cargo transported by tractor and trailer. *Norton v. Cooper Jarrett*, 1 F. R. D. 92.

Rule 46. Exceptions Unnecessary.

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him. [Supplants Code Secs. 422 and 443.]

Cross reference.—For a discussion of this rule, see Address no. 9, appx. D.

This rule should be read in conjunction with Rules 49 (a), 50 (a) and 51. 3 Moore's Fed. Prac. 3050.

A request for findings is not prerequisite to an appeal. *Drybrough v. Ware*, 111 F. (2d) 548.

An appeal from judgment in unlawful detainer action would be decided on the merits, notwithstanding that no question was raised as to admissibility of evidence and that there was no request for special findings and that there were no exceptions. *Stoltze v. United States*, 99 F. (2d) 283.

But the rule does require the party to make known to the court the action he desires taken or his objection to that taken by the court and his grounds therefor. *Drybrough v. Ware*, 111 F. (2d) 548; *Massachusetts Bonding, etc., Co. v. Preferred Automobile Ins. Co.*, 110 F. (2d) 764.

Where case was tried without jury, and bill of exceptions contained no findings of fact specially made by trial court, nor separate conclusions of law, and it did not appear that any proposed findings or conclusions had been requested by appellant, which made no motion for judgment, and record failed to disclose exceptions to trial court's rulings in progress of trial, appeal would be dismissed because of failure to present a "reviewable question" for determination. *Massachusetts Bonding, etc., Co.*

v. Preferred Automobile Ins. Co., 110 F. (2d) 764.

In action for trespass where boundaries set forth in deeds under which defendants were claiming the disputed area were read to defendants' witness, permitting such witness to testify, that he knew the lands embraced by such description and concerning acts of possession by defendants and those under whom defendants claimed, was not subject to objection, first made on appeal, that witness should not have been permitted to testify to acts of possession until boundaries of deeds were fitted to the lands by description of physical objects corresponding to boundaries in deeds. *Virginia-Carolina Tie, etc., Co. v. Dunbar*, 106 F. (2d) 383.

The trial court, upon directing verdict for defendant, assumed that plaintiff took an objection to that ruling in accordance with this rule. *United States v. National Biscuit Co.*, 25 F. Supp. 329.

Where trial court advised defendant that exceptions would be allowed to any adverse rulings upon its proposed findings and conclusions of law, but they were denied and judgment entered in absence of counsel without such allowance, and court vacated judgment for express purpose of entering a new judgment to which exception was taken, the exception was sufficient to permit review of the denied findings of fact and conclusions of law as well as those allowed. *First Nat. Bank v. United States*, 102 F. (2d) 907.

Rule 47. Jurors.**Committee Note.**

With the exception of subdivisions (a) and (b), all of this rule is from the Colorado Code.

(a) **Examination of Jurors.** The parties, or their attorneys, shall conduct the examination of prospective jurors and the court may itself conduct such examination as it deems proper. [From Federal Rule 47 (a).]

(b) **Alternate Jurors.** The court may direct that one or two jurors in addition to the regular panel be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict. If one or two alternate jurors are called each side is entitled to one peremptory challenge in addition to those otherwise allowed. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed shall not be used against the alternates. [Part from Federal Rule 47 (b). See 3 C. S. A. Chap. 95, Sec. 21.]

Committee Note.

If one alternate juror is desired call three extra jurors into the box, and each side will exercise one peremptory challenge to said three jurors. If two alternate jurors are desired call four extra jurors to the box, and each side will exercise one peremptory challenge to said four jurors.

(c) **Challenge to Array.** Any party may challenge the array of jurors by motion setting forth particularly the causes of challenge; and the party opposing the challenge may join issue on the motion, and the issue shall be tried and decided by the court. [From Code Sec. 204.]

(d) **Challenge to Individual Jurors.** A challenge to an individual juror may be for cause or peremptory. [New.]

(e) **Challenges for Cause.** Challenges for cause may be taken on one or more of the following grounds:

(1) A want of any of the qualifications prescribed by the statute to render a person competent as a juror.

(2) Consanguinity or affinity within the third degree to any party.

(3) Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal or agent to either party, or being a member of the family of any party, or a partner in business with any party or being security on any bond or obligation for any party.

(4) Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action.

(5) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except the interest of the juror as a member, or citizen of a municipal corporation.

(6) Having formed or expressed an unqualified opinion or belief as to the merits of the action.

(7) The existence of a state of mind in the juror evincing enmity against or bias to either party. [From Code Sec. 200.]

(f) **Order and Determination of Challenges for Cause.** The plaintiff first, and afterwards the defendant, shall complete challenges for cause. Such challenges shall be tried by the court, and the juror challenged, and any other person, may be examined as a witness. [From Code Sec. 201 and 202.]

(g) **Order of Selecting Jury.** The clerk shall draw by lot and call the number of jurors that are to try the cause plus such an additional number as will allow for all peremptory challenges permitted. After each challenge for cause sustained, another juror shall be called to fill the vacancy and may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of jurors remaining, in the order called, and each side, beginning with plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then swear the remaining jurors, or so many of them in the order listed as will make up the number fixed to try the cause, and these shall constitute the jury. [Supplants Code Sec. 203.]

(h) **Peremptory Challenges.** Each side shall be entitled to four peremptory challenges, and if there be more than one party to a side they must join in such challenges. [From Code Sec. 199.]

(i) **Oath of Jurors.** As soon as the jury is completed, an oath or affirmation shall be administered to the jurors in substance:

That you and each of you will well and truly try the matter at issue between....., the plaintiff, and....., the defendant, and a true verdict render, according to the evidence. [From Code Sec. 198.]

(j) **When Juror Discharged.** If, before verdict, a juror becomes unable or disqualified to perform his duty and there is no alternate juror, the parties may agree to proceed with the other jurors, or that a new juror be sworn and the trial begun anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried anew. [From Code Sec. 209.]

(k) **Examination of Premises by Jury.** If in the opinion of the court it is proper for the jury to see or examine any property or place, it may order the jury to be conducted thereto in a body by a court officer. A guide may be appointed. The court shall, in the presence of the parties, instruct the officer and guide as to their duties. While the jury is thus absent, no person shall speak to it on any subject connected with the trial excepting only the guide and officer in compliance with such instructions. The parties and their attorneys may be present. [From Code Sec. 206.]

(l) **Deliberation of Jury.** After hearing the charge, the jury may either decide in court or retire for deliberation. If it retires, it shall be kept together in a separate room or other convenient place under the charge of one or more officers, until it agrees upon a verdict or is discharged. The officer shall, to

the utmost of his ability, keep the jury together, separate from other persons; he shall not suffer any communication to be made to any juror, or make any himself, unless by order of the court, except to ask it if it has agreed upon a verdict; and he shall not, before the verdict is rendered, communicate to any person the state of its deliberations, or the verdict agreed upon. [From Code Sec. 210.]

(m) **Papers Taken by Jury.** Upon retiring for deliberation, the jury may take all papers, except pleadings, depositions, accounts or account books, which have been received in the case, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession, and any juror may take with him any notes of testimony, or other proceedings, which he has made but none made by any other person. [From Code Sec. 211.]

(n) **Additional Instructions.** After the jury has retired for deliberation, if it desires additional instructions, it may request the same from the court; any additional instructions shall be given it in court in the presence of or after notice to the parties. [From Code Sec. 212.]

(o) **New Trial if no Verdict.** When a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew. [From Code Sec. 213.]

(p) **When Sealed Verdict.** While the jury is absent the court may adjourn from time to time, in respect to other business, but it shall be nevertheless deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of court, in case of an agreement during a recess or adjournment for the day. A final adjournment of the court for the term shall discharge the jury. [From Code Sec. 214.]

(q) **Declaration of Verdict.** When the jury has agreed upon its verdict it shall be conducted into court by the officer in charge. The names of the jurors shall be called, and the jurors shall be asked by the court or clerk if they have agreed upon a verdict, and if the answer be in the affirmative, they shall hand the same to the clerk. The clerk shall enter in his records the names of the jurors. Upon a request of any party the jury may be polled. [From Code Sec. 215.]

(r) **Correction of Verdict.** If the verdict be informal or insufficient in any particular, the jury, under the advice of the court, may correct it or may be again sent out. [From Code Sec. 216.]

(s) **Verdict Recorded, Disagreement.** The verdict, if agreed upon by all jurors, shall be received and recorded and the jury discharged. If all the jurors do not concur in the verdict, the jury may be again sent out, or may be discharged. [From Code Sec. 217.]

- I. Examination of Jurors.
- II. Alternate Jurors.

- III. Challenge to Array.
- IV. Challenge to Individual Jurors.

- V. Challenges for Cause.
- VI. Order and Determination of Challenges for Cause.
- VII. Order of Selecting Jury.
- VIII. Peremptory Challenges.
- IX. Oath of Jurors.
- X. When Juror Discharged.
- XI. Examination of Premises by Jury.
- XII. Deliberation of Jury.
- XIII. Papers Taken by Jury.
- XIV. Additional Instructions.
- XV. New Trial if No Verdict.
- XVI. When Sealed Verdict.
- XVII. Declaration of Verdict.
- XVIII. Correction of Verdict.
- XIX. Verdict Recorded, Disagreement.

Cross Reference.

For a discussion of this rule, see Address no. 10, appx. D.

I. EXAMINATION OF JURORS.

Right of counsel to interrogate jurors.—Permission of the court is necessary under the Federal Rule but this is not necessary under the Colorado rule. See Address no. 10, appx. D.

In personal injury case, counsel for plaintiff may interrogate prospective jurors respecting their interest in or connection with indemnity insurance companies apparently interested in the result of the case so long as counsel acts in good faith, but he may not interrogate defendant's counsel, either at the bar or as a witness, concerning whether an insurance company is interested in the case for the purpose of obtaining a basis for interrogating the jurors. *Bass v. Dehner*, 103 F. (2d) 28. See *Vindicator Consol. Gold Min. Co. v. Firstbrook*, 36 Colo. 498, 86 P. 313, cited in notes, 12 L. R. A. (N. S.) 1044, 40 L. R. A. (N. S.) 37, 47 L. R. A. (N. S.) 86, L. R. A. 1915A, 158, Ann. Cas. 1913C, 106, 56 A. L. R. 1440, 1457, 1546; *Independence Coffee, etc., Co. v. Kalkman*, 61 Colo. 98, 156 P. 135, cited in notes, 56 A. L. R. 1457, 1481.

Extent of preliminary examination is largely within discretion of trial court.—The general rule is that the course and extent of voir dire examination is largely within the discretion of the trial court. *Bass v. Dehner*, 103 F. (2d) 28, 36.

II. ALTERNATE JURORS.

Cross reference.—As to selecting and summoning of jurors, see ch. 85, §§ 10-21, vol. 3, C. S. A.

Changes in alternate juror set-up.—See discussion of this rule in Address no. 10, appx. D.

Constitutionality of similar statute.—In *State v. Dalton*, 206 N. C. 507, 174 S. E. 422, it was held that the North Carolina statute providing for an extra or alternate juror was constitutional.

III. CHALLENGE TO ARRAY.

It seems to be the settled practice at common law to allow challenges to the panel or array, both in civil and criminal cases. *Jones v. Woodworth*, 24 S. D. 583, 124 N. W. 844.

IV. CHALLENGE TO INDIVIDUAL JURORS.

For general treatment of peremptory challenges, see 31 Am. Jur., Jury, §§ 184-195.

V. CHALLENGES FOR CAUSE.

Cross references.—As to additional grounds of challenge, see vol. 3, ch. 95, § 52 et seq. and the notes there placed.

Editor's note.—The cases below construe § 200 of the Code of Civil Procedure which was substantially the same as subdivision (e) of this rule.

Inability to speak or understand the English language does not necessarily disqualify a juror.—Inability upon the part of persons called to serve as jurors, to speak the English language, and to understand it when spoken, does not necessarily disqualify them from serving as jurors, under the statutes of Colorado. *Trinidad v. Simpson*, 5 Colo. 65, cited in note, 34 A. L. R. 200; *In re Allison*, 13 Colo. 525, 22 P. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790, cited in notes, 22 Am. St. Rep. 660, 25 Am. St. Rep. 527, 28 Am. St. Rep. 132, 54 Am. St. Rep. 880, 92 Am. St. Rep. 121, 125 Am. St. Rep. 1060, 28 L. R. A. 205, 33 L. R. A. 87, 58 L. R. A. 869, 11 L. R. A. (N. S.) 180, 42 L. R. A. (N. S.) 973, L. R. A. 1917A, 1233, Ann. Cas. 1914B, 775, 34 A. L. R. 201, 43 A. L. R. 1517, 1554.

But it is within the discretion of the court to exclude such jurors.—The court is not unmindful that there are many serious objections to the interposition of interpreters in judicial proceedings; and while the court holds it within its power to appoint an interpreter under the circumstances of this case (where the juror did not understand the English language) it was also within its discretion to exclude the jurors named for the cause assigned. Such persons are not disqualified, but whenever it is practicable to secure a full panel of English speaking jurors, a wise discretion would excuse from jury duty persons ignorant of that language. *Trinidad v. Simpson*, 5 Colo. 65, 71, cited in note, 34 A. L. R. 200.

Fact that both juror and plaintiff were stockholders is no ground for sustaining challenge.—The juror was a stockholder and treasurer in the smelting company, and was engaged in smelting ores. The plaintiff was also a stockholder in the same company, but it does not appear that the juror was otherwise connected with the plaintiff or with the defendants. Such a showing as this furnished no grounds for sustaining the defendant's challenge of this juror for cause. *Tabor v Sullivan*, 12 Colo. 136, 146, 20 P. 437, cited in notes, 16 Am. St. Rep. 387, 91 Am. St. Rep. 863, 865, 866, 4 L. R. A. (N. S.) 1127, Ann. Cas. 1913D, 169, 63 A. L. R. 1363, concurring opinion by Mr. Justice Elliot.

The interest of a juror as a member or citizen of a municipality which is a party to the proceeding, does not disqualify him. *Warner v Gunnison*, 2 Colo. App. 430, 31 P. 238, cited in notes, 132 Am. St. Rep. 152, 58 L. R. A. 242, 250, 61 L. R. A. 35, 22 L. R. A. (N. S.) 157, 158, 168, 47 L. R. A. (N. S.) 163, Ann. Cas. 1912C, 200, Ann. Cas. 1912D, 252, Ann. Cas. 1916D, 960.

The ruling of the trial court should be sustained unless it clearly appears from the record that these requirements have been disregarded in the overruling of a challenge for cause. *Denver, etc., R. Co. v Moynahan*, 8 Colo. 56, 58, 5 P. 811, cited in notes, 18 L. R. A. 455, 96 A. L. R. 212.

The decision of the trial court on the challenge of a juror for cause is not ground for reversal, unless manifestly erroneous and prejudicial to the party complaining of it. *Salazar v Taylor*, 18 Colo. 583, 33 P. 369, cited in notes, 64 L. R. A. 316, 37 A. L. R. 87, 69 A. L. R. 958.

It is the legal right of litigants to have their causes tried by the jurors who are first regularly drawn, if, upon being tried, they are found competent, subject to such peremptory challenges as the law allows. It is frequently as injurious to sustain an unfounded challenge as to refuse a well founded one, and sometimes it is even more so; for, if a challenge for cause be refused, while a peremptory challenge remains, relief may be had by a peremptory challenge of the objectionable juror. If, after the trial of a challenge, there is room for reasonable doubt as to the competency of the juror, the ruling of the trial judge should not be disturbed. *Tabor v Sullivan*, 12 Colo. 136, 146, 20 P. 437, cited in notes, 16 Am. St. Rep. 387, 91 Am. St. Rep. 863, 865, 866, 4 L. R. A. (N. S.) 1127, Ann. Cas. 1913D, 169, 63 A. L. R. 1363, concurring opinion by Mr. Justice Elliot.

Forming or expressing opinion.—This provision does not make the forming or expressing of an opinion a decisive test as to the juror's competency, unless the opinion be unqualified as to the merits of the action. *Collins v Burns*, 16 Colo. 7, 26 P. 145.

The law contemplates that the minds of jurors shall be free from such impressions of the merits as amount to a conviction or prejudgment of the case. The rule is a plain and necessary one, but its application is often exceedingly difficult. This is owing to a variety of circumstances which arise in practice. *Denver, etc., R. Co. v Moynahan*, 8 Colo. 56, 57, 5 P. 811, cited in notes, 18 L. R. A. 455, 96 A. L. R. 212.

The matter of permitting questions to jurors upon which to base a peremptory challenge is within the discretion of the trial court. *Bonfils v Hayes*, 70 Colo. 336, 201 P. 677, citing *Union Pac. Ry. Co. v Jones*, 21 Colo. 340, 40 P. 891, cited in note, 21 A. L. R. 1519.

A juror was asked if he would be satisfied to have a man with the same amount of prejudice that he had against defendants, try his case. An objection to the question held properly sustained. *Bonfils v Hayes*, 70 Colo. 336, 201 P. 677.

Challenge properly overruled.—Among the grounds set forth in this provision, the only one that approaches fitness to this case, is the seventh clause. No bias in favor of the plaintiff, nor enmity toward the defendants was shown. The challenge for cause was therefore properly overruled. *Bonfils v Hayes*, 70 Colo. 336, 341, 201 P. 677.

Assignment of error based upon the alleged bias and prejudice of the jury, overruled, nothing appearing of record to substantiate the charge, and no specific objection having been made and no exception preserved on this point. *Stock Yards Nat. Bank v Neugebauer*, 97 Colo. 246, 48 P. (2d) 813.

Right to demand a discharge may be waived.—Where on the trial of a damage case and during the examination of the jury counsel for defendant announced that he did not wish to demand discharge of the jury on the ground of alleged improper interrogation of its members, the statement constituted a waiver of the right to have the court declare a mistrial on such ground at that stage of the proceedings, if any such right existed. *Rains v Rains*, 97 Colo. 19, 46 P. (2d) 740.

VI. ORDER AND DETERMINATION OF CHALLENGES FOR CAUSE.

In the absence of statute, the method and order of procedure in ascertaining the qualifications of veniremen, and disposing of challenges for cause, are commonly in the discretion of the court; but the discretion is not an arbitrary one. A party is not to be unreasonably denied a challenge to which he shows himself entitled. His right in such case is a substantial right which it is not within the discretion of the

court to take away. *Denver City Tramway Co. v Carson*, 21 Colo. App. 604, 123 P. 680, cited in notes, Ann. Cas. 1913E, 1100, Ann. Cas. 1915D, 98.

It must be said that the existence of a uniform rule of practice, which requires the challenge of any particular juror for cause to be made at the very time when the ground for challenge becomes apparent from his examination, and before passing to the examination of another juror, is doubtful, and the argument in favor of such a rule is not convincing. *Id.*

VII. ORDER OF SELECTING JURY.

The forming of a jury to try an issue of fact rests largely in the discretion of the trial court. If the examination leaves the competency of the juror in doubt, the ruling of the court will not be disturbed. Before the supreme court will interfere, it must appear that some positive statute has been violated, or that the court has abused its discretion. The court will not attempt to set out the examination of the juror. *Rio Grande Southern R. Co. v Nichols*, 52 Colo. 300, 307, 123 P. 318, cited in notes, 52 L. R. A. (N. S.) 1101, Ann. Cas. 1915D, 99, citing *Collins v Burns*, 16 Colo. 7, 26 P. 145; *Denver, etc., R. Co. v Driscoll*, 12 Colo. 520, 21 P. 708, 13 Am. St. Rep. 243, cited in notes, 18 Am. St. Rep. 86, 75 Am. St. Rep. 624, 635, 636, 51 L. R. A. 521, 592, 607; *Denver, etc., R. Co. v Moynahan*, 8 Colo. 56, 5 P. 811, cited in notes, 18 L. R. A. 455, 96 A. L. R. 212.

In order for assignment of error to be considered, it must affirmatively appear from the record that the challenging party exhausted all its peremptory challenges. *Rio Grande Southern R. Co. v Nichols*, 52 Colo. 300, 307, 123 P. 318, cited in notes, 52 L. R. A. (N. S.) 1101, Ann. Cas. 1915D, 99, citing *Grand Lodge v Taylor*, 44 Colo. 373, 375, 99 P. 570, cited in note, Ann. Cas. 1915D, 98; *Blackman v Edsall*, 17 Colo. App. 429, 68 P. 790.

VIII. PEREMPTORY CHALLENGES.

A peremptory challenge is not granted by the common law, and the right exists, if at all, by virtue of a statute. *Butler v Hands*, 43 Colo. 541, 542, 95 P. 920.

The right to peremptory challenge is a valuable right, and unless the code regulating the manner of challenges is such that the right cannot be exercised, the court must hold that the right exists. *Butler v Hands*, 43 Colo. 541, 544, 95 P. 920.

Juror possessing statutory qualifications is still subject to challenge. *Trinidad v Simpson*, 5 Colo. 65, 66, cited in note, 34 A. L. R. 200.

IX. OATH OF JURORS.

The juror's oath prescribes his duty. By the obligation thus imposed, he is to well and truly try the issues joined and a true verdict render, according to the law and the evidence. *Demato v People*, 49, Colo. 147, 111 P. 703, 35 L. R. A. (N. S.) 621, Ann. Cas. 1912A, 783.

X. WHEN JUROR DISCHARGED.

In discussing a similar provision the court in *Swink v Bohn*, 6 Colo. App. 517, 519, 41 P. 838 said: "Code 1887, § 189 gives the court power to discharge a jury under certain circumstances. The existence of this authority as a common law right is recognized by most of the authorities. *Thompson on Trials*, ch. 4, § 90. We need not decide whether this general common law right to discharge a jury which has been impaneled is still possessed by Colorado courts, notwithstanding the legislation which under exceptional circumstances confers it. We need not determine whether the provisions of § 189 must be taken to exclude all other basis for the courts' action, because under no rule of law that we have been able to discover or to which our attention has been called has the court any arbitrary power to discharge a jury after it has been impaneled and sworn. The parties are entitled to have their case heard by the jury which has been selected and they cannot be deprived of that right unless some sufficient reason exists for the exercise of the court's power in the premises."

XI. EXAMINATION OF PREMISES BY JURY.

Editor's note.—The cases below construe § 206 of the Code of Civil Procedure from which subdivision (k) derives.

Inspection of premises is within discretion of trial court.—An inspection of the premises by the jury is a matter entirely within the discretion of the trial court. *Nogote-Northeastern Consol. Ditch Co. v Gallegos*, 70 Colo. 550, 203 P. 668, cited in notes, 86 A. L. R. 1452, 1472; *Saint v Guerrero*, 17 Colo. 448, 30 P. 335, 31 Am. St. Rep. 320, cited in notes, 32 Am. St. Rep. 854, 33 Am. St. Rep. 215, 615, 50 Am. St. Rep. 214, 57 Am. St. Rep. 156, 71 Am. St. Rep. 68, 80 Am. St. Rep. 67, 30 L. R. A. 677, 42 L. R. A. 372, 373. See *Lowe v Donnelly*, 36 Colo. 292, 85 P. 318.

Whether the jury shall be sent to view the place where the injury occurred or the structure to which it is attributed, is entirely in the discretion of the trial court. *Greeley Irrigation Co. v Von Trotha*, 48 Colo. 12, 108 P. 985, cited in notes, L. R. A. 1916E, 1023, Ann. Cas. 1917C, 1225, 52 A. L. R. 46.

In *Smith v Mayer*, 3 Colo. 207, 210, cited in note, 35 L. R. A. (N. S.) 502, it was

said that the refusal of the court to permit the jury to inspect the samples of furniture produced by the defendant was entirely proper. The jury are to hear the testimony. An inspection is allowed only in special cases, and generally only by consent of both parties.

Likewise as to permitting counsel to be present at time of view.—It is discretionary with the court to refuse permission to counsel or other representative of the plaintiff in error to be present with the jury at the time of the view. These were matters of discretion, but the court is inclined to think it the better practice that a representative of either party, if the privilege be asked, should be allowed to be present and witness the action and conduct of the jury in taking a view of premises. *Chicago v. Baker*, 98 F. 830, 831.

Jurymen are expected to look at everything upon premises.—Where the jury is permitted by the court to view the premises involved in the litigation, the jurymen are expected to look at everything upon the viewed premises, and are not confined to the matters and things mentioned in the testimony given in the court room. *Bijou Irrigation Dist. v. Ceteran Land, etc., Co.*, 73 Colo. 93, 213 P. 999, cited in notes, 38 A. L. R. 1244, 69 A. L. R. 1233, 1235.

XII. DELIBERATION OF JURY.

Jury shall not separate during deliberation.—Upon the close of the cause a jury shall retire for deliberation, and during such deliberation shall not separate, yet the court is not prepared to go to the length of saying that it is not in the discretion of the court to permit the jury to separate under certain circumstances. *Dozenback v. Raymer*, 13 Colo. 451, 457, 22 P. 787, cited in note, 103 Am. St. Rep. 156.

But mere separation, per se, is not ground for setting aside verdict.—The rule seems to be that the mere separation of a jury will not, per se, be sufficient ground for setting aside the verdict and granting a new trial. Something else must appear; that is, that there was a strong probability that the jury had been tampered with or influenced to return the verdict which is sought to be set aside. *Dozenback v. Raymer*, 13 Colo. 451, 459, 22 P. 787, cited in note, 103 Am. St. Rep. 156. See also, *Beals v. Cone*, 27 Colo. 473, 62 P. 948, cited in notes, 85 Am. St. Rep. 966, 87 Am. St. Rep. 406, 414, 89 Am. St. Rep. 193, 216, 91 Am. St. Rep. 100, 93 Am. St. Rep. 101, 98 Am. St. Rep. 572, 102 Am. St. Rep. 22, 105 Am. St. Rep. 73, 129 Am. St. Rep. 1108, 68 L. R. A. 847, 7 L. R. A. (N. S.) 822, 826, 830, 841, 861.

Trial judge may recall jury and impress upon them importance of agreeing.—The practice of calling the jury into the court

room, after they have deliberated longer than usual without agreeing upon a verdict, and impressing upon them the importance of agreeing if possible, has been approved by the supreme court of Colorado. Ordinarily a trial judge is within his rightful province when he urges agreement upon a jury at loggerheads with itself; but this process has its limits. *Peterson v. Rawalt*, 95 Colo. 368, 36 P. (2d) 465.

"Charge" is a word which connotes only the common law address of the court to the jury. Article by Mr. John H. Dennison of the Denver Bar, in *Dicta VI*, no. 5, p. 23.

XIII. PAPERS TAKEN BY JURY.

The pleadings should not be sent out with the jury. *Spaulding v. Saltiel*, 18 Colo. 86, 31 P. 486, cited in notes, 43 L. R. A. 599, 89 A. L. R. 1264. Thus, it is not good practice to allow the jury to take the declaration to their room when they retire to consider of their verdict. *Good v. Martin*, 1 Colo. 165, 91 Am. Dec. 706, cited in notes, 6 Am. St. Rep. 433, 35 Am. St. Rep. 469, 36 Am. St. Rep. 103, 72 Am. St. Rep. 677, 89 A. L. R. 1266.

It is assigned for error that the court permitted the jury to take the promissory notes and the pleadings with them when they retired. There is no record of an objection or an exception. This court cannot review alleged irregularities that were apparently waived or consented to. *King v. Rea*, 13 Colo. 69, 80, 21 P. 1084, cited in notes, 22 Am. St. Rep. 190, 86 Am. St. Rep. 101.

XIV. ADDITIONAL INSTRUCTIONS.

Editor's note.—The cases below construe § 212 of the Code of Civil Procedure from which subdivision (m) derives.

This provision must be given a reasonable construction. *Tilley v. Montelius Piano Co.*, 15 Colo. App. 204, 208, 61 P. 483, cited in notes, Ann. Cas. 1912A, 669, 72 A. L. R. 730, 793, 84 A. L. R. 240.

It applies only to instructions which bear upon the issues of the case.—This provision is intended simply to apply to such instructions or communications from the court to the jury as might bear upon the issues of the case and influence it in its determination for the one party or the other. *Tilley v. Montelius Piano Co.*, 15 Colo. App. 204, 209, 61 P. 483, cited in notes, Ann. Cas. 1912A, 669, 72 A. L. R. 730, 793, 84 A. L. R. 240.

It was not intended to reach, or embrace, such communications as could not be construed to be instruction as to the law in the case, and were manifestly harmless in their character. *Id.*

And has no application to communications which endeavor to bring jury to an agreement.—This provision has no application to a communication of the judge to jury, not as to the law of the case, but an exhortation to endeavor to harmonize their differences, and come to an agreement. The communication not in any way indicating the opinion of the court as to the merits of the controversy, and not tending in any degree to coercion upon the jury, was held entirely proper and praiseworthy, though made in the absence of counsel, and without their knowledge. *Hutchins v. Haffner*, 63 Colo. 365, 167 P. 966, L. R. A. 1918A, 1008, cited in notes, 32 A. L. R. 1507, 64 A. L. R. 861, 876, 84 A. L. R. 236.

Trial courts of necessity possess and exercise a large discretion in recalling juries and submitting amended or additional legal propositions by way of instructions. Unless it fairly appears that some legal right of the party complaining has under proper objection been invaded, and that the invasion may have resulted in injury, a reversal will not take place upon this ground. *Commonwealth v. Snelling*, 15 Pick. (Mass.) 321; *Dowzelot v. Rawlings*, 58 Mo. 75, 78; *Hayes v. Williams*, 17 Colo. 465, 475, 30 P. 352, cited in notes, L. R. A. 1916E, 136, Ann. Cas. 1913B, 351, 355, Ann. Cas. 1916E, 652.

Communication should take place in open court.—The rule is well established that there ought to be no communication between the judge and jury after the latter have been charged and have retired to consider their verdict, unless the communication takes place in open court, and, if practicable, in the presence of counsel on the respective sides. *Watertown Bank, etc., Co. v. Mix*, 51 N. Y. 558; *State v. Patterson*, 45 Vt. 308; *O'Connor v. Guthrie*, 11 Iowa 80; *Chouteau v. Jupiter Iron-Works*, 94 Mo. 388, 400, 7 S. W. 467; *Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383, 390, 9 S. Ct. 101, 32 L. Ed. 439. But in the present case the communication complained of evidently took place in open court, and, if defendant's counsel were not present, as their exception recites, it may have been due to their own fault, in absenting themselves from the court room when they should have remained in attendance. In the absence of any showing as to the cause of their absence, or as to whether any efforts were made to secure their presence, we are bound to indulge in every presumption in favor of the regularity and propriety of the court's action. *Colorado Cent. Consol. Min. Co. v. Turck*, 50 F. 888, 896.

Inquiry as to admissibility of verdict held not error.—In an action by a vendee against a vendor to rescind the sale of a pinao, and to recover the amount paid on the purchase price, where the jury after retiring sent to the court by the bailiff, in the absence of counsel on both sides, a communication

wherein they inquired whether the following verdict would be admissible: "We, the jury, find the issues herein joined for the defendant, and further find that the plaintiff be allowed \$25.00 for repairing said piano," to which communication the court returned by the bailiff a verbal answer, "No," it was not reversible error as in violation of this provision. *Tilley v. Montelius Piano Co.*, 15 Colo. App. 204, 61 P. 483, cited in notes, Ann. Cas. 1912A, 669, 72 A. L. R. 730, 793, 84 A. L. R. 240.

Abstract must show request for further instructions.—Where a jury after retiring for deliberation returned into court and requested further instructions, which request was denied by the court, and the abstract of record contains neither the instructions given nor the request for further instructions, it will be presumed that no error was committed in denying the request. *Buzanes v. Frost*, 19 Colo. App. 388, 75 P. 594.

XV. NEW TRIAL IF NO VERDICT.

This provision derives from Laws 1887, P. 158, § 193 and appeared in the Code of 1908 as § 212.—Ed. note.

XVI. WHEN SEALED VERDICT.

Jurors may, by order of court, if they arrive at a verdict during recess reduce it to writing, seal it, and separate. *Kohn v. Kennedy*, 6 Colo. App. 388, 41 P. 510.

But the verdict must be retained by the jury or by some member thereof, and be by the jury delivered to the court. *Kohn v. Kennedy*, 6 Colo. App. 388, 41 P. 510.

Although a jury may be allowed to separate after having sealed a verdict, they must be called at the opening of court and asked whether they have agreed upon their verdict. *Id.*

Irregularity in the reception of a verdict is not waived by a failure to object at the time it was so received. *Kohn v. Kennedy*, 6 Colo. App. 388, 41 P. 510.

XVII. DECLARATION OF VERDICT.

Whether there shall be a poll of the jury in a civil case rests in the sound discretion of the trial judge. *Morgan v. Gore*, 96 Colo. 508, 44 P. (2d) 918; *Hindrey v. Williams*, 9 Colo. 371, 12 P. 436, cited in notes, 1 L. R. A. 826, 827.

But if there should be any good reason, a request by either party to test the unanimity of the jury by a poll should be allowed. *Hindrey v. Williams*, 9 Colo. 371, 12 P. 436, cited in notes, 1 L. R. A. 826, 827.

As a matter of practice, when a demand for a poll is made, it should be granted. And we know of no case where, in this

jurisdiction at least, there has been a refusal on such request. *Ryan v People*, 50 Colo. 99, 108, 114 P. 306, Ann. Cas. 1912B, 1232, cited in note, 18 A. L. R. 918.

XVIII. CORRECTION OF VERDICT.

Where verdict is for plaintiff it was the duty of the plaintiff and not the defendant to see that the verdict was corrected at the proper time, and when these facts were brought to the notice of the court, it became the duty of the court to send the jury back to their room for the purpose of returning a correct verdict. *Dorsett v Crew*, 1 Colo. 18, 22, cited in note, 99 Am. Dec. 124.

Objections to the form of a verdict must be made in the court below and before the jury is discharged. An objection that the verdict found "the issue" instead of "the issues," or for "the plaintiff" instead of "the plaintiffs," cannot be raised in the supreme court for the first time. *Cowell v Colorado Springs Co.*, 3 Colo. 82, cited in notes, Ann. Cas. 1917C, 110, 111.

Error by act of clerk is amendable.—It appears from the bill of exceptions that the verdict as originally rendered was corrected, and put in form by the court so as to obviate the objection made, but through what must be presumed to have been a default of the clerk, this corrected verdict does not appear to have been entered upon the record proper. Any error or defect in a record which occurs through the act or omission of the clerk of the court in entering, or failing to enter of record, its judgment or proceedings, and is not an error in the express judgments pronounced by the court in the exercise of its judicial discretion, is a clerical error and amendable. *Hittson v Davenport*, 4 Colo. 169,

176, cited in notes, 87 Am. Dec. 127, 29 L. R. A. 519, 520, 593, 10 A. L. R. 528, 550, 589, 84 A. L. R. 1510.

Word "defendant" in verdict may be presumed to include both defendants.—Where two persons are sued as defendants, and, although answering separately, make the same defense, a verdict for "the defendant" is not void for uncertainty, but must be presumed to include both defendants. *Waddingham v Dickson*, 17 Colo. 223, 29 P. 177, cited in notes, 42 L. R. A. (N. S.) 883, 29 A. L. R. 966, 30 A. L. R. 11, 24, 42.

Non-pertinent matter may be disregarded.—Where a verdict is irregular, the court may direct the jury to make necessary corrections, but it is not limited to that procedure. It may properly disregard non-pertinent matter. *Morgan v Gore*, 96 Colo. 508, 41 P. (2d) 918. See *Harris v McLaughlin*, 39 Colo. 459, 90 P. 93.

Correction by court after jury discharged.—The action of the trial court after receiving the verdict of the jury, and remarking to them that they were discharged, in causing them to amend their verdict, by reducing it to the amount claimed by the plaintiff, was not reversible error. The same action might have been taken without the jury. *Patrick Red Sandstone Co. v Skoman*, 1 Colo. App. 323, 29 P. 21, cited in notes, 66 A. L. R. 542, 553.

XIX. VERDICT RECORDED, DISAGREEMENT.

If the answer is in the affirmative, the sealed verdict may be delivered to the court, and if in form the jury may be discharged from the case, and until they are so discharged they are not relieved of the duties of a jury pertaining to the case. *Kohn v Kennedy*, 6 Colo. App. 388, 41 P. 510.

Rule 48. Juries of Less Than Twelve—Majority Verdict.

Committee Note.

This rule is entirely state procedure.

The jury shall consist of six persons, unless the parties agreed to a smaller number. Any party may have the right to increase the number of jurors to twelve by depositing with the clerk an additional jury fee, sufficient to pay the additional jurors for one day's service, and there shall be taxed as costs a like sum for every day thereafter consumed in the trial, to be taxed to the party calling the additional jurors. The parties may stipulate at any time before the verdict is returned that a verdict or a finding of a stated majority

of the jurors shall be taken as the verdict or finding of the jury. [From Code Sec. 197 and new.]

Cross references.—See vol. 2, ch. 46, § 162. As to the difference between this rule and the Federal Rule, see discussion of this rule in Address no. 10, appx. D.

Unless the parties consent thereto, a jury of three cannot lawfully try a suit for divorce.—The defendant objected to a jury of three, and his objection was overruled. The objection should have been sustained and a jury of six impaneled to try the cause.

The court holds that unless the parties consent thereto, a jury of three cannot lawfully try a suit for divorce. The court must not be understood as holding that in case of default, where an attorney has been appointed by the court to represent the absent defendant, the attorney so appointed can consent for the defendant to have the cause tried by a jury of three. Branch v. Branch, 30 Colo. 499, 71 P. 632, cited in notes, 43 L. R. A. (N. S.) 259, Ann. Cas. 1916A, 857.

Rule 49. Special Verdicts and Interrogatories.

(a) **Special Verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict. [Supplants Code Secs. 218, 219 and 289.]

(b) **General Verdict Accompanied by Answer to Interrogatories.** The court may submit to the jury, together with appropriate form for a general verdict, written interrogatories upon one or more issues of fact, the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may re-

turn the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial. [Supplants Code Sec. 291.]

Committee Note.

Code Secs. 220 and 221 were regarded as court procedure regardless of rule, and are, therefore, superseded without being incorporated in the rules.

- I. Special Verdicts.
- II. General Verdict Accompanied by Answer to Interrogatories.

Cross References.

For a discussion of this rule, see Address no. 10, appx. D. See Rule 38 (d) as to similar waiver provisions to right of jury trial in general.

I. SPECIAL VERDICTS.

This rule does not require submission of all questions which the parties may request, nor of requested questions which are substantially covered by others, but only of questions raised by the pleadings and evidence and important to the judgment to be rendered. *Maryland Cas. Co. v. Broadway*, 110 F. (2d) 357.

Thus in action to recover compensation for death of electric welder caused by sulphur dioxide gas escaping from pipes which he was welding, questions on merely collateral matters, such as what pipe workman was working on, on particular days and when complaint was made, though proper subjects of cross-examination and of consideration in reaching verdict, were not a necessary part of the verdict and need not be submitted as specific questions upon request. *Id.*

In action to recover compensation for death, refusal to submit specific questions on whether injury to some extent contributed to death by reducing power of resistance, and whether death was due directly to an independent intervening agency, was not error, where the point was covered by other questions on whether pneumonia causing death was caused solely by accidental injury, which jury answered affirmatively. *Id.*

A party may not object to the court's failure to submit special issues to the jury in case submitted on general charge.—Where case was submitted on a general

charge, and not under this rule, defendant could not complain that special issues, if requested, were not submitted, especially where defendant knew that case was to be submitted on a general charge, and filed and had given several written requests for instructions, in connection with such a submission. *Dallas Ry., etc. Co. v. Sullivan*, 108 F. (2d) 581.

Where jury, in action on Utah life policy, were submitted special interrogatories, found in effect that insured's answers to questions regarding his residence, length of time engaged in his principal business, as well as his other occupations, were not true, that answers were material and relied on in part by insurer in issuing the policy, but that they were not knowingly and intentionally untrue, nor made with intent to defraud, insurer could not escape liability on policy. *Zolintakis v. Equitable Life Assur. Soc.*, 108 F. (2d) 902.

Where special questions only were submitted to jury, and trial court made no finding but entered judgment for plaintiffs, Circuit Court of Appeals would assume that trial court made a finding in accordance with the judgment. *Hinshaw v. New England Mut. Life Ins. Co.*, 104 F. (2d) 45.

II. GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES.

Under subdivision (b), court may direct entry of judgment in accordance with answers, notwithstanding general verdict, where action for negligent killing of boy was brought jointly by administrator and parents, and trial resulted in general verdict for plaintiffs, but in answer to interrogatories jury answered that award was in favor of parents and that nothing was awarded to administrator, court would direct entry of judgment in favor of the parents, and in favor of defendant as against the administrator. *Voelkel v. Bennet*, 31 F. Supp. 506.

Rule 50. Motion for a Directed Verdict.

(a) **When Made: Effect.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) **Reservation of Decision on Motion.** Whenever a motion for a directed verdict made at the close of all evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. [Supplants Code Secs. 244 and 245.]

I. When Made: Effect.

II. Reservation of Decision on Motion.

A. In General.

B. Motion for New Trial in Alternative.

Cross Reference.

For a discussion of this rule see Address no. 10, appx. D.

I. WHEN MADE: EFFECT.

This rule could not apply when trial occurred before effective date of rules.—The Civil Procedure Rule relating to motions for a directed verdict could not be applied where trial occurred prior to effective date of rule. *Aetna Cas., etc. Co. v First Nat. Bank*, 103 F. (2d) 977.

It emphasizes the necessity of a motion for a directed verdict to raise the legal question whether the evidence is sufficient. *Baten v Kirby Lbr. Corp.*, 103 F. (2d) 272, 274.

Motion of both sides for a directed verdict no longer amounts to a waiver of jury

trial. *United States v Brown*, 107 F. (2d) 401.

Accordingly, where evidence did not warrant direction of verdict for either party, but trial court directed verdict for plaintiff, judgment must be reversed and new trial granted, notwithstanding motion by both sides for directed verdict. *Id.*

Appellate court will not consider denial of motion for directed verdict when grounds were not stated by movant. *Virginia-Carolina Tie, etc., Co. v Dunbar*, 106 F. (2d) 383.

Thus, whether trial court erred in refusing to direct verdict for appellant did not properly arise upon record before Circuit Court of Appeals where, although appellant's counsel moved for directed verdict and excepted to refusal of trial court to grant directed verdict, the record did not show that grounds of such motion were stated as required by court rule. *Id.*

Unless it is found necessary to so do to prevent a miscarriage of justice. *Virginia-Carolina Tie, etc., Co. v Dunbar*, 106 F. (2d) 383.

However, technical precision need not be observed in stating the grounds of such motions, and it is sufficient if the grounds are sufficiently stated to apprise trial court fairly as to movant's position with respect to motion. *Virginia-Carolina Tie, etc., Co. v. Dunbar*, 160 F. (2d) 383.

Where under the evidence defendant's motion for a directed verdict should have been granted judgment of district court would be reversed and cause remanded with directions to enter judgment for defendant. *Eastern Livestock Co-Operative Marketing Ass'n v. Dickenson*, 107 F. (2d) 116.

II. RESERVATION OF DECISION ON MOTION.

A. In General.

This rule was adopted for the purpose of speeding litigation and preventing unnecessary retrials. It does not alter the right of either party to have a question of law reserved upon the decision of which court might enter judgment for one party in spite of a verdict in favor of other. *Montgomery Ward & Co. v. Duncan*, 61 S. Ct. 189, 193, modifying 108 F. (2d) 848. See *Yearn v. Crane*, 114 F. (2d) 896.

It merely renders unnecessary a request for reservation of the question of law or a formal reservation and, in addition, regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct. *Montgomery Ward & Co. v. Duncan*, 61 S. Ct. 189, 194, modifying 108 F. (2d) 848.

The rule does not authorize withdrawing case from jury entirely. *Saks v. Elliott*, 106 F. (2d) 425.

Motion for judgment n. o. v. treated as motion strictly conforming to subdivision (b).—Under subdivision (b) defendants' motion should be to set aside the verdict and the judgments entered thereon, and to have judgment entered in accordance with defendants' motion for a directed verdict. However, since in substance they are here the same, the court will treat defendants' motion for judgment n. o. v. as if it were a motion strictly conforming to subdivision (b). *Valanda v. Baum*, 31 F. Supp. 71, 72.

Express reservation is unnecessary.—Under subdivision (b) the trial court is deemed to have submitted the action to jury subject to a later determination of legal questions raised by motion for directed verdict, and hence express reservation is unnecessary. *Lowden v. Denton*, 110 F. (2d) 274. See *Conway v. O'Brien*, 111 F. (2d) 611, cert. granted Oct. 21, 1940. *Limbershaft Sales Corp. v. Spalding & Bros.*, 111 F. (2d) 675.

Procedure upon failure of jury to agree.—Where case was submitted to jury with right reserved to pass on defendant's motions for directed verdict, and jury disagreed, and there was evidence of substantial character which, if believed by jury, would require verdict for plaintiff, trial court would permit retrial of case and would deny motion for directed verdict. *Howard v. United States*, 1 F. R. D. 361.

Erroneous denial of motion for judgment.—Where plaintiff's motion for judgment notwithstanding verdict was erroneously denied, judgment appealed from would be reversed and cause remanded with direction to enter judgment for plaintiff. *Reliance Life Ins. Co. v. Burgess*, 112 F. (2d) 234.

Where trial court erroneously denied defendant's motions for directed verdict and judgment notwithstanding verdict for plaintiff on grounds that plaintiff failed to sustain burden of proof by substantial evidence, appellate court should direct the entry of judgment for defendant, instead of remanding case for new trial, on reversing judgment for plaintiff. *Massachusetts Protective Ass'n v. Moubert*, 110 F. (2d) 203.

B. Motion for New Trial in Alternative.

This rule permits motion to enter judgment on directed verdict or in the alternative for new trial after verdict. *Sampson v. Channell*, 27 F. Supp. 213, affirmed in 108 F. (2d) 315, reversed on other grounds in 110 F. (2d) 754, 128 A. L. R. 394, in 310 U. S. 650, 60 S. Ct. 1099.

But such motions must be denied where verdict is based on substantial evidence.—In wife's action for injuries received when automobile in which she was riding and which was driven by husband was struck by automobile driven by defendant's testator, alternative motion for new trial after verdict for plaintiff was denied, where verdict was not clearly against the evidence, notwithstanding court's opinion that evidence against negligence of defendant's testator was more persuasive than evidence to contrary. *Sampson v. Channell*, 27 F. Supp. 213, 214, affirmed in 108 F. (2d) 315, reversed on other grounds in 110 F. (2d) 754, 128 A. L. R. 394, cert. den. in 310 U. S. 650, 61 S. Ct. 1099.

In action for personal injuries, on motion for judgment for defendant on the record, the testimony must be considered in the light most advantageous to the plaintiff to determine whether there was sufficient evidence from which jury might infer negligence of defendant. *Olszewski v. United Fruit Co.*, 34 F. Supp. 113. See *Cline v. Southern Ry. Co.*, 31 F. Supp. 657.

Grant of motion for judgment n. o. v. does not effect an automatic denial of alternative motion for a new trial. *Montgom-*

ery Ward & Co. v. Duncan, 61 S. Ct. 189, modifying 108 F. (2d) 848. See Pessagno v. Euclid Inv. Co., 112 F. (2d) 577.

Where defendant moved for judgment notwithstanding verdict and in the alternative for new trial, and judgment notwithstanding verdict was granted but reversal was necessary because jury questions were presented, reviewing court would remand the case so that trial judge might pass on motion for new trial, rather than order entry of judgment on the verdict. Pruitt v. Hardware Dealers Mut. Fire Ins. Co., 112 F. (2d) 140.

The phrase "in the alternative" means that the things to which it refers are to be taken not together but one in the place of the other. Montgomery Ward & Co. v.

Duncan, 61 S. Ct. 189, 194, modifying 108 F. (2d) 848.

And regardless of ruling on motion for judgment trial judge should also rule on motion for new trial.—Where a party moves for judgment notwithstanding the verdict and for new trial in the alternative, the trial judge should rule on the motion for judgment but whatever his ruling thereon, he should also rule on motion for new trial indicating the grounds of his decision. Montgomery Ward & Co. v. Duncan, 61 S. Ct. 189, modifying 108 F. (2d) 848. See Vearn v. Crane, 114 F. (2d) 896.

This rule should not be construed so as to cut off supervisory power of court over verdict because court erred in giving judgment notwithstanding verdict. Pruitt v. Hardware Dealers Mut. Fire Ins. Co., 112 F. (2d) 140.

Rule 51. Instructions to Jury.

Committee Note.

This rule is entirely state procedure.

When any party desires special instructions, they shall be numbered and tendered to the court in duplicate, the original being unsigned. All instructions shall be submitted to the parties, who shall make all objections thereto before they are given to the jury. Only the grounds so specified shall be considered on motion for a new trial or on writ of error. Before argument, the court shall read its instructions to the jury but shall not comment upon the evidence. Such instructions shall be taken by the jury when it retires. All instructions offered by the parties, or given by the court, shall be filed with the clerk and, with the indorsement thereon indicating the action of the court, shall be taken as a part of the record of the cause. [Supplants Supreme Court Rule 7, and Code Sec. 205.]

- I. General Consideration.
- II. Written Instructions Required.
- III. Numbering.
- IV. When Properly Refused.
- V. Review Limited to Objections.

I. GENERAL CONSIDERATION.

The Colorado practice of instructing juries has not been changed.—See discussion of this rule in Address no. 10, appx. D. Since this rule contains the procedure provided by Rule 7 of the Supreme Court and § 205 of the Code of Civil Procedure, cases construing these former provisions are set out below.—Ed. note.

Discretionary power of court.—As has been repeatedly held, the duty imposed upon the trial court necessarily involves a large discretion as to the form and style in which instructions to the jury shall be given. Moffat v. Tenney, 17 Colo. 189, 199, 30 P. 348, cited in notes, 33 Am. St. Rep. 28, 82 Am. St. Rep. 57, 21 L. R. A. 421, 11 L. R. A. (N. S.) 450, Ann. Cas. 1914B, 1124, 94 A. L. R. 389.

The giving of an instruction for special findings by a jury is discretionary with the court and in the absence of a showing of abuse of that discretion no error can be predicted on the refusal to give such an instruction. Brown v. Maier, 96 Colo. 1, 38 P. (2d) 905.

Instructions to the jury should be confined to the law of the case, leaving the facts to be determined by the jury. *Sopris v. Truax*, 1 Colo. 89.

It is the duty of the court, before the argument is begun, to give the jury such instructions upon the law applicable to the facts as may be necessary for their guidance. *Pickett v. Handy*, 5 Colo. App. 295, 38 P. 606. See *Dozenback v. Raymer*, 13 Colo. 451, 457, 22 P. 787, cited in note, 103 Am. St. Rep. 156.

The existence of facts proper for the consideration of the jury must not be assumed in the instructions of the court. *Kinney v. Williams*, 1 Colo. 191.

A clear statement of the issues to the jury is eminently proper, but the court should be careful to state all the issues and put the case not only as it is laid by the plaintiff, but also as it is controverted by the defendant. He is entitled to have his defense and case stated. *Kindel v. Hall*, 8 Colo. App. 63, 44 P. 781, cited in notes, 116 Am. St. Rep. 112, 41 L. R. A. 53, 96, 48 L. R. A. 371, 387, 73 A. L. R. 449.

The charge of the court is to be taken as a whole. An instruction, which by itself, might be erroneous, may be qualified by what appears in another part of the charge. *Coors v. Brock*, 22 Colo. App. 470, 125 P. 599, cited in note, Ann. Cas. 1914C, 1232.

In construing a charge, each instruction is to be considered in connection with the entire charge; and if, in considering the charge as a whole, the supreme court is satisfied that the jury were not improperly advised as to any material point in the case, the judgment will not be reversed on account of an erroneous instruction. *Dozenback v. Raymer*, 13 Colo. 451, 22 P. 787, cited in note, 103 Am. St. Rep. 156.

Instructions are to be read together and considered as a unified whole. If, when so read and considered, they constitute a fair, full and reasonably accurate statement of the law, the fact that some isolated portions may seem to be incomplete or incorrect, is immaterial. *Kendall v. Lively*, 94 Colo. 483, 31 P. (2d) 343.

Thus, a defective instruction may be cured by another instruction.—An instruction merely defective, incomplete, or ambiguous, or which leaves room for improper inferences, may be cured by another point in the charge. *Nelson v. Nelson*, 27 Colo. App. 104, 146 P. 1079, cited in note, Ann. Cas. 1917E, 130.

It is not required that every instruction should by express words require the jury to find "from the evidence." *Sholine v. Harris*, 22 Colo. App. 63, 123 P. 330.

A trial court cannot, in its instructions to the jury, withdraw from its consideration a proper defense, and by an erroneous construction of the law, re-enact a statute—disregarding its plain provisions—so as to fit the case under consideration. *Potts v. Bird*, 93 Colo. 547, 27 P. (2d) 745, cited in note, 95 A. L. R. 408.

And it must not misstate law or withdraw from jury issues of fact.—An instruction which announces as the law what is not the law, or which assumes as proven what is not supported by the evidence, or withdraws from the jury an issue of fact exclusively within their province, involves fatal error. *King Solomon Tunnel, etc., Co. v. Mary Verna Min. Co.*, 22 Colo. App. 528, 127 P. 129.

It is error for the court to instruct a jury on questions not presented by the pleadings, or with reference to matters irrelevant to the evidence. *Bijou Irrigation Dist. v. Catheran Land, etc., Co.*, 73 Colo. 93, 213 P. 999, cited in notes, 38 A. L. R. 1244, 69 A. L. R. 1233, 1235; *McCaffrey v. Mitchell*, 98 Colo. 467, 56 P. (2d) 926, 57 P. (2d) 900.

II. WRITTEN INSTRUCTIONS REQUIRED.

It is error to instruct a jury orally.—*Brown v. Crawford*, 2 Colo. App. 235, 29 P. 1137. See *Wettengel v. Denver*, 20 Colo. 552, 39 P. 343, cited in note, 22 A. L. R. 1484; *Crawford v. Brown*, 21 Colo. 272, 40 P. 692.

Instructions to the jury should be written, and the court should not orally qualify or modify them. *Dorsett v. Crew*, 1 Colo. 18, cited in note, 99 Am. Dec. 142; *Gile v. People*, 1 Colo. 60, cited in note, 99 Am. Dec. 121. See also, *Montelius v. Atherton*, 6 Colo. 224, cited in notes, 17 L. R. A. 273, Ann. Cas. 1917E, 1059; *Lee v. Stahl*, 9 Colo. 208, 11 P. 77, cited in notes, 58 Am. St. Rep. 276, 50 L. R. A. 209. In *Keith v. Wells*, 14 Colo. 321, 23 P. 991, cited in note, 57 L. R. A. 878, by the express consent of counsel, the charge to the jury was given orally.

And this error is not cured by the extension of the instructions by the stenographer and the signature of the judge. *Brown v. Crawford*, 2 Colo. App. 235, 236, 29 P. 1137.

But it is not error to orally answer a juror concerning the interpretation of a given instruction.—Where the trial court orally answered the question of a juror concerning the interpretation of a given instruction, it is held, in view of the attending circumstances, that in so doing it did not commit error, the answer being correct. *Schlesinger v. Miller*, 97 Colo. 583, 52 P. (2d) 402.

Or to orally admonish jury that they must be controlled by the evidence.—An ad-

monition orally addressed by the presiding judge to the jury to the effect that they must be controlled by the evidence, not substituting their own judgment or impressions, was held not within § 205 of the Code of Civil Procedure. *Denver City Tramway Co. v Armstrong*, 21 Colo. App. 640, 123 P. 136, cited in notes, L. R. A. 1915A, 763, Ann. Cas. 1916E, 687, 688, 18 A. L. R. 310.

III. NUMBERING.

Good practice requires that instructions be numbered. *Kansas Pac. Ry. Co. v Ward*, 4 Colo. 30, cited in notes, 90 Am. Dec. 55, 99 Am. Dec. 138, Ann. Cas. 1912B, 1245.

Formerly it was held that the omission of the appellee to number the instructions prayed by him, and excepted to by the appellant was not a fatal defect. *Gibbs v Wall*, 10 Colo. 153, 14 P. 216, cited in note, 11 Am. St. Rep. 879.

Instructions could be rejected if not signed and numbered as required by § 205 of the Code of Civil Procedure. *Schoolfield v Houle*, 13 Colo. 394, 22 P. 781, cited in note, 9 L. R. A. 778; *Mason v Sieglitz*, 22 Colo. 320, 44 P. 588, cited in notes, 115 Am. St. Rep. 414, 432, 18 L. R. A. (N. S.) 981, 982, Ann. Cas. 1916E, 440, 21 A. L. R. 57.

Where three consecutively numbered instructions refer to the same subject-matter and the second refers to the preceding by beginning with these words, "Upon that point the court instructs," and the third began, "In this connection the court instructs," the three were sufficiently connected to indicate to the jury that they were to be taken together and read as a whole, and where the three read together properly expressed the law upon the subject they were not objectionable. *Beals v Cone*, 27 Colo. 473, 62 P. 948, 83 Am. St. Rep. 92, cited in notes, 85 Am. St. Rep. 966, 87 Am. St. Rep. 406, 414, 89 Am. St. Rep. 193, 216, 91 Am. St. Rep. 100, 93 Am. St. Rep. 101, 98 Am. St. Rep. 572, 102 Am. St. Rep. 22, 105 Am. St. Rep. 73, 129 Am. St. Rep. 1108, 68 L. R. A. 847, 7 L. R. A. (N. S.) 822, 826, 830, 841, 861.

But a party cannot complain because instructions are irregularly numbered, where no possible prejudice resulted to him, nor can such alleged error be reviewed when raised for the first time on appeal. *Austin v Austin*, 42 Colo. 130, 94 P. 309, cited in notes, 38 L. R. A. (N. S.) 954, Ann. Cas. 1912A, 938, Ann. Cas. 1913D, 1135, 1141, Ann. Cas. 1916A, 857, 6 A. L. R. 70, 81, 40 A. L. R. 1240.

IV. WHEN PROPERLY REFUSED.

In general.—Requested instructions which attempt to dispose, by arbitrary legal pronouncement, of questions of fact, or which

are ambiguous, confusing, self-contradictory, indefinite and misleading, are properly refused. *Denver v Stutzman*, 95 Colo. 165, 33 P. (2d) 1071.

Requested instructions, the substance of which is covered by instructions given by the court, are properly refused. *Kline v Slater*, 95 Colo. 489, 37 P. (2d) 381; *Ft. Collins v Smith*, 84 Colo. 511, 272 P. 6, cited in note, 87 A. L. R. 921; *Rollman v Stenger*, 84 Colo. 507, 271 P. 625; *Pring v Udall*, 95 Colo. 23, 31 P. (2d) 1113; *Boyd v Guardian Trust Co.*, 73 Colo. 159, 214 P. 535; *Heinricy v Richart*, 73 Colo. 156, 214 P. 391. See *Alamosa v Johnson*, 99 Colo. 134, 60 P. (2d) 1087.

Likewise, instructions for which there is no basis in the evidence.—*Ft. Collins v Smith*, 84 Colo. 511, 272 P. 6, cited in note, 87 A. L. R. 921; *Pring v Udall*, 95 Colo. 23, 31 P. (2d) 1113; *Consolidated Truck Co. v Jones*, 93 Colo. 297, 25 P. (2d) 721. See also, *Gilligan v Blakesley*, 93 Colo. 370, 26 P. (2d) 808; *Denver v Talarico*, 99 Colo. 178, 61 P. (2d) 1.

A party is not entitled to an instruction upon an issue made by the pleadings, but sustained by no evidence. *Finding v Gitzen*, 24 Colo. App. 38, 131 P. 1042, cited in notes, 47 L. R. A. (N. S.) 739, Ann. Cas. 1914D, 114.

Or instructions based upon evidence which is untrue.—*Ft. Collins v Smith*, 84 Colo. 511, 272 P. 6, cited in note, 87 A. L. R. 921.

Or which are fragmentary.—*Consolidated Truck Co. v Jones*, 93 Colo. 297, 25 P. (2d) 721.

Or which will tend to confuse the jury.—*Consolidated Truck Co. v Jones*, 93 Colo. 297, 25 P. (2d) 721; *Gilligan v Blakesley*, 93 Colo. 370, 26 P. (2d) 808.

Or which are contrary to settled law.—*Consolidated Truck Co. v Jones*, 93 Colo. 297, 25 P. (2d) 721.

Likewise, instructions which are cumulative.—*Gilligan v Blakesley*, 93 Colo. 370, 26 P. (2d) 808.

Or instructions which assert abstract propositions of law inapplicable to the issues and facts of the case on trial.—*Dozenback v Raymer*, 13 Colo. 451, 22 P. 787, cited in note, 103 Am. St. Rep. 156.

Or which are erroneous.—A requested instruction, which is in part erroneous, is properly refused. The court is not required to correct it. *Ft. Collins v Smith*, 84 Colo. 511, 272 P. 6, cited in note, 87 A. L. R. 921.

Requested instructions are properly refused where they contain erroneous statements of law or are covered by instructions

of the court which are approved by counsel. *Stock Yards Nat. Bank v. Neugebauer*, 97 Colo. 246, 48 P. (2d) 813.

Or which are irrelevant and immaterial.—*Consolidated Truck Co. v. Jones*, 93 Colo. 297, 25 P. (2d) 721.

Or which are incomplete and inaccurate.—A requested instruction which is incomplete and inaccurate, and which would unduly emphasize a portion of the specific evidence, is properly refused. *Gilligan v. Blakesley*, 93 Colo. 370, 26 P. (2d) 808.

Likewise, instructions which would constitute an objectionable repetition.—*Estate of Wartenbee*, 93 Colo. 347, 26 P. (2d) 101.

Where correct instructions are given covering all the points of a case, the refusal of others, though correct in themselves, is not ground of error. *Dozenback v. Raymer*, 13 Colo. 451, 22 P. 787, cited in note, 103 Am. St. Rep. 156.

The refusal to give a requested instruction does not constitute error where the instructions given by the court are sufficiently comprehensive to advise the jury fully upon the questions presented for their determination. *Weicker Transfer, etc., Co. v. Bedwell*, 95 Colo. 280, 35 P. (2d) 1022.

There is no error in refusing a requested instruction, where the refusal does not prejudice the rights of the requesting party. *Heinricy v. Richart*, 73 Colo. 156, 214 P. 391.

The refusal of a particular instruction prayed is harmless, where those given are as favorable to the party as the facts justify. *Greeley Irrigation Co. v. Von Trotha*, 48 Colo. 12, 108 P. 983, cited in notes, L. R. A. 1916E, 1023, Ann. Cas. 1917C, 1225, 52 A. L. R. 46.

Tendered instructions which are argumentative and not based upon the evidence, are properly refused. *Andrus v. Hall*, 93 Colo. 526, 27 P. (2d) 495, cited in note, 95 A. L. R. 392.

A requested instruction which contains unwarranted assumptions, is properly refused. *Alamosa v. Johnson*, 99 Colo. 134, 60 P. (2d) 1087.

V. REVIEW LIMITED TO OBJECTIONS.

Editor's note.—Since this rule contains the procedure provided for by old Rule 7 of the Supreme Court and § 205 of the Code of Civil Procedure (see discussion of this rule in Address no. 10, appx. D), cases construing these former provisions are set out below.

A party is required to make specific objections to an instruction in the trial court,

to entitle him to assign error thereon on review. *Schwalbe v. Postle*, 80 Colo. 1, 249 P. 495, followed in *Sandner v. Temmer*, 81 Colo. 57, 253 P. 400; *Koontz v. People*, 82 Colo. 589, 263 P. 19; *Colorado Nat. Bank v. Ashcraft*, 83 Colo. 136, 263 P. 23; *Small v. Clark*, 83 Colo. 211, 263 P. 933. See *Rains v. Rains*, 97 Colo. 19, 32, 46 P. (2d) 740.

Under § 205 of the Code of Civil Procedure it was held that a general objection to the whole of an instruction would not prevail, where such instruction contained distinct propositions, one of which was sound in law. *Atchison, etc., Ry. Co. v. Gumaer*, 22 Colo. App. 495, 125 P. 589, cited in note, Ann. Cas. 1914B, 1124. But where the attention of the trial court was sufficiently directed to objectionable words in an instruction it was held, in the circumstances disclosed, that the point was saved for consideration on writ of error, although specific objections were not made to other instructions in which the error was repeated. *Lewis v. La Nier*, 84 Colo. 376, 270 P. 656, cited in note, 69 A. L. R. 524.

The supreme court does not hold that it would not make an exception to this rule (Rule 7 of the Supreme Court) concerning objections to instructions, where its enforcement would result in a miscarriage of justice. *Mansfield v. Harris*, 79 Colo. 164, 244 P. 474.

An objection to an instruction was as follows: "The defendant objects to the giving of instruction No. 6 by the court as offered by the plaintiff for the reason that it assumes a condition of fact existing in the case which is absent therefrom upon which the law is made to apply." It was held not to comply with Rule 7 of the Supreme Court. *Carlberg v. Willmott*, 87 Colo. 374, 378, 287 P. 863.

In order to give such court an opportunity to correct the instructions.—Objections to instructions should be made in such time and manner as to give the trial court an opportunity to correct the same, if found erroneous. General exceptions to instructions "in each and every part thereof" are insufficient. *Jacobs v. Mitchell*, 2 Colo. App. 456, 31 P. 235, cited in note, 64 L. R. A. 598. See *Colorado Utilities Corp. v. Casady*, 89 Colo. 168, 169, 300 P. 606.

So when instructions are about to be given to the jury counsel may not sit idly by and allow improper instructions to be given without proper and specific objections thereto in time for the court to correct the instructions before giving them to the jury. It is not in furtherance of justice to permit them to lie in wait and catch the court in error for the purpose of obtaining a reversal. *Blanchard v. People*, 74 Colo. 431, 432, 222 P. 649.

It is the duty of counsel to examine or listen to the reading of instructions when given, and, if objections or errors are not called to the attention of the court at the time, they must ordinarily be deemed waived. *Gilligan v. Blakesley*, 93 Colo. 370, 26 P. (2d) 808.

Objections to instructions on a former trial do not eliminate the necessity of a renewal of the objections on the new trial if the party wishes to avail himself of such objections. Except by stipulation or proper order to the contrary, every judgment depends upon its own record only. *Everett v. Cole*, 86 Colo. 414, 415, 282 P. 253.

Objections to instructions not specifically made in the lower court before they are given will not be considered on review. *Colorado Utilities Corp. v. Casady*, 89 Colo. 156, 300 P. 601, cited in notes, 81 A. L. R. 425, 84 A. L. R. 691, 694, 85 A. L. R. 1049. See also, *Krohn v. Colorado Springs, etc., Ry. Co.*, 70 Colo. 243, 199 P. 88; *State v. Nelson*, 75 Colo. 98, 223 P. 1086; *Goodfellow v. People*, 75 Colo. 243, 224 P. 1051; *Galligan v. Bua*, 77 Colo. 386, 236 P. 1016; *Clark v. Giacomini*, 85 Colo. 530, 277 P. 306, cited in note, 73 A. L. R. 1122; *Milow v. People*, 89 Colo. 469, 3 P. (2d) 1077. And see *Blanchard v. People*, 74 Colo. 431, 222 P. 649; *Bijou Irrigation Dist. v. Cateran*

Land, etc., Co., 73 Colo. 93, 213 P. 999, cited in notes, 38 A. L. R. 1244, 69 A. L. R. 1233, 1235; *Beals v. Cone*, 27 Colo. 473, 62 P. 948, cited in notes, 85 Am. St. Rep. 966, 87 Am. St. Rep. 406, 414, 89 Am. St. Rep. 193, 216, 91 Am. St. Rep. 100, 93 Am. St. Rep. 101, 98 Am. St. Rep. 572, 102 Am. St. Rep. 22, 105 Am. St. Rep. 73, 129 Am. St. Rep. 1108, 68 L. R. A. 847, 7 L. R. A. (N. S.) 822, 826, 830, 841, 861.

Error based on instructions will not be considered where the abstract of record contains no exceptions to the giving of such instructions. *Wertz v. Lawrence*, 69 Colo. 540, 195 P. 647, cited in note, 66 A. L. R. 1263.

Abstract must set out instructions given by court.—To entitle a party to a consideration of an assignment of error based upon the refusal of the trial court to give requested instructions, the abstract must set out the instructions given by the court. *Rollman v. Stenger*, 84 Colo. 507, 271 P. 625.

Where neither the requested instructions nor those given are set out in the abstract, plaintiff in error is not entitled to a ruling on assignments of error based thereon. *Federal Life Ins. Co. v. Lorton*, 97 Colo. 545, 51 P. (2d) 693.

Rule 52. Findings by the Court.

C (a) Effect. In all actions tried upon the facts without a jury, the court shall find the facts and state its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. [Supplants part of Code Sec. 191.]

Committee Note.

This sentence was stricken from the Federal subdivision: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses," on the ground that the supreme court of Colorado has held that where the record is entirely documentary it is not bound by the finding of the trial court. *Stuart vs. Asher*, 15 Colo. App. 403; *Carlson vs. Akeyson*, 65 Colo. 35; *Gerard vs. Costen*, 68 Colo. 542.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made

with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.

Committee Note.

Compare Rule 59 C (c).

- I. Effect.
- II. Amendment.

Cross References.

As to acceptance by court of master's findings unless clearly erroneous, see Rule 53 (c) (2). For a discussion of this rule, see Address no. 10, appx. D.

I. EFFECT.

Editor's note.—That part of Federal Rule 52 (a) which provides that: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness," has been omitted in subdivision C (a). See committee note under subdivision C (a). The Colorado decisions on the power of the appellate court over fact findings of the trial court, not based on documentary evidence, are to the effect that where the reviewing court is in as advantageous position to pass upon testimony as was the trial court, it will not be bound by the latter's findings, particularly where the merits of the case call for different conclusions. *Perdew v Perdew*, 99 Colo. 544, 64 P. (2d) 602. But generally, it is said: "It has long been the rule in this jurisdiction that fact findings of the trial court based on substantially conflicting oral evidence and not unwarranted as a matter of law, are almost universally regarded as binding on the appellate court. *Mosquito Gold Mines v London-Butte Gold Mines Co.*, 96 Colo. 536, 45 P. (2d) 175; *Protheroe v Bonser*, 94 Colo. 95, 28 P. (2d) 807. If there is evidence which upholds the findings, they will not be disturbed on the ground of insufficient support, simply because there is other evidence which, if accepted, warrants findings the other way. *Williams v Miller*, 93 Colo. 541, 27 P. (2d) 502. This is true even though the reviewing court might have concluded differently had it been passing upon the facts in the first instance. *Jones v Milliken*, 96 Colo. 279, 42 P. (2d) 467." *Gold, Silver & Tungsten v Wallace*, 104 Colo. 273, 283, 91 P. (2d) 975.

The Federal Rule requires the trial court to find facts specifically and to state separately its conclusions of law, whereas it will be noted that this rule provides that the court shall find the facts and state its conclusions of law thereon.

Findings of facts and conclusions of law for interlocutory injunction need only be such as constitute ground of actions.—Under rule requiring court granting or refusing interlocutory injunctions to set forth findings of fact and conclusions of law "which constitute the grounds of its action," interlocutory injunction may be issued without attempting to settle either facts or law of case, if it appears that substantial questions of law and fact exist and that irreparable injury to one party may be prevented by injunction without undue inconvenience and loss to the other, and in such a case the findings of fact and conclusions of law need be only such as constitute grounds of court's action. *Cone v Rorick*, 112 F. (2d) 894.

It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with this rule. *Mayo v Lakeland Highlands Canning Co.*, 309 U. S. 310, 60 S. Ct. 517, 520.

Findings of a master.—Under new Rules of Civil Procedure, dispensing with necessity of findings by court where court agrees with master's conclusions, court need not indicate in opinion all grounds for adhering to master's report. *Joyce v Fern Shoe Co.*, 32 F. Supp. 401.

In suit for infringement of a patent, where case was referred to a master, master's report, so far as containing findings of fact, was adopted by the court. *National Biscuit Co. v Crown Baking Co.*, 105 F. (2d) 422. See also, *Stonega Coke, etc., Co. v Price*, 106 F. (2d) 411.

In patent infringement suit, findings of fact contained in masters report were adopted as court's findings of fact. *Sturtevant Co. v Massachusetts Hair, etc., Co.*, 31 F. Supp. 975.

II. AMENDMENT.

Time for amendment.—Under this rule requiring motion to amend findings of fact to be filed not later than ten days after entry of judgment, defendants' motion to withdraw defendants' proposed conclusions, and for amendment of conclusions as made and adopted by court, even if motion was permitted under the rule, would be denied as not having been filed in time, where judgment was entered on June 14, and the motion was filed on August 31. *Columbia*

River Packers Ass'n v Hinton, 34 F. Supp. 970.

Where on June 21, 1939, 16 days after entry of findings of fact, appellees filed motion to modify findings in certain particulars, on August 30, notice of appeal was given and on September 21, court of its own motion made an order supplementing and amending findings, and parties agreed that original and so-called supplemental findings correctly reflected facts, appellate court considered the whole of the findings without passing upon authority of trial court to amend. Hayes v Kelley, 112 F. (2d) 897.

Under this rule a plaintiff may file request for amended findings before judgment has been entered. Great Lakes Cas. Co. v Peano, 1 F. R. D. 244.

Motion to amend after final judgment.—A motion to amend findings of fact, conclusions of law and judgment order or to make additional findings of fact and con-

clusions of law would be denied in toto in view of doubt whether this rule permits additional findings after judgment where additional findings are merely by way of enlargement of original findings and do not call for amendment of judgment. Great Lakes Cas. Co. v Peano, 1 F. R. D. 244. See also, Columbia River Packers Ass'n v Hinton, 34 F. Supp. 970.

The portion of plaintiff's motion to amend, withdraw, and make additional findings of fact and conclusions of law requesting that exceptions be allowed to plaintiffs to the findings and conclusions and to the court's judgment was granted even though no such order was necessary to enable plaintiffs to have any findings and conclusions reviewed. Sonken-Galamba Corp. v Atchison, etc., Ry. Co., 34 F. Supp. 15.

The court did not err in filing special fact findings after entering decree dismissing cause for want of equity, though neither party moved to amend or add findings. Reinstine v Rosenfield, 111 F. (2d) 892.

Rule 53. Masters.

(a) **Appointment and Compensation.** The court in which any action is pending may appoint a master therein. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and may be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party. [Supplants Code Secs. 223, 225, 230 and 235.]

(b) **Reference.** A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it. [Supplants Code Secs. 224, 226 and 227.]

(c) **Powers.** The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in

the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence received, offered and excluded in the same manner and subject to the same limitations as provided in Rule 43 (c) for a court sitting without a jury. [Supplants Code Secs. 229 and 231.]

(d) Proceedings.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 107.

(3) Statement of Accounts. When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) Report.

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report.

He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) **In Non-Jury Actions.** In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 C (d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) **In Jury Action.** In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) **Stipulation as to Findings.** The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) **Draft Report.** Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions. [Supplants Code Secs. 232, 233 and 234.]

Committee Note.

This rule supplants Code Secs. 223 to 235, inclusive.

- I. Appointment and Compensation.
- II. Reference.
- III. Powers.
- IV. Proceedings.
- V. Report.
 - A. Contents and Filing.
 - B. In Non-Jury Actions.
 - C. In Jury Action.

Cross Reference.

For a discussion of this rule, see Address no. 10, appx. D.

I. APPOINTMENT AND COMPENSATION.

Cross references.—As to fees of referees, see vol. 3, ch. 66, § 31. As to when referee appointed in registration of land titles, see vol. 2, ch. 40, § 195. As to appointment of referees in cases under the workmen's compensation law, see vol. 3, ch. 97, §§ 319 and 375.

Appointment of auditor to act at corporation's offices in another state.—In action against corporation for salesman's commissions, wherein thousands of transactions over a period of six years, some of them for small items, were necessarily involved, and corporation's main offices, records, and officers were located in a distant state, court would appoint an auditor to act at corporation's offices in the other state, but plaintiff would be permitted to examine the officers by written interrogatories if he should not appear before the auditor. *Newcomb v. Universal Match Corp.*, 25 F. Supp. 169.

II. REFERENCE.

Editor's note.—Some of the cases construing §§ 223-235 of the Code of Civil Procedure are set out in this note since the former procedure is similar to the procedure under this rule. See Address no. 10, appx. D.

Whether a case shall be sent to a referee is discretionary with the court.—A reference may be ordered when the trial of an

issue of fact requires the examination of any long account on either side. But whether a case shall be sent to a referee, is discretionary with the court. Possibly, conditions might exist which would render a refusal to order a reference an abuse of judicial discretion, and, therefore, erroneous; but it is needless to speculate concerning a hypothetical case. Such conditions had no existence in the case at bar. *Wilson v Union Distilling Co.*, 16 Colo. App. 429, 432, 66 P. 170.

Whether the aid of an auditor shall be sought in law cases is ordinarily within the discretion of the trial judge. *Coyner v United States*, 103 F. (2d) 629.

The existence of exceptional conditions requiring reference to a referee for purpose of conducting proceedings supplementary to execution was for trial court to determine in exercise of sound discretion. *Bair v Bank of America Nat. Trust, etc., Ass'n.*, 112 F. (2d) 247.

Reference to and use of auditor's report held not to encroach on province of jury.—A reference of action to auditor and introduction of his report in evidence as prima facie evidence of evidentiary facts and conclusions therein found did not encroach on province of jury, and thereby unduly enlarge power of court. *Coyner v United States*, 103 F. (2d) 629.

Court should try cases where credibility of witnesses is essential to the determination of issues.—Except where stress of work or other good cause is shown it is better practice for the court to try cases where the determination of the issues is dependent upon the credibility of the witnesses than to refer such cases to an auditor. *Coyner v United States*, 103 F. (2d) 629.

Issues in fraud hearings are not the proper subject for reference save in extraordinary or exceptional cases, "exceptional" meaning rare or unusual. *In re Irving-Austin Bldg. Corp.*, 100 F. (2d) 574.

Referee may be directed to hear and decide the whole issue.—The referee may be directed to hear and decide the whole issue, or report upon any specific question of fact involved. *Huston v Wadsworth*, 5 Colo. 213, cited in notes, 48 Am. Dec. 186, 79 Am. Dec. 209, 13 L. R. A. (N. S.) 146, 25 L. R. A. (N. S.) 68, 39 L. R. A. (N. S.) 58.

To controvert a reference motion should be made before trial court for revocation.—A party who desires to controvert the propriety of a reference in a law action should move before the trial court for a revocation of the reference, and failure to make such a motion is tantamount to acquiescence, and the point cannot be initially raised before the reviewing court on appeal. *Coyner v United States*, 103 F. (2d) 629.

In action on war risk policy, contention that reference of action to auditor and admission in evidence of auditor's complete report violated defendant's right to trial by jury was not available on appeal, where defendant did not at the trial question extent of court's power to order a compulsory reference in law action, but raised problem for first time on appeal. *Id.*

Illustrations of proper references.—Where numerous persons were to be examined at various places in proceeding supplementary to execution, a reference was proper. *Bair v Bank of America Nat. Trust, etc., Ass'n.*, 112 F. (2d) 247.

In action in federal District Court for Southern District of New York by resident of the district against Delaware corporation which in Pennsylvania published magazine for publication of alleged libelous article and photographs used in connection therewith, where defendant moved to dismiss action or to quash return of service of summons and existence of essential jurisdictional requirements could not be satisfactorily determined without attendance and examination and cross-examination of witnesses under oath, a reference was made to special master. *Sorrens v Click*, 1 F. R. D. 333.

In an action for accounting where defendant objected to the appointment of a referee unless and until the plaintiff had rendered an account to it, it is held that the court properly exercised its right in overruling the objection and entering an order for reference on the pleadings. No substantial prejudice resulting therefrom, error based upon the claim of premature reference could not be successfully urged on review. *Lallier Const., etc., Co. v Morrison*, 93 Colo. 305, 25 P. (2d) 729.

III. POWERS.

Powers where order of reference is general.—It seems that where the order of reference is general, and the referee is given authority to determine issues of law and of fact, his powers are co-extensive with those of the court; but where the order of reference is limited, the cause being referred with authority to take the testimony and report the same with findings of fact thereon at the next term of court, the order further fixing the time during which the parties should present their evidence, held that the referee had no power to grant a continuance; neither had he authority to pass upon a question as to the sufficiency of the complaint. *Belmont Min., etc., Co. v Costigan*, 21 Colo. 471, 42 P. 647, cited in note, Ann. Cas. 1913A, 1051.

Specific reference.—Where plaintiff's motion for summary judgment granting permanent injunction against copyright infringement was granted, action was re-

ferred to master to pass on issue of damages and to require accounting of profits. *Houghton Mifflin Co. v. Stackpole Sons*, 31 F. Supp. 517.

IV. PROCEEDINGS.

Under subdivision (d) (1) the time and place of hearing in supplementary proceedings to enforce judgment were matters subject to referee's discretion, to be exercised by referee within 20 days after making of order for the supplementary proceedings and appointing the referee, and the time and place of hearing were, therefore, not required to be stated in such order. *Bank of America Nat. Trust, etc., Ass'n v. Bair*, 34 F. Supp. 857.

V. REPORT.

A. Contents and Filing.

Where action was instituted before subdivision (e) (1) requiring master to file transcript of proceedings and of evidence took effect and order of reference did not require report of evidence and no stenographer attended hearings, objection to master's failure to file transcript of stenographer's notes was overruled. *Sullivan v. Canner*, 33 F. Supp. 500.

B. In Non-Jury Actions.

Motion to strike report considered as "written objections." — Under the rules, where matter was referred to a special master on question of a rehearing, motion to strike the master's report would be considered as "written objections" to the report. *In re Blakesley*, 27 F. Supp. 980.

Master's findings of fact accepted unless error clearly appears.—Where special master's material findings of fact in patent infringement action were substantially supported by the evidence, and no clear error appeared, the findings of fact incorporated in the special master's report, excluding those relating to extraordinary or increased damages, would be accepted and made the court's findings of fact. *Creagmile v. John Bean Mfg. Co.*, 32 F. Supp. 646.

The master's report is not necessarily conclusive but is subject to the approval of the court. *National Bondholders Corp. v. McClintic*, 99 F. (2d) 595.

In contempt proceeding for violation of decree enjoining infringement of patent, master's report finding defendant guilty of infringement would be confirmed, no substantial error appearing. *Catalin Corp. v. Slosse*, 30 F. Supp. 169.

Presumptions in favor of special master's findings of fact have no application to masters conclusions or deductions derived from established facts. And any presumption in favor of his conclusions is of slight

importance when his findings are based wholly upon inferences, the reasonableness of which may be as fairly determined by the court as by him. *Thruston v. Nashville, etc., Trust Co.*, 32 F. Supp. 929.

Where referee has no power to make findings, they are not conclusive.—Where the order appointing a referee gave him no specific power to make findings of fact and in his report he reported the evidence taken by him together with his findings of fact, his findings are not conclusive either upon the trial court or the appellate court. *Michael v. Tracy*, 15 Colo. App. 312, 62 P. 1048.

Amount of weight to be given master's finding on appeal.—In weighing conflicting findings by master and district court, practice is the same under Civil Procedure Rule and equity rule, and hence an appellate court is not required to give more weight to masters finding than under equity rule. *Carter Oil Co. v. McQuigg*, 112 F. (2d) 275.

Where question is one of veracity, appellate court should give controlling weight to trier of fact who saw and heard the witnesses, but, where testimony consists of documentary evidence and depositions, master is in no better position to determine issue of fact than a reviewing court, and district court's finding on such evidence is likewise subject to review unaffected by presumptions which ordinarily accompany findings on controverted issues. *Id.*

A district court's order, sustaining exceptions to special master's report, recommending allowance of claim against corporate debtor in proceedings for reorganization under Bankruptcy Act, must be reviewed in light of principle that master's fact findings must be accepted, unless clearly erroneous. *In re Connecticut Co.*, 107 F. (2d) 734.

Where a referee hears evidence and makes findings of fact thereon and his findings are approved by the trial court the findings are entitled to the same weight and are just as binding on the appellate court as the verdict of a jury or findings of the trial court made upon oral testimony. Such findings of a referee, when based upon conflicting evidence, will not be interfered with upon appeal if there is legal evidence to sustain them, unless it appears that the referee or the trial court was governed by bias or prejudice or influenced by passion. *Noble v. Faull*, 26 Colo. 467, 58 P. 681.

It has been frequently held by this court, and also by the supreme court, that the findings of a referee as to their conclusive effect in an appellate court, stand as a verdict of a jury or the findings of a court. *Crater v. McCormick*, 4 Colo. 196, cited in note, 66 L. R. A. 679; *Kimball v. Lyon*, 19

Colo. 266, 35 P. 44; Groth v Kersting, 4 Colo. App. 395, 36 P. 156. Where, therefore, these findings are supported by the evidence and are not manifestly against the weight of the evidence, they will not be disturbed by an appellate court. *Perdew v Creditors of the Estate of Coffin*, 11 Colo. App. 157, 159, 52 P. 747, cited in note, Ann. Cas. 1914A, 1237.

There having been sufficient evidence to support the findings and judgment, this court is bound by the findings and judgment in the court below. *Peck v Alexander*, 40 Colo. 392, 394, 91 P. 38, cited in notes, 17 L. R. A. (N. S.) 394, L. R. A. 1917F, 575.

Where the report of a referee presents some statements of fact sworn to, and conclusions which may be the conclusions of the witness or of the referee, and no objection is made by either party to the method of reporting the testimony, the conclusions stated should be deemed as having been properly drawn from the facts sworn to.

Sylvis v Sylvis, 11 Colo. 319, 17 P. 912, cited in notes, 65 Am. St. Rep. 75, 6 L. R. A. 187, 18 L. R. A. (N. S.) 312, Ann. Cas. 1913B, 10, Ann. Cas. 1918B, 486.

C. In Jury Action.

In jury action the master's report is evidence and objections thereto may be made at trial. *Daley v Evans Case Co.*, 1 F. R. D. 270.

But written objections are unauthorized.—Where action, triable by jury, was referred to master, filing of written objections to master's report was unauthorized by rules and objections were stricken from the files. *Daley v Evans Case Co.*, 1 F. R. D. 270.

Findings concurred in by both auditor and trial judge will not ordinarily be disturbed unless there is a clear mistake, or unless the findings are unsupported by the evidence. *Coyner v United States*, 103 F. (2d) 629.

CHAPTER VI

JUDGMENT

Rule 54. Judgments; Costs.

(a) **Definition; Form.** "Judgment" as used in these rules includes a decree and any order to or from which an appeal or writ of error lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings. [Supplants Code Sec. 241.]

Committee Note.

Appeal from county to district court, writ of error to supreme court.

(b) **Judgment at Various Stages.** When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered. [Supplants Code Secs. 185, 242, 243 and 246.]

Committee Note.

For judgment on the pleadings see Rule 12 (c).

(c) **Demand for Judgment.** A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. [Supplants Code Sec. 187.]

(d) **Costs.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the state of Colorado, its officers or agencies, shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 1 day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Committee Note.

See *Colorado vs. La Plata River and Cherry Creek Ditch Company*, 101 Colo. 368 73 Pac. (2d) 997, that under some circumstances costs may be recovered against the state.

C (e) Against Partnership. Any judgment obtained against a partnership or unincorporated association shall bind only the joint property of the partners or associates, and the separate property of the parties personally served. [From Code Secs. 14 and 48.]

Committee Note.

There are no Federal subdivisions 54 (e), (i), (g) or (h).

C (f) After Death, How Payable. If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may, nevertheless, render judgment thereon. Such judgment shall not be a lien on the real property of the deceased party, but shall be paid as a claim against his estate. [From Code Sec. 249.]

C (g) Against Unknown Defendants. The judgment in an action in rem shall apply to and conclude the unknown defendants whose interests are described in the complaint. [From Code Sec. 50.]

C (h) Revival of Judgments. A judgment may be revived against any one or more judgment debtors whether they are jointly or severally liable under the judgment. To revive a judgment a motion shall be filed alleging the date of the judgment and the amount thereof which remains unsatisfied. Thereupon the clerk shall issue a notice requiring the judgment debtor to show cause within 10 days after service thereof why the judgment should not be revived. The notice shall be served on the judgment debtor in conformity with Rule 4. If the judgment debtor answer, any issue so presented shall be tried and determined by the court. A revived judgment must be entered within 20 years after the entry of the judgment which it revives, and may be enforced and made a lien in the same manner and for like period as an original judgment. If a judgment is revived before the expiration of any lien created by the original judgment, the filing of the transcript of the entry of revivor in the judgment docket with the clerk and recorder of the appropriate county before the expiration of such lien shall continue that lien for the same period from the entry of the revived judgment as is provided for original judgments. Revived judgments may themselves be revived in the manner herein provided. [From Code Secs. 261 to 264, incl., and new.]

Committee Note.

The first sentence is inserted because of *Allen vs. Patterson*, 69 Colo. 302, which holds that a proceeding to revive a judgment must be against all defendants. For judgment in replevin see Rule 104 (m).

- I. Definition and Form.
- II. Judgment at Various Stages.
- III. Demand for Judgment.
- IV. Costs.
- V. Against Partnership.
- VI. Revival of Judgments.

Cross References.

As to declaratory judgments, see Rule 57. For a discussion of this rule, see Address no. 11, appx. D.

I. DEFINITION AND FORM.

This subdivision does away with the necessity for long and verbose judgments. See discussion of this rule in Address no. 11, appx. D.

II. JUDGMENT AT VARIOUS STAGES.

One final judgment contemplated.—This subdivision, providing for a separate judgment on one of several claims upon a determination of all issues material to it, shows

that otherwise only one final judgment is contemplated. *Rosenblum v Dingfelder*, 111 F. (2d) 406.

No appeal until claim finally adjudged.—Under this rule it is not contemplated that as to any claim there shall be an appeal until that claim has been finally adjudged. *Jones v St. Paul Fire, etc., Co.*, 108 F. (2d) 123.

Thus an order granting motion to dismiss first and second causes of action based on violation of rights of privacy was an "appealable order," notwithstanding that third cause of action alleging malicious libel remained standing. *Sidis v F-R Pub. Corp.*, 113 F. (2d) 806.

III. DEMAND FOR JUDGMENT.

A default judgment shall not be different from that covered by the prayer. This conforms to Code Section 187. See discussion of this rule in Address no. 11, appx. D. For cases dealing with default judgment under § 187 of the Code of Civil Procedure, see *Russell v Shurtleff*, 28 Colo. 414, 65 P. 27, 89 Am. St. Rep. 216, cited in notes, 101 Am. St. Rep. 322, 118 Am. St. Rep. 622, 127 Am. St. Rep. 148, 131 Am. St. Rep. 518; *Jahl v Lewis*, 57 Colo. 109, 113, 139 P. 1113; *Griffing v Smith*, 26 Colo. App. 220, 224, 142 P. 202.

But in a contested case the successful party may have a judgment giving him the relief to which he is entitled, even though such relief is not demanded in the pleadings. See discussion of this rule in Address no. 11, appx. D. Section 187 of the Code of Civil Procedure limited relief to that "consistent with the case made by the complaint and embraced within the issue." See *Pickett v Handy*, 9 Colo. App. 357, 48 P. 820.

Request for declaratory judgment does not bar granting appropriate relief.—If plaintiff in action for declaratory judgment in Federal Court has mistaken his remedy but has set forth facts showing that he is entitled to relief of a kind which court can grant, fact that he asks for a declaratory judgment is not a bar to granting of appropriate decree. *Hunkin-Conkey Const. Co. v Pennsylvania Turnpike Comm.*, 34 F. Supp. 26.

The question is not whether the plaintiff has asked for the proper remedy but whether under his pleadings he is entitled to any remedy. *Catanzaritti v Bianco*, 25 F. Supp. 457.

IV. COSTS.

Costs against government agencies and officers imposed only to extent permitted by law.—Defendants who prevailed on trial of action brought by the Reconstruction Finance Corporation were not entitled to costs as against the corporation in absence of any provision of law permitting costs to be imposed against that corporation, which is an agency of the federal government. *Recon-*

struction Finance Corp. v Menihan Corp., 29 F. Supp. 853.

An officer of the United States who prevailed in an action was entitled to recover all such costs as would be awarded to any other prevailing party in absence of an express provision to the contrary in a federal statute or in rules and in absence of a direction by the court to the contrary. *Solomon v Welch*, 28 F. Supp. 823.

Allowance of costs in discretion of court.—Where Reconstruction Finance Corporation, authorized to "sue and be sued," instituted an action to enjoin trade-mark infringement and unfair competition, District Court dismissing complaint had power, at its discretion, to allow costs to defendants and to grant their motion for an additional allowance. *Reconstruction Finance Corp. v Menihan Corp.*, 111 F. (2d) 940.

Motion to review clerk's action must be filed within five days.—*United States v One Ford Coupe*, 26 F. Supp. 598.

For case wherein the decision of the clerk allowing costs was subject to review, see *In re Hogsett*, 1 F. R. D. 284.

Examples of taxing of costs.—The cost of taking of plaintiff's deposition by defendant would be taxed as costs against the plaintiff, who was the losing party, where rules permitted taking of the deposition, and taking thereof was reasonably necessary, and failure to take deposition would have been negligence. *Schmitt v Continental-Diamond Fibre Co.*, 1 F. R. D. 109.

In action to recover for insured deposits, costs should neither be awarded in favor of nor against federal deposit corporation, since it is a governmental agency. *Federal Deposit Ins. Corp. v Casady*, 106 F. (2d) 784.

V. AGAINST PARTNERSHIP.

Judgment against a partnership binds the joint property of the associates and the separate property of members duly served with process. *Denver Nat. Bank v Grimes*, 97 Colo. 158, 47 P. (2d) 862.

No personal judgment could be obtained against the partners not served; and, as to them, the judgment rendered could bind only their interests in the partnership property. The judgment should be against the partnership, and in a proper manner the individual property of the member or members served, might be reached for the purpose of satisfying it. *Peabody v Oleson*, 15 Colo. App. 346, 349, 62 P. 234, cited in notes, 43 L. R. A. (N. S.) 542, Ann. Cas. 1918D, 1136, citing *Craig v Smith*, 10 Colo. 220, 15 P. 337, cited in notes, 43 L. R. A. (N. S.) 542, Ann. Cas. 1918D, 1136; *Dessauer v Koppin*, 3 Colo. App. 115, 32 P. 182, cited in notes, 43 L. R. A. (N. S.) 542, Ann. Cas. 1918D, 1136. See *Sawyer v Armstrong*, 23 Colo. 287, 47 P.

391, cited in note, 43 L. R. A. (N. S.) 542; *Ellsberry v. Block*, 28 Colo. 477, 65 P. 629, cited in notes, 43 L. R. A. (N. S.) 542, Ann. Cas. 1918D, 1136; *Blythe v. Cordingly*, 20 Colo. App. 508, 512, 80 P. 495, cited in notes, 43 L. R. A. (N. S.) 542, 1 A. L. R. 1605.

Any member being served with summons has notice that he may appear in the case and set up any defense to the partnership liability or to his liability as a partner. *Denver Nat. Bank v. Grimes*, 97 Colo. 158, 47 P. (2d) 862, citing *Sargeant v. Grimes*, 70 F. (2d) 121.

Court has jurisdiction of a partner who is served with summons for purpose of pro-

ceeding to final judgment against him.—A judgment having been entered against a partnership and execution thereon having been returned unsatisfied, under the provisions of this section the court had, and continued to have, jurisdiction of a partner who has been served with summons, for the purpose of proceeding to final judgment against him. *Denver Nat. Bank v. Grimes*, 97 Colo. 158, 47 P. (2d) 862.

VI. REVIVAL OF JUDGMENTS.

See committee note under subdivision C (h). See also, discussion of this subdivision in Address no. 11, appx. D.

Rule 55. Default.

(a) **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) **Judgment.** Judgment by default may be entered as follows:

C (1) By the Clerk. Except as provided in subdivision C (f) of this rule, when the plaintiff's claim against a defendant arises upon contract for the recovery of money or liquidated damages only, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person. [Part from Code Sec. 186.]

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, guardian ad litem, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper. [Supplants Code Sec. 186.]

(c) **Setting Aside Default.** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 C (b).

(d) **Plaintiffs, Counterclaimants, Cross-Claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54 (c).

(e) **Judgment Against an Officer or Agency of the State of Colorado.** No judgment by default shall be entered against an officer or agency of the state of Colorado unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

C (f). **Judgment on Substituted Service.** In actions where the service of summons was by publication, mail, or personal service out of the state, the plaintiff, upon expiration of the time allowed for answer, may upon proof of service and of the failure to plead or otherwise defend, apply for judgment. The court shall thereupon require proof to be made of the claim and may render judgment subject to the limitations of Rule 54 (c). [Supplants Code Sec. 186.]

Committee Note.

There is no Federal subdivision 55 (i).

- I. Entry and General Consideration.
- II. Judgment.
 - A. By the Clerk.
 - B. By the Court.
- III. Setting Aside Default.
- IV. Judgment on Substituted Service.

I. ENTRY AND GENERAL CONSIDERATION.

Editor's note.—The court in construing § 186 of the Code of Civil Procedure held that no distinction existed under the code between a judgment *nil dicit* and by default. See *Wilbur v. Maynard*, 6 Colo. 483, 485. See also, *Manville v. Parks*, 7 Colo. 128, 2 P. 212, cited in notes, 83 Am. Dec. 104, 107, 91 Am. St. Rep. 857.

This rule is not a limitation on power of the court to enter an order of default. *Fisher v. Taylor*, 1 F. R. D. 448.

When party should be defaulted.—No party should be defaulted unless grounds authorizing it are authoritatively established and are so clear that litigants may know without question that they are subject to default if they do not act in a certain manner. *Missouri v. Fidelity, etc., Co.*, 107 F. (2d) 343.

When default entered by clerk as a matter of course.—Where proper service has

been had and defendant has failed to make any defense within time provided by law, default should be entered by clerk as of course without any application to court on filing of appropriate affidavit. *Fisher v. Taylor*, 1 F. R. D. 448.

Where record showed that judgment for affirmative relief was sought and that defendant failed to plead or otherwise defend, application for entry of default of defendant would be granted, notwithstanding that under Rules of Civil Procedure default should be entered by clerk as of course without application to the court. *United States v. Jackson*, 25 F. Supp. 79.

II. JUDGMENT.

- A. By the Clerk.

Editor's note.—In *Phelan v. Ganebin*, 5 Colo. 14, cited in notes, 74 Am. St. Rep. 290, 26 L. R. A. 218, 20 L. R. A. (N. S.) 8, the court held that § 186 of the Code of Civil Procedure, part of which is incorporated in the instant subdivision, was not in conflict with the constitution as an invasion of the province of the judiciary: the theory being that "the judgment is the sentence which the law itself pronounces as the sequence of statutory conditions. * * * the statute directs the judgment * * * And the judgment, though in fact entered by the clerk, is, in the consideration of the law, what it purports on its face to be, namely:

the act and determination of the court itself." The court called attention to the fact that "the courts of many of the states have acted under similar statutory provisions for many years past," and "the validity of such judgments has been upheld by repeated decisions of the highest courts of the code states." See *Walton v. Walton*, 86 Colo. 1, 22, 278 P. 780, cited in note, 71 A. L. R. 727, dissenting opinion of Mr. Justice Butler.

And in *Griffing v. Smith*, 26 Colo. App. 220, 224, 142 P. 202, the court held that § 186 of the Code of Civil Procedure was never intended to deprive the court of its power to render a judgment, but only to give the clerk authority to enter it.

Application for default judgment referred to clerk or presented again to court.—Where proper service was had and defendant failed to make any defense within time provided by law, application for judgment by default could be referred to the clerk or presented again to the court on filing of appropriate affidavit as to amount due from defendant to plaintiff. *Fisher v. Taylor*, 1 F. R. D. 448.

B. By the Court.

Editor's note.—The court, construing § 186 of the Code of Civil Procedure, which is supplanted by this subdivision, stated that in default cases where testimony is taken, it must be by the court or referee, in accordance with the section. See *Hotchkiss v. First Nat. Bank*, 37 Colo. 228, 85 P. 1007, cited in note, 20 L. R. A. (N. S.) 8.

Under the rules the granting of a default is discretionary. *Missouri v. Fidelity, etc., Co.*, 107 F. (2d) 343.

Failure to give required notice held error.—Where plaintiff was in default of answer to counterclaim and cross-claim at time case was called for trial and plaintiff was absent through excusable neglect, "plaintiff had failed to plead or otherwise defend" and was a party which had "appeared in the action" within court rules, so that counterclaimant and cross-claimants were required by court rule to cause the plaintiff to be served with written notice of application for judgment, and failure to give notice was error necessitating reversal, notwithstanding trial court heard evidence and made findings. *Commercial Ins. Co. v. White Line Transfer, etc., Co.*, 114 F. (2d) 946.

In proceeding under Pennsylvania statute for rule to show cause why defendant should not bring ejectment action against plaintiff, wherein defendant's motion to dismiss for want of jurisdiction was pending at time plaintiff's petition for final judgment was filed without notice to defendant, court's entry of final default judgment, without notice, five days after order dismissing defendant's motion to dismiss was entered, was

erroneous, defendant being entitled to notice and reasonable time to file answer after his motion as to jurisdiction had been disposed of. *Hoffman v. New Jersey Federation, etc.*, 106 F. (2d) 204. But see *New Jersey Federation, etc. v. Hoffman*, 26 F. Supp. 556, wherein the court held that a default judgment would not be set aside because three-day notice required by the rules was not given, where default was not due to non-compliance with any requirement of the rules and motion for judgment was filed nearly eight months before such rules took effect.

And where failure to give notice exists, entry of default judgment is improper.—Where defendant appeared in proceeding under Pennsylvania statute for rule to show cause why defendant should not bring ejectment action against plaintiff, default judgment entered against defendant without notice after new Rules of Civil Procedure, which required such notice, became effective was improper, notwithstanding plaintiff's motion for judgment was filed before the new rules became effective. *Hoffman v. New Jersey Federation, etc.*, 106 F. (2d) 204.

Plaintiff was entitled to entry of default on proper application where answer was not filed because of failure to remit requisite fee and clerk was advised that defendant no longer desired to contest petition, but was not entitled to judgment on the pleadings. *Interstate Commerce Comm. v. Daley*, 26 F. Supp. 421.

III. SETTING ASIDE DEFAULT.

Editor's note.—The court in construing § 186 of the Code of Civil Procedure held that a vacation of a default judgment was within the sound discretion of the trial court, and its action in sustaining a motion to vacate would not be held error in the absence of a showing of abuse of discretion. See *Koin v. Mutual Benefit Health, etc., Ass'n*, 96 Colo. 163, 41 P. (2d) 306.

Discretion held not abused.—Refusal to vacate default judgment on ground that the defendant had a good defense to the action but was prevented from presenting it by fraud, accident, surprise and excusable neglect, was not an abuse of discretion under the evidence. *Jackson v. Heiser*, 111 F. (2d) 310.

Grounds held insufficient to vacate.—Alleged fact that default judgment was prematurely entered and was otherwise erroneous, that complaint did not state cause of action and was otherwise defective, and that complaint showed on its face that the action was barred, were matters which might have been urged as defenses or if the judgment

had been appealed from as grounds for reversal, but were not grounds on which, without more, the court rendering the judgment could properly vacate it. *Jackson v. Heiser*, 111 F. (2d) 310.

IV. JUDGMENT ON SUBSTITUTED SERVICE.

See committee note under subdivision 55 C (f).

Rule 56. Summary Judgment.

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

C (c) **Motion and Proceedings Thereon.** The motion shall not be heard until at least 10 days after the service thereof. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Committee Note.

This rule does not affect judgments by confession rendered on judgment notes. See *Cross vs. Moffat*, 11 Colo. 210.

- I. General Consideration.
- II. For Claimant.
- III. For Defending Party.
- IV. Motion and Proceedings Thereon.
- V. Case Not Fully Adjudicated on Motion.
- VI. Form of Affidavits—Further Testimony.
- VII. When Affidavits are Unavailable.
- VIII. Affidavits Made in Bad Faith.

Cross Reference.

For a discussion of this rule see Address no. 11, appx. D.

I. GENERAL CONSIDERATION.

Purposes of rule.—The purpose of the rule relating to summary judgments is to force parties, when notices are given under the rule, to present their cause in answer thereto. *Sanders v. Nehi Bottling Co.*, 30 F. Supp. 332.

The court in considering this and rules 42(b) and 13(i) said "Obviously these provisions were intended to provide a more adequate and elastic procedure for the protection of the rights of the parties and the prompt dispatch of litigation." *Seagram-Distillers Corp. v. Manos*, 25 F. Supp. 233, 234.

The summary judgment procedure is a liberal measure designed for arriving at truth by testing whether litigants really have evidence which they will offer on trial, by inquiring and determining in advance of trial whether such evidence exists, and technical rulings and, particularly, exclusionary rules will not be applied to strike, on grounds of formal defects in the proffer,

evidence proffered on tendered issues. *Whitaker v. Coleman*, 115 F. (2d) 305.

Great leeway is permitted under rule concerning summary judgments. *Fink v. Northwestern Mut. Life Ins. Co.*, 29 F. Supp. 972.

But a summary judgment should be awarded only when the truth is quite clear. *American Ins. Co. v. Gentile Bros. Co.*, 109 F. (2d) 732.

It is drastic remedy and never warranted except on clear showing that no genuine issue as to any material fact remains for trial. *Shultz v. Manufacturers, etc., Trust Co.*, 1 F. R. D. 451; *Merchants Indemnity Corp. v. Peterson*, 113 F. (2d) 4, 6.

And such motion for summary judgment should be sustained only in very clear case in which there is no doubt concerning answer to some question so essential that when it is resolved adversely to one of the parties that party cannot prevail. *Whiteman v. Federal Life Ins. Co.*, 1 F. R. D. 95.

Summary judgment procedure was not intended to abridge right to jury trial.—The summary judgment procedure is valuable for striking through sham claims and defenses which stand in the way of a direct approach to the truth, but was not intended to and cannot deprive a litigant of right to a jury trial. *Whitaker v. Coleman*, 115 F. (2d) 305.

A summary judgment may be granted in action for permanent injunction. *Houghton Mifflin Co. v. Stackpole Sons*, 31 F. Supp. 517, holding that this rule makes no distinction as to the character or kind of judgment which can be rendered.

Interrogatories held not to be "depositions" to be considered on summary judgment.—Interrogatories for discovery are ex-

ploratory, intended to find out facts, witnesses, and documents so that the proponent may thereafter prepare to prove his case in an orderly manner, and they are not "depositions" to be considered on summary judgment. *River Junction v. Maryland Cas. Co.*, 110 F. (2d) 278.

No appeal lies from refusal of summary judgment.—Refusal of summary judgment, like overruling of motion to dismiss action, is not "final judgment," as case still stands for regular trial, so that no appeal lies from such refusal. *Jones v. St. Paul Fire, etc., Ins. Co.*, 108 F. (2d) 123.

II. FOR CLAIMANT.

Rule stated.—Summary judgment for plaintiff should be rendered only when it is apparent to the court that no actual issue of fact exists. *Reiser v. McKee Glass Co.*, 1 F. R. D. 170.

Thus, in action against bank to recover amount deposited to credit of corporation, on ground of deficiency income tax assessment against the corporation, where there was no genuine issue as to any material fact and facts showed right to recovery, summary judgment would be granted. *United States v. National City Bank*, 32 F. Supp. 890.

But where defendant by its denial of allegations in certain paragraphs of the complaint raised an issue, plaintiff was not entitled to an order striking out defendant's answer, granting summary judgment, granting judgment on the pleadings, or striking out defendant's answer as sham and frivolous. *Phoenix Hdw. Co. v. Paragon Paint, etc., Corp.*, 1 F. R. D. 116.

An automobile liability insurer sued on judgment against insured for injuries sustained in automobile accident by plaintiffs alleging that policy was "required policy" under New Jersey financial responsibility statute, and that therefore insurer's liability was absolute under statute, was entitled to its day in court to prove truth of its allegations denying that the policy was a required policy, and summary judgment could not be entered for plaintiffs. *Merchants Indemnity Corp. v. Peterson*, 113 F. (2d) 4.

Effect of res judicata on granting of summary judgment.—A bankruptcy referee's order, entered on bankruptcy trustee's motion to expunge proof of claim, that particular preferential payments had been made to claimant and that no dividend should be made upon the claims until claimant had repaid them, was "res judicata" and authorized summary judgment for trustee in subsequent action to recover such payments as preferences. *Schwartz v. Levine*, 111 F. (2d) 81. See also, *Sonken-Galamba Corp. v. Atchison, etc., Ry. Co.*, 28 F. Supp. 456, wherein the court examined the claim of res judicata as ground for

summary judgment and held that an adjudication in mandamus suit that metal involved therein was scrap iron and scrap steel subject to scrap iron and scrap steel transportation rate and would not warrant summary judgment for shipper in subsequent suit for damages for refusal of carrier to transport alleged similar metal at such rate, since, even if the previous adjudication covered similar metal, since the question of similarity would have to be tried.

Summary judgment denied where plaintiff's delay raised inference of waiver.—Plaintiff seeking to recover balance of minimum royalty allegedly due for 1932 under patent license agreement was not entitled to summary judgment where plaintiff made no claim in respect to alleged deficiency until August, 1938, and did not assert until July, 1938, that agreement was still in force, since his conduct raised an issue of implied waiver and estoppel which should not be disposed of in a summary judgment proceeding. *Ottinger v. General Motors Corp.*, 27 F. Supp. 508.

Illustrative cases.—Where defendant admitted that he owed plaintiff the amount sued for, but filed counterclaims, and several motions for continuance had been granted on ground that defendant was too ill to appear at trial, but defendant was able to travel to Europe without giving a deposition before he left, the plaintiff would be granted a summary judgment for amount of defendant's admitted liability. *Seagram-Distillers Corp. v. Manos*, 25 F. Supp. 233.

Where record conclusively showed that payment by debtor to unsecured creditor constituted a preferential payment and that, if no motion for summary judgment had been made and the case had been tried in the regular manner, motion for directed verdict in favor of plaintiff would have been necessary, trustee in bankruptcy was entitled to summary judgment against the unsecured creditor. *Culhane v. Jackson Hdw. Co.*, 25 F. Supp. 324.

In action to recover an additional estate tax from defendant individually and as executrix, where opposing affidavit conceded liability of estate and merely disclaimed personal liability, motion for summary judgment was granted in view of facts. *United States v. Wolff*, 26 F. Supp. 940.

In action on valued policy to recover for damage to citrus fruit by freeze, granting plaintiff's motion for summary judgment was not improper on ground that declaration and affidavits in support of motion showed only net proceeds from sale of salvaged fruit instead of f. o. b. market value within salvage clause, where affidavits showed that "net" proceeds were the same as f. o. b. market value as defined in policy. *American Ins. Co. v. Gentile Bros. Co.*, 109 F. (2d) 732.

Where preferred stock certificates provided that they would be redeemed on demand at par and accrued dividends on January 1, 1930, and preferred stockholder alleged that on that day he made demand for redemption of stock but that corporation refused and still refused to pay him, and corporation's answer admitted allegations and alleged that from January 1, 1930, up to date of institution of action, corporation had been insolvent, but did not allege present insolvency, preferred stockholder was awarded summary judgment. *Schneider v Foster-Thornburg Hdw. Co.*, 33 F. Supp. 271.

In action by United States for balance due on note, given for loan to farmer under Congressional Joint Resolution, there was no issue as to amount of payment by defendant on note, so that summary judgment for plaintiff was not erroneous, where only allegations in answer as to payment did not challenge amount thereof, but denied, for purposes of limitations, that any payments were made beyond certain date. *Person v United States*, 112 F. (2d) 1.

Taxpayers were entitled to summary judgment against the United States for recovery of documentary stamp taxes paid, where pleadings and papers on file with the court showed that the transfer upon which the taxes were paid was "by operation of law" and hence not subject to the tax. *Weil v United States*, 30 F. Supp. 349.

III. FOR DEFENDING PARTY.

This subdivision by reason of its language applies "at any time," if it appears by uncontradicted proof that a party to a proceeding actually has no cause of action. The principle seems to be that if, under the facts developed, the court at a trial would be required to direct a verdict for the moving party, then a summary judgment should be entered. *Miller v Hoffman*, 1 F. R. D. 290, 292.

The summary judgment rule may be used at any time where it clearly appears that a party to an action has no valid claim or defense, so that motion for summary judgment would not be denied because defense of release allegedly could not be disposed of on motion, preliminary to filing of an answer setting up such defense. *Id.*

When any affirmative defenses are set up in the answer, a summary judgment method of disposing of the issues may be used. *Miller v Hoffman*, 1 F. R. D. 290.

Facts must clearly show right to summary judgment.—A movant is not entitled to summary judgment unless the facts conceded show right to a judgment with such clarity as to leave no room for controversy and show affirmatively that plaintiff would not be entitled to recover under any cir-

cumstances. *Clair v Sears Roebuck & Co.*, 34 F. Supp. 559.

For an issue as to facts precludes summary judgment.—In executors' actions for accounting, based on complex and intricate scheme of fraud, fact issue as to whether decedent participated in alleged transactions with knowledge of facts or sufficient knowledge thereof to put him on inquiry must be resolved, not on affidavits, but on facts and circumstances shown by pleadings and evidence, so as to preclude summary judgment for defendant. *Shultz v Manufacturers, etc., Trust Co.*, 1 F. R. D. 451.

In action to recover alleged excessive estate tax payments, issues raised by taxpayer's complaint and affidavit as to value of corporate stock and of realty and as to whether sole legatee was indebted to the estate were issues of fact as to which taxpayer was entitled to have a trial and present his evidence, hence defendant's motion for summary judgment would be denied. *Baker v Hoey*, 33 F. Supp. 799.

A bill averring that advertising pamphlet designed to for self-addressed envelope infringing patent for advertising order sheet would not be dismissed on motion for summary judgment notwithstanding answers to interrogatories addressed to plaintiff allegedly disclosed that no cause of action existed, since infringement was a fact to be found under all evidence which might be introduced at trial. *Blum Advertising Corp. v L. & C. Mayers Co.*, 25 F. Supp. 934.

But the denial of a defendant's motion must be based upon existence of a genuine issue as to material fact. *Banco De Espana v Federal Reserve Bank*, 28 F. Supp. 958.

Summary judgment may be granted for failure of adverse party to deny requested admissions.—Failure to serve a sworn statement either denying matters of which admissions are requested or setting forth in detail the reasons why party cannot either admit or deny such matters, resulting in admission of facts alleged in the complaint, authorizes summary judgment. *Walsh v Connecticut Mut. Life Ins. Co.*, 26 F. Supp. 566, wherein the court held that such a drastic remedy should not be applied until the members of the bar "have ample opportunity to familiarize themselves with the rules". So that in the instant case, plaintiff was given an opportunity to move for further time within which to comply with defendant's requests, before awarding of summary judgment.

Where defendant moves for judgment on pleadings and for summary judgment motions need not be treated separately.—Defendants' motions for judgment on the pleadings and for summary judgment need not be treated separately, as if the first dealt exclusively with issues of law on the

pleadings and the second only with issues of fact, where both motions sought judgment for defendants. *Palmer v. Palmer*, 31 F. Supp. 861.

And court may rely on any and all grounds disclosed by record.—In granting judgment for defendants on motions for judgment on the pleadings and for summary judgment respectively, court may rely on any or all appropriate grounds disclosed by any or all papers of record in the case. *Palmer v. Palmer*, 31 F. Supp. 861.

Defendant's motion held not to be such within meaning of subdivision.—Where defendants moved for judgments and submitted decrees which were designated "consent decrees" but were not consented to by plaintiff and so were not "consent decrees", and the judgments sought were not in favor of defendants but, if anything, were in favor of plaintiff, the motions could not be considered as motions for "summary judgment" within meaning of this subdivision. *United States v. Hartford Empire Co.*, 1 F. R. D. 424.

Facts warranting summary judgment.—Where record disclosed that plaintiff could not successfully refute defendants' plea of Oklahoma statute of limitations, defendants were entitled to judgment as matter of law and motion for summary judgment for defendants was granted. *Baker v. Sisk*, 1 F. R. D. 232.

In motorist's action against owner of automobile driven by employee for injuries sustained in collision, owner was entitled to summary judgment, where prior judgment for employee in employee's action against motorist in state court established that motorist was negligent. *Mabardy v. Railway Exp. Agency*, 26 F. Supp. 25.

In action on life policy issued in 1923 where insured died in 1934 and last premium payment was made in 1924, at which time policy had no cash surrender value, and beneficiary did not allege or offer proof of total and permanent disability of insured resulting in waiver of premiums in accordance with terms of policy, defendant's motion for summary judgment would be granted. *Rabe v. Metropolitan Life Ins. Co.*, 1 F. R. D. 391.

In action for injuries sustained when bottle of ginger ale exploded allegedly as result of negligence of bottle manufacturer in manufacturing bottle, bottling company in filling bottle, and delivery company in handling the bottle, defendants' motions for summary judgment were granted where plaintiff who relied on, but was not entitled to recover under, *res ipsa loquitur* doctrine, took depositions; which failed to make case for plaintiff and did not seek further time to develop plea of alleged negligence. *Sanders v. Nehi Bottling Co.*, 30 F. Supp. 332.

Where second cause of action alleged that plaintiff's assignor entered into contract with defendant, that contract was assigned to plaintiff with defendant's consent, that plaintiff performed all its obligations, but that defendant arbitrarily, wrongfully, contrary to custom, and trade, and contrary to its own practice, terminated and canceled the agreement in bad faith to plaintiff's damage, but contract identified in bill of particulars contained provision that it might be terminated at any time at will of either party, defendant was entitled to summary judgment dismissing the second cause of action. *Bushwick-Decatur Motors v. Ford Motor Co.*, 30 F. Supp. 917.

In death action against corporation, pleadings with plaintiff's admission of proceedings in her previous death action in state court against other tort-feasors, held to show absence of fact issue as to plaintiff's right to recover against defendant and defendant's right to judgment as matter of law because of judgment dismissing previous action pursuant to compromise and settlement agreement, so as to require that defendant's motion to dismiss be overruled and its motion for summary judgment sustained. *Eberle v. Sinclair Prairie Oil Co.*, 34 F. Supp. 296.

Defendant's motion for summary judgment and other relief was granted, where plaintiffs conceded upon argument that defendant was entitled to all relief sought except finding that certain company and its subsidiary defended the action, and record submitted by defendant, to which there was no denial by affidavit or other competent proof, conclusively showed that such company and its subsidiary had agreed to defend the action at their own expense and save defendant harmless. *Minneapolis Honeywell Regulator Co. v. Thermoco*, 34 F. Supp. 403.

In action to obtain relief against Connecticut probate decrees, records and affidavits held not to raise material fact issue on whether decedent died domiciled in the probate district in which decrees were rendered, notwithstanding affidavits of decedent's wife indicating that marital residence was in another state, and hence parties relying on such decrees were entitled to summary judgment on ground that such decrees were conclusive as rendered by a court having sufficient jurisdiction. *Palmer v. Palmer*, 31 F. Supp. 861.

Summary judgment denied.—Where plaintiff pleaded a right to recovery which appeared to be good as a pleading concerning what occurred since March 1, 1936, the court could not dismiss the complaint and grant judgment on the pleadings or summary judgment for defendant. *Phoenix Hdw. Co. v. Paragon Paint, etc., Corp.*, 1 F. R. D. 116.

Fifth cause of action alleging that sales agreement gave manufacturer upon termination of agreement option to repurchase from dealer whatever of manufacturer's products were in dealer's possession, that subsequent to cancellation manufacturer exercised its option and agreed to purchase all of its products in possession of dealer's assignee, and that thereafter manufacturer failed and refused to make repurchase, to assignee's damage, stated a cause of action, and manufacturer was not entitled to summary judgment. *Bushwick-Decatur Motors v. Ford Motor Co.*, 30 F. Supp. 917.

A motion to dismiss and for summary judgment on ground that plaintiffs' delay in bringing patent infringement suit with knowledge of facts precluded recovery was denied, where determination whether plaintiffs should be denied recovery because of unwarranted delay could only be made after hearing proof. *Clair v. Sears Roebuck & Co.*, 34 F. Supp. 559.

Cross-motion for summary judgment would be denied in proceedings by receiver of national banking association to enforce collection of assessment on bank stock, where question presented by motions was the determination of date of failure of bank to meet its obligations, and pleadings and affidavits in support thereof were not sufficient to permit a determination of such question. *Schram v. Clair*, 28 F. Supp. 422.

In action to enjoin alleged infringement of design patent, where defendant had not answered, and made motion, treated as one for summary judgment, upon affidavits, but there was a grave question respecting existence of infringement, plaintiff was entitled to establish his proof respecting patentability and infringement upon trial, and motion would be denied. *Weil v. N. J. Richman Co.*, 34 F. Supp. 401.

IV. MOTION AND PROCEEDINGS THEREON.

This subdivision operates for both sides. *Sanders v. Nehi Bottling Co.*, 30 F. Supp. 332.

Question of fact cannot be decided on motion for summary judgment.—If there is any question of fact, the question cannot be decided on motion for summary judgment, since parties are entitled to jury trial on fact questions. *Whiteman v. Federal Life Ins. Co.*, 1 F. R. D. 95; *Wyant v. Crittenden*, 113 F. (2d) 170; *Boerner v. United States*, 26 F. Supp. 769; *Chandler v. Cutler-Hammer*, 31 F. Supp. 451.

Thus where defendant in the first part of its amended answer denied and put in issue material matters required to be proved before plaintiff could recover, plaintiff was not entitled to summary judgment. *Hindleman v. Specialty Salesman Magazine*, 1 F. R. D. 272.

A motion for summary judgment, based in part upon averment that patent was invalid for want of invention in view of prior art, was denied where court could not, after hearing counsel, say with assurance that there was "no genuine issue as to any material fact". *Kendall Co. v. Earnshaw Knitting Co.*, 1 F. R. D. 357.

Where party proffered transcript of testimony at former trial which apprised judge that there was relevant evidence which party would tender on trial before jury on fact issue determinative of the litigation, granting of summary judgment against the party was error regardless of any defects in the certification and presentation of the transcript. *Whitaker v. Coleman*, 115 F. (2d) 305.

The defendant in suit involving trademark infringement was not entitled to summary judgment on ground that plaintiff had no valid rights in the trade-mark, where defendant's defenses presented issues of fact. *Lip Lure v. Bloomingdale Bros.*, 30 F. Supp. 388.

Where liability of automobile owner for deceased's death caused by automobile driver and liability of insurer under liability policy depended upon whether driver used automobile with permission of owner, deceased's administrator's offer of proof that driver had privilege of using automobile, kept keys, and used automobile without objection by owner, presented a genuine issue of fact which entitled administrator to a jury trial on the issue and precluded summary determination against administrator. *Whitaker v. Coleman*, 115 (2d) 305.

In action to rescind agreement respecting sale of stock and operation, control, and management of a subsidiary of a holding company in which defendant corporation owned majority stock, or for alternative relief, wherein issue was whether plaintiff was induced to enter into contract by false representation that contract contained a clause authorizing rescission within 18 months, motion for summary judgment was denied, since issue involved a material fact which could only be determined by testimony of witnesses on final hearing. *Merchants Distilling Corp. v. American Beverage Corp.*, 33 F. Supp. 304.

An action involving validity and infringement of two unadjudicated patents could not be disposed of on motion for summary judgment, since questions involved could only be adequately determined after trial. *Refractolite Corp. v. Prismo Holding Corp.*, 25 F. Supp. 965.

And summary judgment is precluded by mixed question of law and fact.—In action against automobile liability insurer for amount of plaintiff's judgment against insured for injuries sustained in automobile

accident, issues presented by complaint alleging that insured was obligated to furnish proof of financial responsibility as result of prior automobile accident, and that policy was "required policy" under New Jersey financial responsibility statute, and that as a result insurer's liability was absolute under such statute, and by answer denying such allegations, were mixed questions of law and fact precluding entry of summary judgment. *Merchants Indemnity Corp. v. Peterson*, 113 F. (2d) 4.

Where pleadings and affidavits established that plaintiff brought suit for surplus remaining from proceeds of trust deed foreclosure, and there was either a fact issue for jury, concerning ownership of claim, or issue of law concerning sufficiency of undisputed facts to constitute ownership in plaintiff, court's action in granting defendant's motion for summary judgment was error. *Wyant v. Crittenden*, 113 F. (2d) 170.

Hence motion can only be sustained when case cannot be submitted to jury.—Motion for summary judgment should only be sustained if, under the admitted facts indubitably established by the pleadings and affidavits, the case could not be submitted to jury if case were tried. *Whiteman v. Federal Life Ins. Co.*, 1 F. R. D. 95.

And motion will not be granted where facts alleged in affidavits are in dispute.—In action by former chauffeur-carrier against the United States to recover amount deducted from salary for retirement fund, wherein United States alleged that chauffeur-carrier was indebted to the United States for thefts in an amount in excess of deduction, motion for summary judgment would not be granted where facts alleged in affidavits on which motion was based were in dispute. *Boerner v. United States*, 26 F. Supp. 769.

Or where the sufficiency of testimony proffered on a tendered issue is in question.—It is not sufficient that trial judge may not credit testimony proffered on a tendered issue but, in order to proceed to summary judgment, it must appear that there is no substantial evidence on a tendered issue, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds or that, conceding its truth, it is without legal probative force. *Whitaker v. Coleman*, 115 F. (2d) 305.

But what is theoretically a question of fact may be resolved in ruling a motion for summary judgment if it is determined that there is no genuine issue. *Heart of America Lbr. Co. v. Belove*, 28 F. Supp. 619.

Where both parties move for judgment cause is before the court on the pleadings, exhibits, etc., referred to in the motions.—Where plaintiff filed a motion for summary judgment on the pleadings, exhibits, docu-

ments, etc., and defendant filed a memorandum in opposition of plaintiff's motion for summary judgment, and moved on the pleadings, exhibits, documents, and affidavits, for a summary judgment in his favor, cause was before the court on the pleadings and documents referred to in the respective motions for summary judgment. *Hartford Acci., etc., Co. v. Flanagan*, 28 F. Supp. 415.

The decision on motion for summary judgment need not be restricted to the pleadings, but should be made upon the whole record, including order made upon findings made in pre-trial conference, containing agreements of counsel. *Continental Illinois Nat. Bank, etc., Co. v. Ehrhart*, 1 F. R. D. 199.

The rule providing for the filing of a motion for summary judgment contemplates that the judge shall take the pleadings as they have been shaped to see what issues of fact they make and then shall consider the depositions and admissions on file together with the affidavits to see if any such issues are real and genuine, and if they are not, judgment is given without further trial. *River Junction v. Maryland Cas. Co.*, 110 F. (2d) 278.

In determining whether there is a disputed issue of fact, the petition, the interrogatories, the affidavits and admissions are to be considered. *Gasifier Mfg. Co. v. Ford Motor Co.*, 1 F. R. D. 10.

And it is the duty of court to consider all facts and allegations in affidavits of parties.—The court, in ruling on defendant's motion for summary judgment, had duty to take account of all of the facts and allegations stated in affidavits of the parties, and not merely of those facts set forth by defendant. *Wyant v. Crittenden*, 113 F. (2d) 170.

Summary judgment granted as a matter of law where there is no genuine fact issue.—Where pleadings, admissions and depositions on which case was submitted showed that there was no genuine issue as to any material fact, party moving for summary judgment was entitled to judgment as a matter of law. *Mutual Life Ins. Co. v. O'Donnell*, 29 F. Supp. 1010.

Thus where there was no genuine issue as to any material fact in action by receiver of national bank to recover statutory assessment levied against stockholders, a motion for summary judgment was properly granted. *MacPherson v. Schram*, 112 F. (2d) 674.

And where facts in action for an alleged willful assault were insufficient for jury, defendant railroad was entitled to summary judgment. *Hufner v. Erie R. Co.*, 26 F. Supp. 855.

In lessee's action against lessor for damages for breach of contract where lease pro-

vided that lessor would repair leased building if it should become so damaged by fire as to be untenable and lessor had erected a new building following a fire and rented property to third party, lessor's motion for summary judgment would be sustained since there was no genuine issue as to extent of injury to building by fire in view of letters by plaintiff's agent acknowledging that only the walls of building remained standing; the building having been "destroyed" by fire rather than "damaged" within contemplation of lease. *Heart of America Lbr. Co. v. Belove*, 28 F. Supp. 619.

In action by the United States after reimbursing a Morris Plan Bank for amount lent on note executed to enable makers to buy an oil burner, where papers disclosed that payee had no notice of alleged defect in burner until after note had been executed and money lent, payee's transferee was entitled to summary judgment as a matter of law. *United States v. McCulloch*, 26 F. Supp. 7.

Where Circuit Court of Appeals, on appeal from denial of preliminary injunction against copyright infringement, had held that plaintiff had title and that copyrights were valid, and defendant raised only such two issues in objecting to granting of plaintiff's motion for summary judgment granting permanent injunction, summary judgment was granted. *Houghton Mifflin Co. v. Stackpole Sons*, 31 F. Supp. 517.

And this is true where facts within judicial knowledge eliminate all genuine issues.—In libel action against newspaper based on report concerning proceedings to disbar plaintiff, where plaintiff admitted matters of fact as to the disbarment proceedings and orders and merely denied that they were legally effective as judicial proceedings and orders, the pleadings, admissions, and facts within judicial knowledge eliminated all genuine issues as to material fact and warranted judgment for newspaper as a matter of law upon newspaper's motion for summary judgment. *Fletcher v. Evening Star Newspaper Co.*, 114 F. (2d) 582.

Where the question becomes one of law only, the rights of the parties may be properly adjudged in a proceeding for summary judgment. *Sun Ins. Office v. Leshefsky*, 31 F. Supp. 952, 954, citing *Culhane v. Jackson Hdw. Co.*, 25 F. Supp. 324; *Hufner v. Erie R. Co.*, 26 F. Supp. 855; *Mabardy v. Railway Exp. Agency*, 26 F. Supp. 25; *United States v. McCulloch*, 26 F. Supp. 7; *Walsh v. Connecticut Mut. Life Ins. Co.*, 26 F. Supp. 566.

V. CASE NOT FULLY ADJUDICATED ON MOTION.

In suit to compel a finance company to deliver a certificate of origin for an automobile, where answer of defendant pre-

sented an issue regarding a material fact, and each party moved for summary judgment, it was trial court's duty under the rules to specify in a finding, the facts that appeared from pleadings without substantial controversy and to go forward with trial in respect of those facts which remained in dispute. And at close of trial upon disputed facts to make findings with respect to them and to make conclusions of law upon the whole case. *Associates Discount Corp. v. Crow*, 110 F. (2d) 126.

VI. FORM OF AFFIDAVITS—FURTHER TESTIMONY.

A bona fide affidavit must be a statement of facts which the affiant knows and is able to substantiate at trial. *Banco De Espana v. Federal Reserve Bank*, 114 F. (2d) 438.

And when proof is found in affidavit it should be considered even in absence of offer to submit to cross-examination.—When proof, competent to support issues to which it is directed, is found in an affidavit presented in support of a motion for summary judgment, it should be considered even though the affidavit does not contain offer of the affiant to submit to a cross-examination. *Banco De Espana v. Federal Reserve Bank*, 114 F. (2d) 438.

Any hearsay contained in the supporting and opposing affidavits should be disregarded. *Boerner v. United States*, 26 F. Supp. 769.

As should a supporting affidavit not made on personal knowledge. *Person v. United States*, 112 F. (2d) 1.

In action for balance due on note, insufficiency of affidavit, not made on personal knowledge, to support plaintiff's motion for summary judgment, does not require reversal of such judgment, where affidavit had to do with payments on note and no issue as to payment was made by pleadings, so that defendant was not prejudiced. *Id.*

Affidavit varying terms of resolution will not be considered.—An affidavit in support of a counter motion for summary judgment offered to show that at time of adoption of resolution to pay off an amount of preferred stock equal to net proceeds received from property condemned when payment was received, corporation's directors intended resolution as an exercise of option to redeem preferred stock, was subject to a motion to strike, since affidavit attempted to vary terms of resolution, and so did not set forth facts admissible in evidence as required under procedural rule. *Fox v. Johnson*, 31 F. Supp. 64.

Submission of an affidavit was not the equivalent of the "introduction of evidence at a trial or hearing" within provision of rules authorizing a voluntary dismissal of

a counterclaim, cost claim or third party claim by claimant at any time before a responsive pleading is served or, if there is none, before the "introduction of evidence at the trial or hearing", so as to preclude defendant from voluntarily dismissing its counterclaim. *Tar Asphalt Trucking Co. v. Fidelity, etc., Co.*, 1 F. R. D. 330.

Affidavits held insufficient to authorize summary judgment.—In action to recover estate taxes paid in respect of trust created by decedent at the age of 74, allegedly in contemplation of death, affidavits executed long before commencement of the action, and containing statements inadmissible in evidence, though tending to show that decedent was a vigorous man in good health, actively engaged in business, when trust was created, and desired only to relieve himself of the responsibility of managing property to reduce income taxes, held not sufficient to authorize summary judgment for plaintiffs. *Saunders v. Higgins*, 29 F. Supp. 326.

VII. WHEN AFFIDAVITS ARE UNAVAILABLE.

Plaintiffs' motion to defer consideration of defendants' motion for summary judgment to permit depositions to be taken was denied without prejudice to right to renew within 20 days upon a showing of knowledge or information of plaintiffs regarding explicit facts sufficient to justify a belief regarding allegations of complaint, upon specifying particular persons whose depositions plaintiffs desired to take, particular issues regarding which they desired to examine each of the persons and what in particular plaintiffs sought to establish by the examination. *Shultz v. Manufacturers, etc., Trust Co.*, 30 F. Supp. 443.

VIII. AFFIDAVITS MADE IN BAD FAITH.

See committee note under subdivision (g).

Rule 57. Declaratory Judgments.

Committee Note.

This is the Colorado Declaratory Judgment Act, 3 C. S. A., Chap. 93, Secs. 78 to 86, 88, 89 and 91. Sections 87 and 90 are omitted as covered elsewhere in the rules. It differs from the Federal Rule.

(a) **Power to Declare Rights, etc.; Force of Declaration.** Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

(b) **Who May Obtain Declaration of Rights.** Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

(c) **Contract Construed Before Breach.** A contract may be construed either before or after there has been a breach thereof.

(d) **For What Purposes Interested Person May Have Rights Declared.** Any person interested as or through an executor, administrator, trustee,

guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic or insolvent, may have a declaration of rights or legal relations in respect thereto :

(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or other ; or

(2) To direct the executors, administrators. or trustees to do or abstain from doing any particular act in their fiduciary capacity ; or

(3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

(e) **Not a Limitation.** The enumeration in paragraphs (b), (c) and (d) of this rule does not limit or restrict the exercise of the general powers conferred in paragraph (a) of this rule, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

(f) **When Court May Refuse to Declare Right.** The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

(g) **Review.** All orders, judgments and decrees under this rule may be reviewed as other orders, judgments and decrees.

(h) **Further Relief.** Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

(i) **Issues of Fact.** When a proceeding under this rule involves the determination of an issue of fact, such issues may be tried and determined in the same manner as issues of facts are tried and determined in other actions in the court in which the proceeding is pending.

(j) **Parties; Municipal Ordinances.** When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

(k) **Rule Is Remedial; Purpose.** This rule is declared to be remedial ; its purpose is to settle and to afford relief from uncertainty and insecurity with

respect to rights, status and other legal relations; and is to be liberally construed and administered.

(1) **Interpretation and Construction.** This rule shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

- I. General Consideration.
- II. The Particular Provisions.
 - A. Power to Declare Rights, etc.—Force of Declaration.
 - B. Who May Obtain Declaration of Rights.
 - C. Contract Construed Before Breach.
 - D. For what Purposes Interested Persons May Have Rights Declared.
 - E. Not a Limitation.
 - F. When Court May Refuse to Declare Right.
 - G. Review.
 - H. Parties—Municipal Ordinances.
 - I. Article Is Remedial—Purpose.

Cross Reference.

For discussion of this rule, see Address no. 11, appx. D.

I. GENERAL CONSIDERATION.

Editor's note.—For cases dealing with declaratory judgments under the Federal Rule, which differs from this rule, see *Mutual Life Ins. Co. v. Benton*, 1 F. R. D. 151 (purpose of rule); *Ohio Cas. Ins. Co. v. Richards*, 27 F. Supp. 18 (the rules favor declaratory proceedings); *(American) Lumbermens Mut. Cas. Co. v. Timms & Howard*, 108 F. (2d) 497 (jury trial as matter of right); *Bakelite Corp. v. Lu-Bri-Zol Develop. Corp.*, 34 F. Supp. 142 (declaratory action not a suit in equity); *Maryland Cas. Co. v. Tindall*, 30 F. Supp. 949 (entertainment of declaratory action within discretion of court; other adequate remedy does not bar relief); *Dunleer Co. v. Minter Homes Corp.*, 33 F. Supp. 242 (complex factual situation does not preclude declaratory relief); *American Signal Corp. v. International Roll-Call Systems*, 110 F. (2d) 942 (as to proper parties in declaratory action); *Bliss Co. v. Cold Metal Process Co.*, 102 F. (2d) 105 (as to justifiable controversy); see also, *O'Leary v. Liggett Drug Co.*, 1 F. R. D. 272; *Mutual Life Ins. Co. v. Ballard*, 1 F. R. D. 180; *Pacific Indemnity Co. v. McDonald*, 25 F. Supp. 522; *General Acci. Fire, etc., Assur. Corp. v. Morgan*, 30 F. Supp. 753; *Employers' Liability Assur. Corp. v. Ryan*, 109 F. (2d) 690.

Since this rule embraces the Uniform Declaratory Judgment Act, cases from other jurisdictions adopting the act, as well as the

Colorado cases, have been included in the following notes.

The Declaratory Judgment Act is constitutional.—See *San Luis Power, etc., Co. v. Trujillo*, 93 Colo. 385, 26 P. (2d) 537, wherein the court said that the act's work was well done, if it has prevented, as it likely would, extended expensive litigation, and obviated the animosity between parties that is often attendant upon litigated cases.

The constitutionality of Declaratory Judgment Acts has been upheld in at least eight other states.—*Kansas* (*State v. Grove*, 109 Kan. 619, 201 P. 82); *California* (*Blakeslee v. Wilson*, 190 Cal. 479, 213 P. 495); *Tennessee* (*Miller v. Miller*, 149 Tenn. (22 Thomp.) 463, 261 S. W. 965); *Pennsylvania* (*Petition of Kariher*, 284 Pa. 455, 131 A. 265); *Virginia* (*Patterson v. Patterson*, 144 Va. 113, 131 S. E. 217); *New York* (*Board of Education v. Van Zandt*, 119 Misc. 124, 195 N. Y. 297); *Connecticut* (*Braman v. Babcock*, 98 Conn. 549, 120 A. 150); *New Jersey* (*McCrory Stores Corp. v. Braunstein*, 102 N. J. L. 590, 134 A. 752). See article by Mr. Allen Moore of the Denver Bar, *Dicta VI*, no. 4, pp. 20, 24.

Summary of principles of declaratory judgments.—Some of the broad principles relating to declaratory judgments may be indicated briefly as follows: 1. In order to invoke the jurisdiction of the court for a declaratory right or a declaratory order or judgment, it is not necessary that a "cause of action" in the sense of facts entitling him to consequential relief be present. 2. Jurisdiction to render a declaratory judgment is discretionary and should be exercised with great care and with due regard to all the circumstances of the case. 3. A bona fide controversy as to which judgment will be res judicata is necessary. 4. When future events are involved the courts should not assume jurisdiction, unless a present right depends upon the decision, or there are other special circumstances. 5. A declaration of rights will not be made in a matter where the interest of the plaintiff is merely contingent upon the happening of some event in the future. 6. Where there are disputed questions of fact which may be the subject of judicial investigation in a regular action, the court may refuse a declaratory judgment. 7. A declaration cannot be given as to a claim which it is feared defendant may assert. 8. In the absence of very special circumstances the court should not

make a declaration of right as to matters over which jurisdiction is vested in another court. See article by Mr. Allen Moore of the Denver Bar, *Dicta* VI, no. 4, pp. 20, 25.

And their purpose.—In 28 *Yale Law Journ.*, 1-125, Professor Borchard explained declaratory judgments as follows: "The purpose is to afford security and relief against uncertainty and doubt. It does not necessarily pre-suppose culpable conduct on the part of the defendant, but it enables any party, whose rights, privileges, powers, or immunities—whether evidenced by written instrument or not—have been disputed, in danger thrust, or placed in uncertainty, by another person, to invoke the aid of a court to obtain an authority, determination or declaration of his rights or other legal relations." See article by Mr. Allen Moore of the Denver Bar, *dicta* VI, no. 4, pp. 20, 23.

One of the essential purposes of the Uniform Declaratory Judgment Act is to enable parties, in a proper case, to obtain a determination of their rights and duties in advance of the time when litigation might possibly arise with respect to a specific transaction. *McNichols v. Denver*, 101 Colo. 316, 74 P. (2d) 99.

Effect is to increase usefulness of court.—The effect of the Declaratory Judgment Act, as embraced in the act adopted in Virginia, is to increase the usefulness of the courts and remove doubt and uncertainty as to the final result of legal controversies, by empowering the courts to enter declaratory judgments and decrees touching the rights of the parties in such cases. *Patterson v. Patterson*, 144 Va. 113, 131 S. E. 217. See generally, 34 *Harvard Law Rev.*, 697; 9 *Va. Law Rev.*, 167; Annotation 19 A. L. R. 1124.

II. THE PARTICULAR PROVISIONS.

A. Power to Declare Rights, etc.— Force of Declaration.

Supreme Court may declare and adjudge rights.—Since the adoption of the Uniform Declaratory Judgment Act, the Supreme Court is permitted to declare and adjudge rights and liabilities under a given state of facts irrespective of whether it directly supplies remedies to enforce them. *Employers Mut. Ins. Co. v. Board of County Com'rs.*, 102 Colo. 177, 78 P. (2d) 380.

The act permits determination of rights before breach.—It is hardly conceivable that any fundamental principle of our government, beyond legislative control, prevents two disputants, each of whom sincerely believes in the rightfulness of his own claim, but each of whom wishes to abide by the law, whatever it may be determined to be, from obtaining an adjudication of their controversy without one or the other first doing something that is illegal if he is mistaken in

his view of the law. *State v. Grove*, 109 Kan. 619, 201 P. 82, construing the corresponding act adopted in the state of Kansas.

Both parties must have real interest in the subject matter of the suit.—While jurisdiction under the act is not dependent upon any right of the parties to immediate consequential relief, it is necessary, in order to confer jurisdiction, that the proceeding be instituted by a party with real interest in the subject matter and against the party whose interest is adverse. *Cummings v. Shipp*, 156 Tenn. (3 Smith) 595, 3 S. W. (2d) 1062; *Perry v. Elizabethton*, 160 Tenn. (7 Smith) 102, 22 S. W. (2d) 359.

In controversy to determine validity of a statute, where parties before the court have a real interest in the integrity of the act under consideration, a declaration from the court is required. *Goetz v. Smith*, 152 Tenn. (25 Thomp.) 451, 278 S. W. 417.

And remote or incidental questions cannot be considered.—Parties are not entitled to a declaratory judgment on remote and incidental questions or to aid them in another transaction. *Hodges v. Hamblen County*, 152 Tenn. (25 Thomp.) 395, 277 S. W. 901. See also, *Family Loan Co. v. Hickerson*, 168 Tenn. (4 Beeler) 36, 73 S. W. (2d) 694, 698.

Decree not binding where court is without jurisdiction.—Where the courts are without jurisdiction a decree on a bill brought under this act would not be conclusive of the questions presented. *Cummings v. Shipp*, 156 Tenn. (3 Smith) 595, 3 S. W. (2d) 1062.

But no breach of obligation need first be committed.—The only controversy necessary to invoke action of court under the act, is that the question must be real and not theoretical; the person raising it must have a real interest, and there must be someone having a real interest who may oppose the declaration sought, and it is not necessary that any breach of obligation should be first committed, any right invaded, or wrong done. *Miller v. Miller*, 149 Tenn. (22 Thomp.) 463, 261 S. W. 965.

The dispute must be over the legal consequences of known facts rather than over the facts themselves.—In *Newsum v. Interstate Realty Co.*, 152 Tenn. (25 Thomp.) 302, 278 S. W. 56, two brokers were each claiming a commission for the sale of the same piece of real estate. The bill was filed as a bill of interpleader and in the alternative as a proceeding under the Declaratory Judgment Act. The bill did not set forth either a written or an oral contract of agency. The Supreme Court held that no declaratory judgment should be rendered as the case required a judicial investigation of disputed facts. This decision seems sound, for as stated by the court, "a declaratory judgment is essentially one of construction." In the instant case the real estate dispute

apparently was on the facts of the controversy rather than on the legal consequences of known facts. 4 Tenn. Law. Rev. no. 2, pp. 104, 105.

The act cannot be used to delay one in the prosecution of an accrued cause of action.—It is contrary to the spirit and purpose of the act that a party should be delayed in the prosecution of an accrued cause of action until the termination of a proceeding brought for a declaratory judgment. *McFarland v Crenshaw*, 160 Tenn. (7 Smith) 170, 22 S. W. (2d) 229.

The decree should set out the rights of the parties under the statute construed.—Where a bill is filed under the Declaratory Judgment Act for the purpose of having a statute construed and a demurrer is filed, the better practice is to enter a decree, sometimes referred to as a declaration, defining the rights of the parties under the issues made, even though such decree is adverse to the contentions of the bill. *Frazier v Chattanooga*, 156 Tenn. (3 Smith) 346, 1 S. W. (2d) 786.

A real controversy must exist.—The act has so often been considered by the highest court of Tennessee, which has consistently held that its provisions may only be invoked when the complainant asserts rights which are challenged by the defendant, and presents for decision an actual controversy to which he is a party, capable of final adjudication by the judgment or decree to be rendered. *Nashville, etc., Ry. Co. v Wallace*, 288 U. S. 249, 260, 53 S. Ct. 345, 77 L. Ed. 730, 87 A. L. R. 1191.

Action on insurance policy held to be clearly within contemplation of this provision.—A case was clearly within the contemplation of this provision where certain beneficiaries of a life insurance policy brought an action against an insurance company to establish the applicability of a double indemnity clause to the death of the insured whose death was caused by an overdose of luminal; since a contract was involved, persons interested and a controversy concerning the construction of the policy. *Equitable Life Assur. Soc. v Hemenover*, 100 Colo. 231, 67 P. (2d) 80, 110 A. L. R. 1270, cited in notes, 111 A. L. R. 629, 123 A. L. R. 303.

Applied in *Rice v Franklin Loan, etc., Co.*, 82 Colo. 163, 258 P. 223, cited in note, 99 A. L. R. 1028, to declare a mortgage and note void for usury; in *Bedford v Johnson*, 102 Colo. 203, 78 P. (2d) 373; in *Smith-Brooks Printing Co. v Young*, 103 Colo. 199, 85 P. (2d) 39, to determine the status of plaintiff with respect to eligibility to bid for state printing; in *Highland Sales Co. v Robertson*, 104 Colo. 222, 90 P. (2d) 2, for salary and percentages of profit from business plaintiff had helped develop; in *Bedford v Hartman Bros.*, 104 Colo. 190, 89 P. (2d)

584, to obtain a judicial construction of the sales tax act; in *Union Colony Co. v Gallie*, 104 Colo. 46, 88 P. (2d) 120, for the purpose of voiding a condition subsequent contained in a deed through which plaintiff deraigned title to property.

B. Who May Obtain Declaration of Rights.

In general.—This act was not intended to repeal the statute prohibiting judges from giving legal advice, nor to impose the duties of the profession upon the courts, nor to provide advance judgments as the basis of commercial enterprises, nor to settle mere academical questions. *Gabriel v Board of Regents*, 83 Colo. 582, 586, 267 P. 407, cited in notes, 68 A. L. R. 118, 131, 87 A. L. R. 1216. See also, *Denver v Lynch*, 92 Colo. 102, 105, 18 P. (2d) 907, 86 A. L. R. 907, cited in notes, 100 A. L. R. 698, 101 A. L. R. 1215.

The courts have jurisdiction over certain enumerated actions seeking declaratory judgments.—The legislature is without power to require courts to exercise non-judicial functions; but it is not without the power to impose upon courts jurisdiction over certain enumerated actions seeking declaratory judgments on matters that lend themselves to and receive judicial determination in otherwise litigated cases, as it at once appears, such would not be non-judicial in their nature. *San Luis Power, etc., Co. v Trujillo*, 93 Colo. 385, 391, 26 P. (2d) 537.

When the questions presented are not uncertain or hypothetical.—The questions presented here are not uncertain or hypothetical, and because they are presented in an action seeking a declaratory judgment are no less justiciable than if presented by injunction or otherwise. *San Luis Power, etc., Co. v Trujillo*, 93 Colo. 385, 391, 26 P. (2d) 537, citing *Nashville, etc., Ry. Co. v Wallace*, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A. L. R. 1191.

But are not required to reply to mere "speculative inquiries," etc.—The court, in conclusion, said: "We cannot here decide any other of the various questions raised, however desirable it might be to have them settled, unless we are now willing to answer questions 'which have not yet arisen and which may never arise' and reply to mere 'speculative inquiries.' We cannot thus permit the courts to be converted into legal aid bureaus." *Gabriel v Board of Regents*, 83 Colo. 582, 587, 267 P. 407, cited in notes, 68 A. L. R. 118, 131, 87 A. L. R. 1216.

Or determine validity of a proposed city ordinance.—A declaratory judgment may not issue under the provisions of this subdivision on the validity of a city ordinance to create a storm sewer district, where the proposed ordinance is in contemplation only and has not been passed by the city council. *Denver v Denver Land Co.*, 85 Colo. 198,

274 P. 743, cited in notes, 68 A. L. R. 118, 87 A. L. R. 1242. See also, subdivision (j).

Especially in the absence of the necessary parties.—Desirable as it might be to have an announcement of this court upon this question, it would be improper for us to decide it in the absence of the necessary parties. *Denver v. Denver Land Co.*, 85 Colo. 198, 201, 274 P. 743, cited in notes, 68 A. L. R. 118, 87 A. L. R. 1242. See also, *Continental Mut. Ins. Co. v. Cochrane*, 89 Colo. 462, 4 P. (2d) 308, cited in notes, 87 A. L. R. 1213, 1230, 123 A. L. R. 308.

The judgment leaves the parties to pursue the remedies which the law provides, after performing its office of declaring the existence of a certain liability. *San Luis Power, etc., Co. v. Trujillo*, 93 Colo. 385, 391, 26 P. (2d) 537.

But is *res adjudicata* as to questions of statutory construction raised between the parties.—Preventative relief in some instances is just as properly a matter of judicial function as remedial relief and if given by a declaratory order in the construction of a statute, it is *res adjudicata* as to the questions of construction raised between the parties and passed upon. *San Luis Power, etc., Co. v. Trujillo*, 93 Colo. 385, 391, 26 P. (2d) 537.

This act is applicable to an action concerning water rights.—*Stratton v. Beaver Farmers' Canal, etc., Co.*, 82 Colo. 118, 257 P. 1077, discussed in the article by Mr. Allen Moore of the Denver Bar, *Dicta VI*, no. 4, pp. 20, 28, was an action concerning water rights and the prayer for a declaratory judgment under the act. It was there held that the facts stated in the complaint concerning interference with plaintiff's water rights were sufficient to entitle him to some kind of relief against defendant, but that it would not determine the merits of the case until the parties had an opportunity to make an issue of fact. The judgment of dismissal was reversed with directions to overrule the demurrer and proceed with the case.

Hence it is applicable to a dispute over the right to the use of spring waters not tributary to any natural stream. *Colorado, etc., Co. v. Walter*, 75 Colo. 489, 226 P. 864, cited in notes, 50 A. L. R. 52, 55 A. L. R. 1504.

And to determine rights under the Teachers' Salary Law.—*Washington County High School Dist. v. Board of County Com'rs*, 85 Colo. 72, 73, 273 P. 879, was a suit against the board of county commissioners of Washington county, and others, to have determined the rights, if any, of the county high school district under the Teachers' Salary Law of 1921 (ch. 146, § 240 et seq.), as amended.

Or to declare a note and chattel mortgage void for usury.—In *Rice v. Franklin Loan,*

etc., Co., 82 Colo. 163, 258 P. 223, the plaintiffs in error brought an action under the act to declare void a note and chattel mortgage which they gave the Franklin Company, on the ground that the note was usurious under the Money Lenders' Act. It was held that the non-suit below was improperly granted where the evidence indicated that the loan was made at a rate greatly in excess of the 12 per cent. permitted by statute. The contention that the Money Lenders' Act is unconstitutional was overruled. In the article by Mr. Allen Moore of the Denver Bar, *Dicta VI*, no. 4, pp. 20, 28, it was said that this case is a beautiful illustration of the use of the act in the construction of a statute and a determination of its constitutionality.

Constitutionality of statute may be tested.—The constitutionality of a statute may be determined under the Declaratory Judgment Act where it does not appear that the jurisdiction of the court to render a declaratory judgment is challenged. *Erwin Billiard Parlor v. Buckner*, 156 Tenn. (3 Smith) 28, 300 S. W. 565.

But not unless party adversely affected is before court.—In a proceeding under this act to determine the validity of a statute, questions as to whether certain of its provisions are violative of constitution, cannot be considered, where no one before the court is adversely affected by such provisions of the act, or had any real interest in raising the question which did not go to the act as a whole. *Goetz v. Smith*, 152 Tenn. (25 Thomp.) 451, 278 S. W. 417.

As where county judge sues county trustee to test validity of statute extending time for payment of taxes.—The county judge, who is the financial agent of the county, and the county trustee, who is its revenue collector and treasurer, do not have such adverse interests as to entitle the county judge to maintain a bill under this article against the county trustee to test the constitutionality of statute extending time for payment of taxes. *Cummings v. Shipp*, 156 Tenn. (3 Smith) 595, 3 S. W. (2d) 1062.

Or when city auditor brings action to determine validity of bond issue.—In an action under the act to determine whether or not a municipality has the power to issue bonds and levy taxes for the payment thereof, the city auditor, being a person whose legal relations are affected by the proposal, is the proper person to initiate the proceedings. *McNichols v. Denver*, 101 Colo. 316, 74 P. (2d) 99.

Or where all parties agree to and obey act in question.—A declaratory judgment to determine rights of ten of eighteen county magistrates to transact county business when remaining magistrates refuse to act will not be rendered, where, prior to consideration of appeal, all magistrates qualified

and transacted business; no official action having been attempted by complainants alone. *Hodges v Hamblen County*, 152 Tenn. (25 Thomp.) 395, 277 S. W. 901.

Applied in *Denver Land Co v Moffat Tunnel Imp. Dist.*, 87 Colo. 1, 284 P. 339, to determine validity of certain levies; in *Miller v Limon Nat. Bank*, 88 Colo. 373, 296 P. 796, to determine duty of board to draw voucher in favor of bank for return of money paid it "by mistake or error."

Quoted in *Continental Mut. Ins. Co. v Cochrane*, 89 Colo. 462, 4 P. (2d) 308, cited in notes, 87 A. L. R. 1213, 1230, 1243, 123 A. L. R. 308.

C. Contract Construed before Breach.

Cross-reference.—See the notes to the preceding analysis line.

In an action under this act to determine the validity of a contract, the complaint failing to allege that the validity of the contract had been questioned, or that a question had arisen under it, no cause of action was stated. *Gabriel v Board of Regents*, 83 Colo. 582, 267 P. 407, cited in notes, 68 A. L. R. 118, 131, 87 A. L. R. 1216.

D. For What Purposes Interested Person May Have Rights Declared.

It is not good practice for a court by general instructions in advance to designate generally in what cases taxes, etc., are to be paid.—*Mulcahy v Johnson*, 80 Colo. 499, 252 P. 816, cited in notes, 70 A. L. R. 637, 87 A. L. R. 1215, 94 A. L. R. 312, 319, discussed in the article by Mr. Allen Moore of the Denver Bar, *Dicta VI*, no. 4, pp. 20, 27, was an action for an accounting, and construction of a will. In one clause of the decree, the court declared that the general taxes on vacant, unimproved and unproductive real estate are payable out of the general income and also that local improvement taxes assessed against unimproved and unproductive real estate are payable out of general income, while those against improved and productive real estate likely to out-last the life estate should be pro-rated. The court considered these declarations and held that the decisions were not uniform with respect to the matters in question, that it was not safe or good practice for a court of equity by general directions or instructions in advance to designate generally in what cases taxes and assessments should be paid or apportioned but the safer rule was to wait until the concrete question arose and became important and decision thereon became necessary, in which case the court would have power to give such instructions.

While this decision may appear to limit the scope of the act in this state with respect to wills, estates and trusts, the hold-

ings of the court with respect to the general rules of interpretation in the use of the act are sound. See article by Mr. Allen Moore of the Denver Bar, *Dicta VI*, no. 4, pp. 20, 28.

Since the act itself authorizes the determination only of questions "arising" in the administration of an estate or trust. In *Mulcahy v Johnson*, 80 Colo. 499, 511, 252 P. 816, cited in notes, 70 A. L. R. 637, 87 A. L. R. 1215, 94 A. L. R. 312, 319, the court at the request of the parties determined all questions that have properly arisen, but declined to determine those which had not arisen and which might never arise during the administration of the trust. Neither under the equity practice nor under this act are the courts required to give general advice and instructions upon matters which have not yet arisen at the time their jurisdiction is invoked.

It confers no new authority concerning wills and trusts. District Courts had full and complete jurisdiction before the passage of the act to construe wills and trusts and to control executors and trustees in the administration of estates. *Mulcahy v Johnson*, 80 Colo. 499, 500, 252 P. 816, cited in notes, 70 A. L. R. 637, 87 A. L. R. 1215, 94 A. L. R. 312, 319.

Widow of testator, also his executrix and his adult children, have such interest in will of testator as entitled them to declaratory judgment under this subdivision, to settle the right of the executrix to sell real estate devised if she deem it necessary for support, use and benefit of herself and children, and make good and sufficient title, minor child of testator made defendant, being proper contradictor. *Miller v Miller*, 149 Tenn. (22 Thomp.) 463, 261 S. W. 965.

There must be a controversy.—If it does not appear that any controversy exists between plaintiffs and defendants as to their respective rights, status, or legal relations, the action will be dismissed as not coming within the provisions of this and the following subdivisions. *Wright v McGee*, 206 N. C. 52, 173 S. E. 31.

E. Not a Limitation.

Auditor may mandamus himself.—Under the Declaratory Judgment Act in Virginia an auditor, as an individual, could prosecute a writ of mandamus against himself as auditor. *Moore v Moore*, 147 Va. 460, 137 S. E. 488.

Statute covers all cases involving an antagonistic assertion of right.—It will be noticed that deeds, wills and indeed, practically all written instruments are expressly included, as well as statutes and municipal ordinances. But the maxim *expressio unius exclusio alterius* has no application here because the subdivision expressly declares oth-

erwise. Hence, it may be said that the statute is broad enough in its scope to cover every case where there is an antagonistic assertion of right on the part of one of the parties and a denial of that right by the other, it being wholly unnecessary that one party shall invade the asserted rights of the other, or that consequential relief be available at the time. In *Russian Commercial, etc., Bank v. British Bank*, 90 L. J., K. B. (N. S.) 1089, 19 A. L. R. 1106, it was held that the question involved "must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure the proper contradicter, that is to say, someone presently existing who has a true interest to oppose the declaration sought."

F. When Court May Refuse to Declare Right.

See the notes under analysis lines II B, D of this rule.

Applied in *Denver v. Denver Land Co.*, 85 Colo. 198, 274 P. 743.

Quoted in *Continental Mut. Ins. Co. v. Cochrane*, 89 Colo. 462, 4 P. (2d) 308, cited in notes, 87 A. L. R. 1213, 1230, 1243, 123 A. L. R. 308.

G. Review.

See analysis lines II B, D and the notes there placed.

H. Parties—Municipal Ordinances.

Cross reference.—See analysis lines II B, D and the notes thereto.

A declaratory judgment, under this subdivision should not be pronounced in the absence of necessary parties. *Continental Mut. Ins. Co. v. Cochrane*, 89 Colo. 462, 4 P. (2d) 308, cited in notes, 87 A. L. R. 1213, 1230, 1243, 123 A. L. R. 308.

All interested persons should be joined and the rights of those not joined are not prejudiced. Municipalities are made parties where municipal ordinances or franchises are involved, and if their constitutionality is involved, the attorney-general is served with a copy of the proceeding and may be heard. See article by Mr. Allen Moore of the Denver Bar, *Dicta VI*, no. 4, pp. 20, 26.

A court of equity has some discretion as to parties and, in view of the disposition to be made of this case, since the rights of

those not made parties to the proceedings will not be prejudiced, the court may proceed without them. *Powers v. Vinsant*, 165 Tenn. (1 Beeler) 390, 392, 54 S. W. (2d) 938.

Personal representative in Tennessee must be made a party.—Where a declaration of the identity of the distributees of an intestate cannot be had because the personal representative in Tennessee has not been made a party, the cause may be remanded, upon motion, with permission to the complainants to amend by making the Tennessee administrator a party. *Sadler v. Mitchell*, 162 Tenn. (9 Smith) 363, 36 S. W. (2d) 891.

A declaration cannot be made under this subdivision establishing the identity of the distributees of an intestate, unless the personal representative of the intestate in Tennessee is made a party to the suit. *Id.*

In a suit for a distributive share of an estate the administrator is a necessary party. *Id.*

In order to obtain a declaration of the interests of distributees in the estate of a decedent all persons should be made parties, who have or claim any interest which would be affected by the declaration. *Sadler v. Mitchell*, 162 Tenn. (9 Smith) 363, 36 S. W. (2d) 891.

Attorney-general necessary party in proceeding to declare statute void.—When the proceeding involves a statute alleged to be unconstitutional this subdivision requires that the attorney-general of the state shall be served with a copy of process, which provision is mandatory. *Cummings v. Shipp*, 156 Tenn. (3 Smith) 595, 3 S. W. (2d) 1062.

In suit under declaratory judgments statute to have validity of law determined, attorney-general of state is properly made a party. *Peters v. O'Brien*, 152 Tenn. (25 Thomp.) 466, 278 S. W. 660.

Applied in *McNichols v. Denver*, 101 Colo. 316, 332, 74 P. (2d) 99; in *Young v. Board of County Com'rs*, 102 Colo. 342, 79 P. (2d) 654, wherein attorney-general filed a brief, under this subdivision, in a suit by a county treasurer against county for fees earned as ex officio public trustee.

I. Article is Remedial—Purpose.

See the notes under analysis lines II B, D of this rule.

Rule 58. Entry and Satisfaction of Judgment.

(a) **Entry.** Unless the court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs the entry of a judgment that a party recover only money or costs or that there be no recovery, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the judgment docket as provided by Rule 79 C (d) constitutes the entry of the judgment; and the judgment is not effective before such entry. [Supplants Code Sec. 244.]

C (b) **Satisfaction.** Satisfaction in whole or in part of a judgment may be entered in the judgment docket upon an execution returned satisfied in whole or in part, or upon an acknowledgment of such satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property by the judgment creditor, or, within 1 year after the judgment, by his attorney of record unless a revocation of his authority be previously filed, or by the signing of such satisfaction, attested by the clerk, upon the judgment docket by one herein authorized to execute an acknowledgment of satisfaction. Whenever a judgment shall be so satisfied in fact otherwise than upon execution, it shall be the duty of the party or attorney to give such acknowledgment, and upon motion the court may compel it or may order the entry of such satisfaction to be made without it. [From Code Sec. 253.]

Committee Note.

There is no Federal subdivision 58 (b).

- I. Entry.
- II. Satisfaction.

Cross Reference.

For a discussion of this rule, see Address no. 11, appx. D.

I. ENTRY.

The "judgment" is the pronouncement of the court from the bench, and the clerk's entry is not the "judgment," but merely the formal evidence thereof. *Western Union Tel. Co. v. Dismang*, 106 F. (2d) 362.

And entry thereof by clerk is merely a ministerial duty.—Under Federal rules, court need not sign a formal written judgment, but the entry is made by the clerk in performance of a ministerial duty. *Western Union Tel. Co. v. Dismang*, 106 F. (2d) 362.

Entry of judgment may be withheld in discretion of court.—*Voelker v. Delaware, etc., R. Co.*, 31 F. Supp. 515.

Where court had reserved decision on defendant's motion for dismissal made at close of the evidence, and after rendition of verdict defendant moved for new trial, entry of judgment, on defendant's motion, would be withheld till disposition of the other motions. *Id.*

Where, by consent given before rendition of verdict, each counsel reserved right to make any motion pertaining thereto at a time to be fixed by the court, and counsel were not present when verdict was rendered, court was in same position as though on return of verdict defendant had moved for a stay of the entry of judgment. *Id.*

Where assignee sued on two separate but similar claims, court entered order dismissing the first cause of action on merits and provided for a like dismissal of the second cause of action unless within 60 days assignee took certain steps to prove his right to the claim sued upon and thereafter entered order that condition of original

order had not been fulfilled and dismissed both causes of action on the merits and thereafter entered a third order denying assignee's motion for an order that he had complied with the condition of the original order, the proceedings were unnecessarily confusing and court should have withheld direction for entry of judgment of dismissal until all matters before it were settled. *Rosenblum v Dingfelder*, 111 F. (2d) 406.

Especially where parties are not prejudiced thereby.—Where financial responsibility of defendant was not questioned, plaintiff could not be prejudiced by stay of entry of judgment pending disposition of other motions, notwithstanding that some question might arise as to time of running of interest as against judgment, since, under New York statute, interest is computed from time when verdict is rendered, and such practice obtains in Federal courts. *Voelker v Delaware, etc., R. Co.*, 31 F. Supp. 515.

Likewise an application to open, vacate, or set aside a judgment is within its discretion. *Western Union Tel. Co. v Dismang*, 106 F. (2d) 362, 364.

And its action will not be disturbed by an appellate court except for a clear abuse of such discretion. *Western Union Tel. Co. v Dismang*, 106 F. (2d) 362, 364.

However, it is an abuse to open or vacate a judgment where the moving party shows no legal ground therefor or offers no excuse for his own negligence or default. *Western Union Tel. Co. v Dismang*, 106 F. (2d) 362, 364.

Thus where court directed entry of judgment for defendant after return of verdict for plaintiff, and clerk entered order to that effect on the docket, setting aside the judgment for the purpose of enabling plaintiff to move to dismiss without prejudice was an abuse of discretion, in absence of showing that plaintiff would be able to establish missing element in her previous case, or show excuse for her failure to present the necessary evidence at the original trial. *Id.*

II. SATISFACTION.

Editor's note.—Inasmuch as this subdivision was taken from § 253 of the Code of Civil Procedure, see *Ernst v Colburn*, 84 Colo. 170, 268 P. 576, construing that section and holding that an order requiring a judgment creditor to enter satisfaction of his judgment without notice of the motion or hearing was invalid and should be set aside on motion.

Rule 59. New Trials.

C (a) Grounds. A new trial may be granted to all or any of the parties, and on all or part of the issues, after trial by jury, court or master. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. Subject to the provisions of Rule 61, a new trial may be granted for any of the following causes:

- (1) Any irregularity in the proceedings by which any party was prevented from having a fair trial.
- (2) Misconduct of the jury.
- (3) Accident or surprise, which ordinary prudence could not have guarded against.
- (4) Newly discovered evidence, material for the party making the application which he could not, with reasonable diligence, have discovered and produced at the trial.
- (5) Excessive or inadequate damages.

(6) Insufficiency of the evidence.

(7) Error in law.

When the application is made under subdivisions (1), (2), (3), or (4), it shall be supported by affidavit filed with the motion. [Part from Federal Rule 59 (a). Supplants Supreme Court Rule 6 and Code Secs. 236 and 237.]

(b) **Time for Motion.** A motion for a new trial shall be filed not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal or writ of error with leave of court obtained on notice and hearing and on a showing of due diligence. [Supplants Code Sec. 238.]

(c) **Time for Filing and Serving Affidavits.** When a motion for new trial is based upon affidavits they shall be filed with the motion. The opposing party has 10 days after service thereof within which to file opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits. [Supplants Code Secs. 238 and 239.]

(d) **On Initiative of Court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

C (e) No Review Unless Made. The party claiming error in the trial of any case must, unless otherwise ordered by the trial court, move that court for a new trial, and, without such order, only questions presented in such motion will be considered on review. [Supreme Court Rule 8 retained. Supplants Code Sec. 424.]

Committee Note.

There is no Federal subdivision 59 (e). For new trial in attachment and garnishment see Rule 102 (aa). Compare Rule 52 (b).

I. Grounds.

- A. In General.
- B. Misconduct of Jury.
- C. Accident or Surprise.
- D. Newly Discovered Evidence.
- E. Excessive or Inadequate Damages.
- F. Insufficiency of the Evidence.

II. Time for Motion.

III. Time for Filing and Serving Affidavits

IV. On Initiative of Court.

V. No Review unless Made.

- A. In General.
- B. When Motion Unnecessary.
- C. Application.

Cross Reference.

For a discussion of this rule, see Address no. 11, appx. D.

I. GROUNDS.

A. In General.

Editor's note.—Since the grounds for a new trial are the same as those provided by § 237 of the Code of Civil Procedure, the cases that dealt with the misconduct of parties, witnesses and counsel under that section are set out below.

A new trial may be granted to all or any of the parties on all or part of the issues. Ecker & Potts. 112 F. (2d) 581.

But expense of another trial should be avoided where facts are clear and undisputed.

ed.—As regards the granting of motion for new trial, expense of another trial should be avoided when facts are clear and undisputed and upon a proper application of law cannot authorize a recovery. *Conner v. Great Atlantic, etc., Tea Co.*, 25 F. Supp. 855.

Improper remarks to jurors by persons employed by suitor.—If it is made to appear that persons employed by a suitor hang about the purlieus of the court, and the approaches thereto, mingle with those summoned as jurors, converse with them touching causes in which the suitor is concerned, and by flattery, ridicule, and like insidious means, endeavor to improperly influence them, the court has power to punish and suppress the practice, and should not hesitate to employ drastic measures to that end. A verdict shown to have been influenced by such practices should be unhesitatingly vacated. *Liutz v. Denver City Tramway Co.*, 54 Colo. 371, 131 P. 258, cited in note, 49 L. R. A. (N. S.) 890.

However, improper remarks to jurors which manifestly had no effect upon their deliberations is not ground for a new trial. *Id.*

False testimony is not one of the grounds for a new trial enumerated by this provision. *Buchanan v. Burgess*, 99 Colo. 307, 309, 62 P. (2d) 465.

Thus where the contention is that perjury has been committed the motion for a new trial must be grounded upon newly discovered evidence. In such cases a considerable discretion must generally be, and is, vested in the trial judge, and his ruling will not be reversed save for abuse thereof. *Id.*

In some jurisdictions it appears that false testimony is ground for a new trial, in others not. Where it is so it must be clearly established, and that the testimony was by a party, or induced by him, and generally that the witness has been convicted or is dead. *Schlessman v. Brainard*, 104 Colo. 514, 519, 92 P. (2d) 749, cited in notes, 123 A. L. R. 1117, 1130.

The granting or refusal of motion for new trial on ground of misconduct of witness, is within discretion of trial court. *Hicks v. Cramer*, 85 Colo. 409, 411, 277 P. 299, citing *Denver City Tramway Co. v. Armstrong*, 21 Colo. App. 640, 123 P. 136, cited in notes, L. R. A. 1915A, 763, Ann. Cas. 1916E, 687, 688, 18 A. L. R. 310; *Liutz v. Denver City Tramway Co.*, 54 Colo. 371, 379, 131 P. 258, cited in note, 49 L. R. A. (N. S.) 890. See also, *Denver Alfalfa Mill, etc., Co. v. Erickson*, 77 Colo. 583, 239 P. 17, cited in note, 41 A. L. R. 1041.

And its ruling will not be disturbed in absence of showing that its discretion was abused. *Hicks v. Cramer*, 85 Colo. 409, 277 P. 299, citing *Denver City Tramway Co. v.*

Armstrong, 21 Colo. App. 640, 123 P. 136, cited in notes, L. R. A. 1915A, 763, Ann. Cas. 1916E, 687, 688, 18 A. L. R. 310; *Liutz v. Denver City Tramway Co.*, 54 Colo. 371, 131 P. 258, cited in note, 49 L. R. A. (N. S.) 890. See also, *Denver Alfalfa Mill, etc., Co. v. Erickson*, 77 Colo. 583, 239 P. 17, cited in note, 41 A. L. R. 1041.

Objection on ground of misconduct of witness must be made before verdict.—A party to a trial who, although knowing of apparent misconduct on the part of a witness, remains silent until after the verdict has gone against him, may not then assign such misconduct as a ground for a new trial. *Hicks v. Cramer*, 85 Colo. 409, 410, 277 P. 299, citing *Denver Alfalfa Mill, etc., Co. v. Erickson*, 77 Colo. 583, 239 P. 17, cited in note, 41 A. L. R. 1041; *Williams v. Phelps*, (Tex. Civ. App.), 171 S. W. 1100; *Wood v. Moulton*, 146 Cal. 317, 80 P. 92; *Cloherly v. Griffiths*, 82 Wash. 634, 144 P. 912; *Wetzler v. Glassner*, 185 Wis. 593, 201 N. W. 740; *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513.

Conduct of witness held insufficient to warrant reversal.—The fact that a witness was seen in conversation with a juror during a recess of the court, is insufficient to warrant a reversal of the judgment, where there was nothing to indicate any attempt to influence the juror. *Hicks v. Cramer*, 85 Colo. 409, 410, 277 P. 299.

Treating of jurors by counsel.—The fact that the attorney of the successful party treated four of the jurors to cigars, after the verdict, merely in a way of civility, and without any design or forethought, held no ground to vacate the verdict, though the court suggested that, upon ethical grounds the act of the attorney was indiscreet. *Liutz v. Denver City Tramway Co.*, 54 Colo. 371, 131 P. 258, cited in note, 49 L. R. A. (N. S.) 890.

Sufficiency of affidavit.—An affidavit merely stating what the opposing counsel has directed his client to do, but not showing that in fact anything was done, pursuant to the direction, is insufficient to convict the party of misconduct. *Denver, etc., R. Co. v. Heckman*, 45 Colo. 470, 101 P. 976, cited in notes, Ann. Cas. 1913E, 107, 17 A. L. R. 172, 88 A. L. R. 955. See analysis line I, D.

B. Misconduct of Jury.

Editor's note.—Since misconduct of the jury remains a ground for a new trial just as under § 237 of the Code of Civil Procedure, some of the cases construing that section are set out below. It is to be noted that the present subdivision prescribes no rule covering the use of affidavits of the jurors where the jurors themselves have resorted to the determination of chance in arriving at a verdict. It has generally been

held in Colorado that the affidavits of jurors would not be received to impeach a verdict for misconduct of the jury, except as provided in § 237 of the Code of Civil Procedure which allowed their use when the verdict was arrived at by a resort to the determination of chance. See *Liutz v Denver City Tramway Co.*, 54 Colo. 371, 131 P. 258, cited in note, 49 L. R. A. (N. S.) 890.

Disposition of motion is within discretion of trial court.—Disposition of a motion for a new trial based on the ground of misconduct of jurors is within the sound discretion of the trial court. *Denver Alfalfa Mill., etc., Co. v Erickson*, 77 Colo. 583, 584, 239 P. 17, cited in note, 41 A. L. R. 1041.

And its ruling will not be disturbed on review, unless the discretion has been abused or the ruling is manifestly against the weight of the evidence. *Denver Alfalfa Mill., etc., Co. v Erickson*, 77 Colo. 583, 239 P. 17, cited in note, 41 A. L. R. 1041.

In *Burnham v Grant*, 24 Colo. App. 131, 147, 134 P. 254, cited in note, 9 A. L. R. 987, appellants insisted that the trial court erred in not granting a new trial based upon the alleged drunkenness of one of the jurors. This charge was supported, as well as controverted, by many affidavits. The court found that the grounds respecting the drunkenness of the juror A were not well founded. This issue, like all others contained in the motion for new trial, was to be decided by the court in the exercise of sound judicial discretion. See *Jones v People*, 6 Colo. 452, 45 Am. Rep. 526, cited in notes, 124 Am. St. Rep. 1027, 134 Am. St. Rep. 1035, 1036, 1040, L. R. A. 1915C, 307, L. R. A. 1916A, 1256, 3 L. R. A. (N. S.) 357, 358, Ann. Cas. 1912A, 786, 34 A. L. R. 1188, 64 A. L. R. 1036; *May v People*, 8 Colo. 210, 6 P. 816, cited in notes, 124 Am. St. Rep. 1027, L. R. A. 1915C, 307; *Repath v Walker*, 13 Colo. 109, 21 P. 917, cited in notes, L. R. A. 1915C, 309, Ann. Cas. 1912D, 1020.

Misconduct of a juror, if known to counsel, should be made the ground of objection at the time, and before the cause is submitted. If first suggested in the motion for a new trial it is within the discretion of the court to disregard it. *Denver City Tramway Co. v Armstrong*, 21 Colo. App. 640, 641, 123 P. 136, cited in notes, L. R. A. 1915A, 763, Ann. Cas. 1916E, 687, 688, 18 A. L. R. 310.

Quotient verdict.—Quotient verdict, shown to have been afterwards voted upon and accepted by the jury as a legitimate result of which little proof is required, will be permitted to stand. *Greeley Irrigation Co. v Von Trotha*, 48 Colo. 12, 108 P. 985, cited in notes, L. R. A. 1916E, 1023, Ann. Cas. 1917C, 1225, 52 A. L. R. 46.

In *Pawnee Ditch, etc., Co. v Adams*, 1 Colo. App. 250, 252, 28 P. 662, cited in notes, Ann. Cas. 1917C, 1225, 52 A. L. R. 41, it is said: "The difficulties which juries experience in arriving at a conclusion in cases where the damages to be assessed are unliquidated, and to be measured by what may be gathered from the varying opinion of witnesses, have led the courts to permit these verdicts to stand whenever the proof has satisfied them that the finding has subsequently been voted on and accepted by the jury as the legitimate expression of their deliberations. In most cases very little proof in this direction has been required." *Id.*

A quotient verdict, as such, is invalid, but where there is no antecedent agreement, or if after the quotient is ascertained, the jury proceeds to discuss and consider the propriety of the rendition of a verdict for an amount equal to the quotient, the verdict is good. *Denver v Talarico*, 99 Colo. 178, 61 P. (2d) 1, citing *Colorado Springs v Duff*, 15 Colo. App. 437, 62 P. 959.

Whether or not a verdict is a quotient verdict is a question of fact for the trial court. *Denver v Talarico*, 99 Colo. 178, 61 P. (2d) 1.

C. Accident or Surprise.

Editor's note.—The instant subdivision is the same as subdivision three, § 237 of the Code of Civil Procedure. Therefore the cases construing that section are set out below.

An application of defendant for a new trial on the ground of surprise in the evidence produced by plaintiff must be denied unless the attention of the court is called to the surprise at the time of the trial, and application made for some proper relief. *Agnew v Mathieson*, 26 Colo. App. 59, 140 P. 484.

It is well settled that a party cannot avail himself of a motion for a new trial on the ground of surprise unless he calls the attention of the court to the matter at the time when it occurs and asks for proper relief. It is too late for him to manifest his surprise for the first time after the cause has been submitted to the jury and a verdict rendered against him. *Outcalt v Johnston*, 9 Colo. App. 519, 525, 49 P. 1058, cited in notes, 21 A. L. R. 335, 336.

D. Newly Discovered Evidence.

Editor's note.—The instant subdivision is the same as the fourth subdivision of § 237 of the Code of Civil Procedure. Therefore cases construing the above mentioned subdivision of § 237 are set out below.

General rule.—As a general rule, in order to warrant granting a new trial on the

ground of newly discovered evidence, the requirements are that it be such as will probably change the result if a new trial is granted; that it has been discovered since the trial; that it could not have been discovered before the trial by the exercise of due diligence; that it is material to an issue in the case; that it is not merely cumulative to the former evidence; and that it does not merely tend to impeach or contradict the former evidence, except it may be in cases where it clearly appears that it would probably change the results in case of a new trial. *Colorado Springs, etc., Ry. Co. v. Fogelsong*, 42 Colo. 341, 94 P. 356, cited in notes, Ann. Cas. 1913A, 56, 45 L. R. A. (N. S.) 89, L. R. A. 1915B, 244, 68 A. L. R. 176; *Marshall's U. S. Auto Supply v. Cashman*, 111 F. (2d) 140, 142, citing *Prisament v. United States*, 96 F. (2d) 865.

Motions for new trial on ground of newly discovered evidence are viewed with suspicion.—*Sebold v. Rieger*, 26 Colo. App. 209, 142 P. 201. See also, *Gasper v. People*, 83 Colo. 341, 265 P. 97; *Eachus v. People*, 77 Colo. 445, 236 P. 1009; *Ward v. Atkinson*, 22 Colo. App. 134, 123 P. 120, cited in note, 72 A. L. R. 33.

And are left to the sound discretion of the trial court.—*Gasper v. People*, 83 Colo. 341, 265 P. 97, citing *Sebold v. Rieger*, 26 Colo. App. 209, 142 P. 201; *Eachus v. People*, 77 Colo. 445, 236 P. 1009. See also, *Wiley v. People*, 71 Colo. 449, 207 P. 478; *Trinidad Creamery Co. v. McDonald*, 82 Colo. 328, 329, 259 P. 1028; *Ward v. Atkinson*, 22 Colo. App. 134, 123 P. 120, cited in note, 72 A. L. R. 33; *Schlessman v. Brainard*, 104 Colo. 514, 92 P. (2d) 749, cited in notes, 123 A. L. R. 1117, 1130.

In passing upon a motion for a new trial on the grounds of newly discovered evidence, the trial court is vested with a large discretion in granting it, but it cannot be arbitrarily exercised; and, in reviewing such action, each case must be determined on its own facts, as there is no absolute criterion governing all such cases. *Colorado Springs, etc., Ry. Co. v. Fogelsong*, 42 Colo. 341, 94 P. 356, cited in notes, Ann. Cas. 1913A, 56, 45 L. R. A. (N. S.) 89, L. R. A. 1915B, 244, 68 A. L. R. 176.

Whose action in denying such motions will not be reversed except for gross abuse of discretion. *Sebold v. Rieger*, 26 Colo. App. 209, 142 P. 201; *Gasper v. People*, 83 Colo. 341, 265 P. 97; *Eachus v. People*, 77 Colo. 445, 236 P. 1009; *Wiley v. People*, 71 Colo. 449, 207 P. 478; *Ward v. Atkinson*, 22 Colo. App. 134, 123 P. 120, cited in note, 72 A. L. R. 33.

A new trial is not to be awarded for the discovery of evidence merely cumulative. *Griffin v. Carrig*, 23 Colo. App. 313, 128 P. 1126, cited in notes, L. R. A. 1916C, 1172, 1183. See also, *Lathrop v. Hallett*, 20 Colo.

App. 207, 77 P. 1095, cited in notes, 132 Am. St. Rep. 160, 23 L. R. A. (N. S.) 705, 706, 709, 90 A. L. R. 266, 271, 278; *Cole v. Thornburg*, 4 Colo. App. 95, 34 P. 1013, cited in note, L. R. A. 1916C, 1183; *Barton v. Laws*, 4 Colo. App. 212, 35 P. 284, cited in notes, L. R. A. 1916C, 1183, 14 A. L. R. 70.

Or evidence which is immaterial.—It is error to grant a new trial on the ground of newly discovered evidence, when such evidence would be immaterial. *Warshauer Sheep, etc., Co. v. Rio Grande State Bank*, 81 Colo. 463, 464, 256 P. 21.

Newly discovered evidence to justify the granting of a new trial must be relevant and material. *Barton v. Laws*, 4 Colo. App. 212, 35 P. 284, cited in notes, L. R. A. 1916C, 1183, 14 A. L. R. 70.

Or which is merely impeaching or discrediting.—The general rule is that a new trial will not be granted for new evidence which is merely impeaching or discrediting. Hence, impeaching evidence which is merely cumulative of what might have been produced at the trial, is not a sufficient ground for a new trial. *Trinidad Creamery Co. v. McDonald*, 82 Colo. 328, 329, 259 P. 1028.

A new trial will not be granted on the ground of newly discovered evidence when such evidence would only corroborate the testimony already given, or where it tends to contradict or impeach a witness. *Warshauer Sheep, etc., Co. v. Rio Grande State Bank*, 81 Colo. 463, 467, 256 P. 21, citing *Edwards v. People*, 73 Colo. 377, 394, 215 P. 855; *Walsmith v. Hudson*, 77 Colo. 326, 236 P. 783; *Eachus v. People*, 77 Colo. 445, 236 P. 1009.

Thus, evidence must be sufficient so as to probably change result on new trial.—The rule is, on a motion for a new trial on the ground of newly discovered evidence, that the evidence proposed to be adduced must be sufficiently important to make it probable that a different verdict will be returned on a new trial. *Wiley v. People*, 71 Colo. 449, 207 P. 478, citing *Colorado Springs, etc., Ry. Co. v. Fogelsong*, 42 Colo. 341, 94 P. 356, cited in notes, L. R. A. 1915B, 244, 45 L. R. A. (N. S.) 89, Ann. Cas. 1913A, 56, 68 A. L. R. 176. See also, *Heishman v. Hope*, 79 Colo. 1, 242 P. 782; *Warshauer Sheep, etc., Co. v. Rio Grande State Bank*, 81 Colo. 463, 467, 256 P. 21; *Walsmith v. Hudson*, 77 Colo. 326, 328, 236 P. 783; *Eachus v. People*, 77 Colo. 445, 450, 236 P. 1009; *Ft. Collins v. Smith*, 84 Colo. 511, 512, 272 P. 6, cited in note, 87 A. L. R. 921; *Specie Payment Co. v. Kirk*, 56 Colo. 275, 139 P. 21; *Trinidad Creamery Co. v. McDonald*, 82 Colo. 328, 329, 259 P. 1028; *Lathrop v. Hallett*, 20 Colo. App. 207, 77 P. 1095, cited in notes, 132 Am. St. Rep. 160, 23 L. R. A. (N. S.) 705, 706, 709, 90 A. L.

R. 266, 271, 278; *Perry v. People*, 38 Colo. 23, 87 P. 796, cited in notes, Ann. Cas. 1914A, 152, 3 A. L. R. 1222; *Lanham v. Copeland*, 66 Colo. 27, 178 P. 562; *Barton v. Laws*, 4 Colo. App. 212, 35 P. 284, cited in notes, L. R. A. 1916C, 1183, 14 A. L. R. 70; *Schlessman v. Brainard*, 104 Colo. 514, 520, 92 P. (2d) 749, cited in notes, 123 A. L. R. 1117, 1130.

Application for new trial should be supported by affidavit stating facts which will be adduced.—In an application for a new trial on the ground of newly discovered evidence, the application should be supported by an affidavit of the newly discovered witness, stating the facts to which he will testify, and if such affidavit is not attached to the application, there should be a showing that it was impossible or impracticable to secure the same. *Wiley v. People*, 71 Colo. 449, 207 P. 478, citing *Cronin v. Hoage*, 71 Colo. 194, 205 P. 271; *Ward v. Atkinson*, 22 Colo. App. 134, 123 P. 120, cited in note, 72 A. L. R. 33.

The affidavit of counsel, based upon information and belief, of what a witness will testify is insufficient to secure a new trial on the ground of newly discovered evidence. *Cole v. Thornburg*, 4 Colo. App. 95, 34 P. 1013, cited in note, L. R. A. 1916C, 1183.

Affidavit must show that by exercise of reasonable diligence such evidence could not have been produced.—If it does not appear from the affidavits in support of a motion for new trial, on the ground of newly discovered evidence, that by the exercise of reasonable diligence such evidence could not have been produced at the trial, the showing is insufficient. *Outcalt v. Johnston*, 9 Colo. App. 519, 49 P. 1058, cited in notes, 21 A. L. R. 335, 336.

The application of a party for a new trial on the ground of newly discovered evidence must show what diligence he exercised in preparing for the first trial, how the new evidence was discovered, why it was not discovered before the trial, and such facts as make it clear that the failure to produce the evidence was not through any fault or want of diligence of the applicant. *Barton v. Laws*, 4 Colo. App. 212, 35 P. 284, cited in notes, L. R. A. 1916C, 1183, 14 A. L. R. 70.

And it must show efforts of applicant to locate witness proposed to be examined.—The affidavits for a new trial on the ground of newly discovered evidence must show the efforts made by the applicant to locate the additional witnesses proposed to be examined, and must exclude all inference of delay or neglect on the part of the applicant. Evidence as to matters not controverted on the trial will not suffice. *Sebold v. Rieger*, 26 Colo. App. 209, 142 P. 201, citing *Barton v. Laws*, 4 Colo. App. 212, 35 P. 284, cited in notes, L. R. A. 1916C, 1183, 14

A. L. R. 70; *Lee-Kinsey Implement Co. v. Jenks*, 13 Colo. App. 265, 57 P. 191.

Where the application for a new trial is grounded upon the alleged discovery, since the trial, of the whereabouts of an absent witness, the affidavit must by a statement of the facts show what efforts the party made before the trial to ascertain the whereabouts of such witness. A mere averment of "all possible diligence" will not suffice. And where it is manifest by the record that long prior to the trial the applicant knew of the materiality of the testimony of the witness, and knew of his whereabouts, the application should be denied. The affidavit of the absent witness as to the facts to which he will testify should be produced, or the failure to procure it excused. *Ward v. Atkinson*, 22 Colo. App. 134, 135, 123 P. 120, cited in note, 72 A. L. R. 33.

Where application is based upon the recent discovery of a document, a copy thereof should be set forth, or at least the substance of it shown; otherwise its pertinency as evidence does not appear. *Colorado, etc., Ry. Co. v. Breniman*, 22 Colo. App. 1, 2, 125 P. 855, cited in notes, L. R. A. 1916C, 613, L. R. A. 1918C, 540, 22 A. L. R. 972, 998.

Motion for new trial held properly overruled.—In an action for damages resulting from an automobile accident, the contention of defendant that a new trial should have been granted on the ground of newly discovered evidence, was considered and overruled. *Morgan v. Gore*, 96 Colo. 508, 44 P. (2d) 918.

Where it was doubtful whether evidence was "newly discovered" motion was refused.—Where evidence offered on motion for new trial would not change court's decision and it was doubtful whether it was "newly discovered" as alleged, motion was refused but case was allowed to be reopened for receipt of the evidence and of evidence in opposition thereto. *United States v. Parisi*, 27 F. Supp. 922; *United States v. Colangelo*, 27 F. Supp. 921.

E. Excessive or Inadequate Damages.

Editor's note.—It is to be noted that the words "appearing to have been given under the influence of passion or prejudice," which constituted part of the fifth subdivision of § 237 of the Code of Civil Procedure, were omitted from the instant subdivision. For cases construing the fifth subdivision of § 237 of the Code of Civil Procedure, see *Colorado, etc., Ry. Co. v. Jenkins*, 25 Colo. App. 348, 138 P. 437, cited in note, L. R. A. 1915F, 435; *Kohut v. Boguslavsky*, 78 Colo. 95, 239 P. 876; *Denver, etc., Ry. Co. v. Heckman*, 45 Colo. 470, 473, 101 P. 976, cited in notes, Ann. Cas. 1913E, 107, 17 A. L. R. 172, 88 A. L. R. 955; *Tunnel Min., etc., Co. v. Cooper*, 50 Colo. 390, 396, 115 P. 901, cited in notes, L. R. A. 1915F, 357.

415, 434, Ann. Cas. 1913A, 1363, 53 A. L. R. 790; Denver, etc., R. Co. v Scott, 34 Colo. 99, 81 P. 763, cited in notes, L. R. A. 1915F, 112, 461; Clark v Aldenhoven, 26 Colo. App. 501, 143 P. 267, cited in notes, L. R. A. 1915F, 76, 189, 275, 6 A. L. R. 987, 1075, 16 A. L. R. 773; Weicker Transfer, etc., Co. v Bedwell, 95 Colo. 280, 35 P. (2d) 1022; Crosby v Canino, 89 Colo. 434, 435, 3 P. (2d) 792, 78 A. L. R. 1202; Ferrari v Brooks-Harrison Fuel Co., 53 Colo. 259, 125 P. 125, cited in notes, L. R. A. 1915F, 498, Ann. Cas. 1914C, 850, Ann. Cas. 1916B, 385, 389, 402, 405, 88 A. L. R. 956; Grand River Valley Ry. Co. v Murphy, 93 Colo. 533, 27 P. (2d) 754.

New trial may be had as to single issue of damages.—Where damages assessed by verdict were grossly inadequate and there was no need of another trial on other issues raised in a negligence action, new trial would be granted as to damages only. Chesevski v Strawbridge & Clothier, 25 F. Supp. 325.

And this is true where jury cannot agree on any damages.—When there has been a general verdict for plaintiff, court may, in its discretion, grant new trial on issue of damages either because jury has agreed upon a grossly excessive or inadequate amount or because jury has been unable to agree on any damages. Tompkins v Pilots Ass'n, etc., 32 F. Supp. 439.

Thus where evidence to show manner in which drowning of seaman occurred had no bearing on amount of pecuniary loss, court was authorized to award a partial new trial on single issue of damages after jury returned a verdict in plaintiff's favor without reaching an agreement on damages. *Id.*

But should not be granted where issues of liability and damages are inexplicably related.—Partial retrial to fix amount of damages should not be allowed where issues of liability and damages are so inexplicably related that a proper verdict upon the one cannot be reached without taking into account the evidence relating to the other. Tompkins v Pilots Ass'n, etc., 32 F. Supp. 439.

But where issues of negligence and contributory negligence were placed clearly before the jury by the instructions, the issues of negligence and damages could be considered separate issues so as to permit new trial on issue of damages only though verdict was general. Dodson v Raker, 1 F. R. D. 368.

Inadequacy of damages held credited to conduct of jury.—Where there was slight question of defendant's negligence and only slight evidence of plaintiff's contributory negligence, inadequacy of damages would not be credited to compromise, so as to preclude granting of new trial on issue of

damages only, but would be credited to an attempt by jury to show their disapproval of plaintiff's conduct in having with him at time of accident a girl other than his wife and of his conduct in disobeying instructions of his superiors. Dodson v Raker, 1 F. R. D. 368.

Award of new trial held proper.—Where interrogatories were not submitted as basis for special verdict, but were submitted with direction that jury return a general verdict, and jury in response to clerk's inquiry replied that they had agreed upon a verdict, which resolved issues of liability in favor of plaintiff, award of partial new trial upon single issue of damages was not improper because of alleged absence of general verdict for plaintiff, notwithstanding jury had first returned with a verdict awarding damages under some sort of installment arrangement which they were instructed they could not do. Tompkins v Pilots Ass'n, etc., 32 F. Supp. 439.

F. Insufficiency of the Evidence.

Editor's note.—The words "to justify the verdict, or other decision, or that it is against law" appearing in the sixth subdivision of § 237 of the Code of Civil Procedure were omitted from the instant subdivision. However, the cases construing the sixth subdivision of § 237 are set out below.

The weight of evidence does not depend upon its volume, or the number of witnesses. Jurors exercise a large discretion in judging of the credibility of witnesses, and separating the true from the false. Their conclusions will not be disturbed, unless the verdict manifests bias, prejudice, or a wanton disregard of their duties and obligation by the jurors. Clark v Aldenhoven, 26 Colo. App. 501, 143 P. 267, cited in notes, L. R. A. 1915F, 76, 189, 275, 6 A. L. R. 987, 1075, 16 A. L. R. 773, citing Green v Taney, 7 Colo. 278, 3 P. 423; Leitensdorfer v King, 7 Colo. 436, 4 P. 37, cited in notes, 42 L. R. A. 753, 754, 766, 769, Ann. Cas. 1914B, 371, Ann. Cas. 1916B, 263; Hallock v Stockdale, 14 Colo. 198, 23 P. 340.

In actions for tort a verdict will not so readily be vacated as against the weight of evidence, as in actions ex contractu. A verdict will not be set aside either in the trial court or the court of review unless it is so manifestly against the weight of evidence as to warrant a presumption that the jury misunderstood the evidence, or misconstrued its effect, or were influenced by improper motives. Clark v Aldenhoven, 26 Colo. App. 501, 143 P. 267, cited in notes, L. R. A. 1915F, 76, 189, 275, 6 A. L. R. 987, 1075, 16 A. L. R. 773.

As a general rule, when the evidence is conflicting the trial court will refuse a new trial even though there may be a slight

preponderance against the verdict. *Clark v. Aldenhoven*, 26 Colo. App. 501, 143 P. 267, cited in notes, L. R. A. 1915F, 76, 189, 275, 6 A. L. R. 987, 1075, 16 A. L. R. 773.

And its action will not be reviewed unless a manifest abuse of discretion appears.—*Clark v. Aldenhoven*, 26 Colo. App. 501, 143 P. 267, cited in notes, L. R. A. 1915F, 76, 189, 275, 6 A. L. R. 987, 1075, 16 A. L. R. 773.

But where the verdict of a jury is manifestly against the weight of the evidence, it will be set aside by the appellate court. *Denver, etc., R. Co. v. Peterson*, 30 Colo. 77, 69 P. 578, cited in notes, 106 Am. St. Rep. 200, 136 Am. St. Rep. 223, 8 L. R. A. (N. S.) 242.

A verdict so manifestly against the weight of the evidence as to appear the result of bias or prejudice, misconception of the evidence, or of its legal effect, or either non-direction or misdirection as to the law of the case, will be set aside. *McGraw v. Kerr*, 23 Colo. App. 163, 128 P. 870, cited in notes, L. R. A. 1915C, 598 Ann. Cas. 1917D, 708, 709, 27 A. L. R. 1250, 78 A. L. R. 698.

Or where the record fails to disclose any satisfactory evidence.—Where the record fails to disclose any satisfactory evidence as to the real merits of the controversy the judgment will be reversed and the cause remanded for a new trial. *Scott v. Conrad*, 24 Colo. App. 452, 135 P. 135, cited in notes, L. R. A. 1915B, 1009, 65 A. L. R. 1015.

II. TIME FOR MOTION.

Editor's note.—Subdivision (b) is the same as the federal subdivision.

Court cannot enlarge time of serving the motion for new trial. *Theiss v. Owens-Illinois Glass Co.*, 1 F. R. D. 175.

Where an appeal had been perfected both by notice of appeal and by filing of an appeal bond, the District Court had no power to entertain a motion filed more than 10 days after date of final judgment for a reargument, for vacation of final judgment, and on reargument for reversal of court's action or, in the alternative, for an order correcting the court's opinion. *Z. & F. Assets Realization Corp. v. Hull*, 31 F. Supp. 371.

III. TIME FOR FILING AND SERVING AFFIDAVITS.

Where no extension of time was obtained for filing motion for new trial, affidavit verified long after expiration of ten days following entry of judgment could not have been served with the motion within the ten-day period, and hence could not be relied on as aiding or implementing the motion for new trial. *Marshall's U. S. Auto Supply v.*

Cashman, 111 F. (2d) 140, wherein a motion for new trial was made on ground of newly discovered evidence.

IV. ON INITIATIVE OF COURT.

New trials are not abridged by new rules and the judge may even grant new trial on his own initiative without a motion. *Pruitt v. Hardware Dealers Mut. Fire Ins. Co.*, 112 F. (2d) 140.

But subdivision relates to situation after entry of judgment.—This provision conferring on court power to order new trial after judgment was inapplicable on application to show cause why further testimony should not be taken and parties further heard before judgment was entered. *Schick Dry Shaver v. General Shaver Corp.*, 26 F. Supp. 190.

The seasonable serving of motion for new trial did not operate to extend the ten-day limit within which trial court could grant new trial on its own initiative, and hence grant of new trial could not be sustained where motion itself was insufficient, merely because court stated, as additional ground for granting new trial, that court was not satisfied with the verdict. *Marshall U. S. Auto Supply v. Cashman*, 111 F. (2d) 140.

V. NO REVIEW UNLESS MADE.

A. In General.

Editor's note.—This subdivision retains the exact wording of Supreme Court Rule 8 and supplants § 424 of the Code of Civil Procedure. Cases construing Supreme Court Rule 8 are set out below.

This provision refers only to errors in the trial of issues of fact. *Armstrong v. Gresham*, 70 Colo. 502, 202 P. 706, followed in *Steere v. McComb*, 71 Colo. 190, 205 P. 526.

And does not apply when the questions presented to the trial court are purely matters of law. *Chemical Bank, etc., Co. v. National Mtg., etc., Corp.*, 94 Colo. 63, 28 P. (2d) 812, citing *Ahart v. Sutton*, 79 Colo. 145, 244 P. 306.

Motion for a new trial is a condition precedent to the maintenance of error to review the judgment. *Snider v. Ostrander*, 62 Colo. 99, 160 P. 195, followed in *Denver Pub. Co. v. Farrell*, 62 Colo. 491, 163 P. 965; *Krohn v. Colorado Springs, etc., Ry. Co.*, 70 Colo. 243, 199 P. 88; *Post Printing, etc., Co. v. Hawkins*, 73 Colo. 481, 216 P. 530; *State v. Nelson*, 75 Colo. 98, 223 P. 1086; *Eachus v. People*, 77 Colo. 445, 236 P. 1009; *Davis v. People*, 77 Colo. 546, 238 P. 25; *Farmers Life Ins. Co. v. Connor*, 82 Colo. 81, 257 P. 260.

So issues of fact determined by the trial court cannot be reviewed in the absence of a motion for a new trial or an order dispensing therewith. *Blackmer v. Blackmer*,

84 Colo. 540, 272 P. 10. See also, *Keenan v. Colorado Farm Lands Co.*, 65 Colo. 113, 173 P. 1140; *Larson v. Long*, 73 Colo. 241, 243, 214 P. 539; *Colorado State Bank v. Bird*, 79 Colo. 625, 247 P. 802; *Parrish's Addition v. Reid*, 82 Colo. 419, 260 P. 1018; *Graham v. Francis*, 83 Colo. 346, 265 P. 690; *Stotts v. Stotts*, 83 Colo. 368, 265 P. 911, cited in note, 76 A. L. R. 394; *Sauve v. Hamilton*, 84 Colo. 498, 271 P. 630; *Watson v. Denver*, 86 Colo. 555, 283 P. 538; *Walters v. Dillon Hdw. Co.*, 89 Colo. 444, 4 P. (2d) 308.

Thus where the hearing of a water adjudication proceeding involved a determination of issues of fact, the writ of error will be dismissed, where no motion for a new trial was filed as required by the rule. *Lapham v. Phillips*, 81 Colo. 449, 255 P. 1100.

Where there is no motion for a new trial on questions of fact, and no order dispensing with such motion, the writ of error will be dismissed, the Supreme Court in such circumstances having no alternative but to conclude that the alleged errors of which complaint is made for the first time on review, did not and do not exist. *Grand Lodge v. Grand Lodge*, 86 Colo. 330, 282 P. 193, citing *Blackmer v. Blackmer*, 84 Colo. 540, 272 P. 10; *Stotts v. Stotts*, 83 Colo. 368, 265 P. 911, cited in note, 76 A. L. R. 394; *Parrish v. Reid*, 82 Colo. 419, 260 P. 1018; *Denver Tramway Corp. v. Gentry*, 82 Colo. 51, 256 P. 1088; *Takamine v. Hirschfeld*, 81 Colo. 501, 256 P. 312, cited in note, 52 A. L. R. 792; *Colorado State Bank v. Bird*, 79 Colo. 625, 247 P. 802, cited in note, 80 A. L. R. 1187; *Price v. People*, 78 Colo. 223, 240 P. 688; *Jones v. Dunlap*, 78 Colo. 221, 239 P. 989; *Daugherty v. People*, 78 Colo. 43, 239 P. 14; *Fincher v. Bosworth & Co.*, 76 Colo. 69, 230 P. 596.

This rule is a wise one, intended to compel parties to litigate all points in the lower court first. *Denver v. Bowen*, 67 Colo. 315, 317, 184 P. 357.

Its purpose is to require that the trial court be given a fair opportunity to correct its own errors. It is not contended that this question was raised by the motion for a new trial unless by the bald statement that "the verdict is contrary to the law and the evidence." If that is sufficient nothing more would be required in any motion for a new trial in any case, no such motion would call the court's attention to anything, and this rule would be useless for any purpose. *Dickson v. People*, 82 Colo. 233, 235, 259 P. 1038. See also, *Leadville v. McDonald*, 67 Colo. 131, 186 P. 715, cited in note, 38 A. L. R. 20; *Southern Surety Co. v. Peterson*, 86 Colo. 350, 281 P. 746.

It only requires that the questions be presented in the motion.—This rule does not state that questions must be presented

to the trial court by a hearing on a motion for a new trial, but only that the questions must be presented in the motion. *Larson v. Long*, 73 Colo. 241, 214 P. 539.

Leave to file motion is discretionary with court.—Under this rule, it is within the discretion of the trial court to grant or refuse leave to file a motion for new trial. *Abshier v. People*, 87 Colo. 507, 508, 289 P. 1081. See also, *May v. People*, 77 Colo. 432, 236 P. 1022, cited in note, 89 A. L. R. 300.

B. When Motion Unnecessary.

A motion for a new trial is not necessary to review a ruling on a motion for judgment non obstante veredicto. *Fincher v. Bosworth & Co.*, 76 Colo. 69, 230 P. 596, citing *Armstrong v. Gresham*, 70 Colo. 502, 202 P. 706.

Failure to file a motion for new trial did not deprive a party of the right to have reviewed an order directing a judgment non obstante veredicto entered after the time for filing the motion had expired. *De Boer v. Olmsted*, 82 Colo. 369, 370, 260 P. 108.

Order dispensing with motion for new trial was in effect a denial of such motion.—Where the trial court regularly ordered that the filing of a motion for new trial be dispensed with, the order in effect was a denial of any such motion that might otherwise have been filed. *Dickson v. Horn*, 89 Colo. 234, 1 P. (2d) 96.

After order was entered the defeated party could not postpone final determination of the cause by filing such a motion. *Dickson v. Horn*, 89 Colo. 234, 235, 1 P. (2d) 96. See also, *Swanson v. First Nat. Bank*, 74 Colo. 135, 136, 219 P. 784.

Fact that motion was undisposed of when court announced motion was unnecessary was immaterial.—The fact that a motion for a new trial was undisposed of at the time the decree was signed, was immaterial, where the court announced at the time of making its findings, that such a motion was unnecessary. *Swanson v. First Nat. Bank*, 74 Colo. 135, 219 P. 784.

C. Application.

All errors relied on as grounds of a motion for a new trial should be specifically set forth in the motion. *Jones v. Dunlap*, 78 Colo. 221, 239 P. 989.

Motion for a new trial which states that "The court erred in admitting, over defendant's objections, certain evidence offered by plaintiff, to which rulings defendant excepted," held not sufficiently specific in view of Supreme Court Rule 8, to entitle defendant to a review of the court's rulings on such questions. *Denver Tramway Corp. v. Gentry*, 82 Colo. 51, 256 P. 1088.

Since questions not presented in such motion will not be considered on review. *Jennings v Board of County Comr's*, 85 Colo. 498, 499, 277 P. 467, citing *Freeman v Frasher*, 84 Colo. 67, 268 P. 538, cited in note, 65 A. L. R. 616. See also, *Daugherty v People*, 78 Colo. 43, 239 P. 14.

Failure to raise question as to sufficiency of complaint.—Where the motion for a new trial raised no question as to the sufficiency of the complaint no such question would be considered in this court. *Denver v Bowen*, 67 Colo. 315, 184 P. 357.

Or the giving of oral instructions.—Where no mention was made in the motion for a new trial concerning oral instructions given by the court, an assignment of error

based thereon required no consideration on review. *Schlesinger v Miller*, 97 Colo. 583, 52 P. (2d) 402.

Or the admission or rejection of evidence.—If error in the admission or rejection of evidence is relied upon, the evidence improperly admitted or excluded must be specifically designated in the motion for a new trial. Where the evidence is conflicting, if there is sufficient to support the judgment it will not be disturbed on review. *Jones v Dunlap*, 78 Colo. 221, 239 P. 989.

A motion which clearly indicates the objections sought to be raised thereby is sufficient. *Leadville v McDonald*, 67 Colo. 131, 186 P. 715, cited in note, 38 A. L. R. 20.

Rule 60. Relief From Judgment or Order.

(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

C (b) **Mistake; Inadvertence; Surprise; Excusable Neglect.** On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding 6 months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) when, for any cause, the summons in an action has not been personally served within or without the state on the defendant, to allow, on such terms as may be just, such defendant, or his legal representatives, at any time within 6 months after the rendition of any judgment in such action, to answer to the merits of the original action. [Supplants part of Code Sec. 50 (par. e) and Sec. 81.]

- I. Clerical Mistakes.
- II. Mistake; Inadvertence; Surprise; Excusable Neglect.
 - A. General Consideration.
 - B. Time for Motion.

Cross Reference.

For a discussion of this rule, see Address no. 11 in appx. D. As to stay of pro-

ceedings to enforce judgment pending disposition of motion under this rule, see Rule 62 (b).

I. CLERICAL MISTAKES.

Under this rule, court could not set aside order sustaining a demurrer to amended complaint without leave to amend where court of its own knowledge knew that order was not made as result of oversight or

omission and ruling was complained of for first time two years and nine months after it was made. *Shurtz v. Foster, etc., Co.*, 29 F. Supp. 162.

II. MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT.

A. General Consideration.

Subdivision (b) is not intended to provide relief for error on the part of the court, but it is concerned rather with the mistake, inadvertence, surprise or excusable neglect of a party. *Nachod, etc., Signal Co. v. Automatic Signal Corp.*, 32 F. Supp. 588.

Court may vacate order of dismissal for want of prosecution.—Under this rule court had power to act on plaintiff's petition to vacate order of dismissal for want of prosecution, and, where plaintiff's petition showed sufficient excuse for failure to prosecute to make it proper to set aside the judgment of dismissal and defendant denied the facts, a hearing would be held on the petition. *Dauphinee v. American Range Line*, 1 F. R. D. 437.

The lower court judge was without power to alter a judgment which had been affirmed by the appellate court by adding provision for interest from date of institution of suit to date of judgment, notwithstanding this rule. *Home Indemnity Co. v. O'Brien*, 112 F. (2d) 387. See also, *Miller v. United States*, 114 F. (2d) 267.

B. Time for Motion.

The power of the court is limited to six months.—After expiration of six months, court was without authority to relieve defendant from an order of default. *Cassell v. Barnes*, 1 F. R. D. 15.

Under this rule, a wife was not entitled to relief on allegation that decree awarding alimony was entered by mistake where decree was entered March 14, 1939, and wife first moved to reopen case on December 27, 1939, and filed motion on January 19, 1940. *Moran v. Moran*, 31 F. Supp. 227.

This six-months period may extend beyond term of court.—By virtue of Rule 6 (c), the power of the court to grant relief provided for in subdivision (b) of this rule is extended beyond the term. *National Pop-sicle Corp. v. Hughes*, 32 F. Supp. 397. See also, *Sprague v. Ticonic Nat. Bank*, 307 U. S. 161, 59 S. Ct. 777, 83 L. Ed. 1184.

This limitation shortens the time previously allowed.—Under § 81 of the Code of Civil Procedure, supplanted by this rule, the party aggrieved could apply for relief within six months after the adjournment of the term at which the judgment, order or proceeding was taken. The rule now provides that the motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order or proceeding was taken.—Ed. note.

And under the Code of Civil Procedure, when the limiting periods had passed, order vacating judgment was absolutely void for lack of jurisdiction. *Elder v. Richmond Gold, etc., Min. Co.*, 58 F. 536. See also, *Board of Control v. Mulertz*, 60 Colo. 468, 154 P. 742, cited in notes, Ann. Cas. 1916E, 1017, 76 A. L. R. 658; *Empire Const. Co. v. Crawford*, 57 Colo. 281, 141 P. 474.

The period may not be enlarged.—Rule 5 providing for the enlargement of the period allowed for the doing of any act does not enlarge the express limitation of this rule providing that a motion for relief against mistake shall be brought in no case exceeding six months after order was taken. *Nachod, etc., Signal Co. v. Automatic Signal Corp.*, 32 F. Supp. 588.

Rule 61. Harmless Error.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. [Supplants Code Secs. 84 and 439.]

Cross references.—For a discussion of this rule, see Address no. 11 in appx. D. As to disregard of error not affecting sub-

stantial rights by Supreme Court, see Rule 118 (f).

This rule is intended for guidance of trial

courts, but should be heeded by appellate courts to make it effective. *University City v. Home Fire, etc., Ins. Co.*, 114 F. (2d) 288.

And is not intended to deprive a litigant of a substantial right in the trial of a case. *University City v. Home Fire, etc., Ins. Co.*, 114 F. (2d) 288.

Appellate court will not disturb judgment where it appears substantial justice has been done.—Harmless error is not ground for setting aside or disturbing verdict or judgment, and appellate court will not disturb judgment where, after an examination of the entire record, it appears that substantial justice has been done. *Morgan v. Sun Oil Co.*, 109 F. (2d) 178.

Whether a "substantial right" is invaded by admission of irrelevant and incompetent evidence depends upon circumstances. *University City v. Home Fire, etc., Ins. Co.*, 114 F. (2d) 288.

Admission of evidence.—In action for death of motorist in collision with rear of parked truck, where there was evidence from which jury could have properly formed their own opinion as to speed of automobile so that alleged erroneous admission of an opinion with respect thereto could not have affected substantial rights of plaintiff, the admission of the opinion could under the rule be disregarded on appeal. *Woods v. Gettelfinger*, 108 F. (2d) 549.

Admission of evidence was held prejudicial in *University City v. Home Fire, etc., Ins. Co.*, 114 F. (2d) 288.

Exclusion of evidence.—Exclusion of deceased plaintiff's deposition where plaintiff's two witnesses contradicted each other as to matter which was also touched in the deposition was reversible error. *Cervin v. W. T. Grant Co.*, 100 F. (2d) 153.

In declaratory actions concerning obligation of automobile liability insurer, exclu-

sion of affidavit executed by insured's president at behest of insurer's adjuster was not ground for reversal, where jury's verdict was advisory only and insurer in course of examination had substantial benefit from existence of affidavit. (*American*) *Lumbermens Mut. Cas. Co. v. Timms & Howard*, 108 F. (2d) 497.

Dismissal of counts where issues raised thereby are covered by other counts is harmless.—In suit by trustee in corporate reorganization proceedings against creditor to recover amount received by creditor which resulted in a preference of the creditor, wherein issues raised by counts under Bankruptcy Act were the same as issues of fact presented by count under New York law which were sent to jury, if dismissal of counts based on Bankruptcy Act was error, the error was harmless and under Civil Procedure Rule was required to be disregarded. *Hughes v. Lawyers Trust Co.*, 108 F. (2d) 792.

Error in charging that 7-year statute of limitations, rather than 21-year statute, was applicable was harmless, where, under defendant's evidence, jury could not have found that defendants had been in possession for 7 years without finding that they had been in possession 21 years. *Virginia-Carolina Tie, etc., Co. v. Dunbar*, 106 F. (2d) 383.

New trial refused where error was in the form of the verdict and did not affect the substantial rights of the parties, the error being a technical defect which the trial court had power to remedy. *United States v. 20.08 Acres of Land*, 35 F. Supp. 265.

Admission of evidence constituted no ground for new trial in *Manley v. Northumberland County*, 32 F. Supp. 775.

Judgment vacated and case reassigned for trial on the merits, see *United States v. Schaeffer*, 33 F. Supp. 547.

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) Automatic Stay; Exceptions; Injunctions, Receiverships. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. An interlocutory or final judgment in an action for an injunction or in a receivership action shall not be so stayed, provided that until and unless a supersedeas is granted the trial court in its discretion may suspend, modify, restore or grant an injunction upon such terms as to bond or otherwise as it

considers proper for the security of the rights of the adverse party. [Supplants Supreme Court Rules 9 and 22 and Code Secs. 161 and 425.]

Committee Note.

See Rule 113 for supersedeas.

(b) **Stay on Motion for New Trial or for Judgment.** In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52 (b), or pending the filing and determination of an application to the supreme court for a supersedeas. [Supplants Supreme Court Rule 9.]

For a discussion of this rule, see Address no. 11 in appx. D.

Rule 63. Disability of a Judge.

If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge lawfully sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

For a discussion of this rule, see Address no. 11 in appx. D.

Rule 64.

Committee Note.

There is no Colorado rule under this heading. The Federal rule is inapplicable to state practice.

CHAPTER VII

INJUNCTIONS, RECEIVERS, DEPOSITS IN COURT,
OFFER OF JUDGMENT**Rule 65. Injunctions.**

(a) **Preliminary; Notice.** No preliminary injunction shall be issued without notice to the adverse party. [Supplants Code Secs. 167 and 169.]

(b) **Temporary Restraining Order; Notice; Hearing; Duration.** No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint or by testimony that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed, the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and take precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. [Supplants Code Secs. 165 and 167.]

Committee Note.

In this action verification is necessary.

C (c) .Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or of any county or municipal corporation of this state or of any officer or agency thereof

acting in official capacity. If at any time it shall appear to the court that security given under this rule has become impaired or is insufficient, the court may vacate the restraining order or preliminary injunction unless within such time as the court may fix the security be made sufficient. [Supplants Code Secs. 163, 164, 165 and 173.]

(d) **Form and Scope of Injunction or Restraining Order.** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) [This Federal subdivision is omitted because it is inapplicable to state procedure.]

Committee Note.

There are no Federal subdivisions 65 (f), (g), (h) and (i).

C (f) Mandatory. If merely restraining the doing of an act or acts will not effectuate the relief to which the moving party is entitled, an injunction may be made mandatory. Such relief may include an injunction restoring to any person any property from which he may have been ousted or deprived of possession by fraud, force or violence, or from which he may have been kept out of possession by threats or words or actions which have a natural tendency to excite fear or apprehension of danger. [From Code Sec. 159 and 176.]

C (g) When Relief Granted. Relief under this rule may be also granted on the motion of any party at any time after an action is commenced and before or in connection with final judgment. [Supplants Code Sec. 161 and 168.]

C (h) When Inapplicable. This rule shall not apply to suits for divorce, alimony, separate maintenance or custody of infants. In such suits, the court may make prohibitive or mandatory orders, without notice or bond, as may be just. [New.]

C (i) State Courts Jurisdiction When Suit Commenced in Federal Court; Stay of Proceedings; Notice; Writ of Error. Whenever a suit praying for an interlocutory injunction shall have been begun in a federal district court to restrain any official or officials of this state from enforcing or administering any statute or administrative order of this state, or to set aside such statute or administrative order, any defendant in such suit or the attorney general of the state may bring a suit to enforce such statute or order in the district court of the state at any time before the hearing on the application for an interlocutory injunction in the suit in the federal court; and jurisdiction is hereby conferred upon the district courts of the state, and on the supreme court on writ of error as hereinafter set out, to entertain such suit with the powers hereinafter granted. The district court shall, when such suit is brought, grant

a stay of proceedings by any state officer or officers under such statute or order pending the determination of such suit in the courts of the state. The district court shall, upon the bringing of such suit therein, at once cause a notice thereof together with a copy of the stay order by it granted, to be sent to the federal district court in which the action was originally begun. A writ of error may be taken within 10 days after the termination of the suit in the state district court to the supreme court of the state and such writ of error shall be in every way expedited and set for an early hearing. [Code Sec. 178 A.]

Committee Note to Subdivision.

Code Section 178A and this subdivision are in conformity with Federal Judicial Code Section 266.

Committee Note to Rule.

In the opinion of the Committee Rule 65 and other Rules supplant all of Code Sections 159 to 178A except that portion of Code Section 162 referred to in the "Statement by the Revision Committee."

- I. Subdivision (a).
- II. Subdivision (b).
- III. Subdivision C (c).
- IV. Subdivision (d).
- V. Subdivision C (f).

Cross Reference.

For a discussion of this rule, see Address no. 12, appx. D.

I. SUBDIVISION (a).

The type of notice is left to discretion of court.—Although no preliminary injunction can issue without notice to the adverse party, this subdivision leaves the type of notice to be given to the discretion of the court. See 3 Moore's Fed. Prac. 3322.

When issue should be determined summarily.—Where there is nothing that can be modified or changed or that needs further exploration, and there is no factual situation that could be more definitely presented in the future than immediately, and the same issue will be presented even after extensive arguments, the issue raised by application for preliminary injunction restraining pendente lite commercial use of term in manufacture, sale and marketing of a beverage should be determined summarily. Coca-Cola Co. v Los Angeles Brewing Co., 1 F. R. D. 67.

II. SUBDIVISION (b).

Editor's note.—This subdivision provides that "immediate or irreparable injury" may be shown by testimony. The corresponding Federal Rule contains no such provision. Under the Federal Rule the fact that the complaint is not verified is not important as long as the prayer for preliminary injunction is not pressed. See Thermex Co. v Lawson, 25 F. Supp. 414, 415.

Injury contemplated must be real.—To warrant the granting of an injunction on the ground that irreparable injury for which the remedies at law are inadequate is threatened, the injury contemplated must be real, not fancied, actual, not prospective, and threatened, not imagined. Redlands Foothill Groves v Jacobs, 30 F. Supp. 995.

III. SUBDIVISION C (c).

Editor's note.—The first sentence of this subdivision is taken verbatim from the Federal Rule. The remainder is taken from § 173 of the code.

Bond covers only damages and costs directly sustained as result of injunction.—The bond required by this rule does not require payment of such sum as court may decree to be paid on the merits, but covers only the damages and costs directly sustained as result of suing out the injunction or restraining order. See 3 Moore's Fed. Prac. 3323. See also, Penmac Corp. v Falcon Pencil Corp., 28 F. Supp. 639.

Damages occasioned by suit independently of an injunction granted therein are not recoverable in action on injunction bond and recovery on the bond must be confined to damages arising from operation of the injunction itself. Greenwood County v Duke Power Co., 107 F. (2d) 484.

Awarding of damages is within discretion of court.—The awarding of damages under temporary injunction bond is not a matter of right, and is a matter resting in the sound discretion of the court. Greenwood County v Duke Power Co., 107 F. (2d) 484.

Until relief is ready to be granted, indemnifying security is not required. If the suit is permitted to go to final hearing without interlocutory relief being granted, no security will be required. Thermex Co. v Lawson, 25 F. Supp. 414, 415.

Thus, complaint should not be dismissed because no bond has been given.—The fact that no indemnity bond had been given did not require dismissal of complaint containing prayer for preliminary injunction. *Thermex Co. v Lawson*, 25 F. Supp. 414.

Investments should not be considered in fixing amount of bond.—The investment of corporations, deliberately and continuously infringing beverage trade-mark and invading owner's trade rights, with knowledge of such facts because of their officer's experience in beverage field and formal notice thereof, should not be considered in fixing amount of bond owner should be required to file on issuance of preliminary injunction against such infringement and invasion. *Moxie Co. v Noxie Kola Co.*, 29 F. Supp. 167.

Application.—In suits by trustees for bondholders under corporate bond issues for specific performance of corporation's covenant to maintain collateral security at 150 per cent. of principal amount of outstanding bonds, trustees were required to furnish bond in amount of \$5,000 on issuance of preliminary injunction restraining corporation from disposing of unpledged cash sum of \$413,325.39 claimed to be subject to agreement to deposit collateral. *Marine Midland Trust Co. v Alleghany Corp.*, 28 F. Supp. 680.

As condition of issuance of preliminary injunction against infringement of patent on application by plaintiffs in injunction suit, they must give security for payment of costs and damages which defendant may incur or suffer if found to have been wrongfully enjoined, and directions in this rule must be followed by counsel in preparing order granting such injunction. *Penmac Corp. v Falcon Pencil Corp.*, 28 F. Supp. 639.

IV. SUBDIVISION (d).

In suits for specific performance of corporation's covenant to maintain collateral

security at 150 per cent. of principal amount of outstanding bonds, form of preliminary injunction restraining corporation from disposing of cash sum subject to agreement to deposit would be governed by this rule. *Marine Midland Trust Co. v Alleghany Corp.*, 28 F. Supp. 680.

V. SUBDIVISION C (f).

Cross reference.—As to prohibition against issuance of mandatory injunction by county judge, see vol. 2, ch. 46, § 160.

Power to issue writ should be exercised with great discretion.—The writ of injunction is the strong arm of the court, and to render its operation benign and useful, the power to issue it should be exercised with great discretion, and when necessity requires it. *McLean v Farmers' High Line Canal, etc., Co.*, 44 Colo. 184, 195, 98 P. 16.

Evidence of wrongful entry and retention thereof by force held to support decree in *Sprague v Locke*, 1 Colo. App. 171, 174, 28 P. 142.

Conditional decree may be granted.—Trial courts have considerable latitude in injunction cases, and if convinced that a plaintiff should comply with certain conditions in order that equity might be done between the parties, such conditions may be prescribed, and compliance therewith required as a prerequisite to the granting of injunctive relief. *Brennan v Monson*, 97 Colo. 448, 50 P. (2d) 534.

Decree ordering restitution is final and appealable.—In an action founded on a complaint for injunction and affirmative relief wherein it is alleged that the plaintiffs were ousted by the defendants, by force and violence from the possession of mining property, and its possession ever since withheld from them by fire-arms and threats of violence, a decree ordering restitution of the property to the plaintiffs is a final judgment from which an appeal will lie. *Sprague v Locke*, 1 Colo. App. 171, 28 P. 142.

Rule 66. Receivers.

Committee Note.

This rule is entirely state practice.

(a) **When Appointed.** A receiver may be appointed by the court in which the action is pending at any time:

(1) Before judgment, provisionally, on application of either party, when he establishes a *prima facie* right to the property, or to an interest therein,

which is the subject of the action and is in possession of an adverse party and such property, or its rents, issues and profits are in danger of being lost, removed beyond the jurisdiction of the court, or materially injured or impaired; or

(2) By or after judgment, to dispose of the property according to the judgment, or to preserve it during appellate proceedings; or

(3) In other cases where proper and in accordance with the established principles of equity. [Supplants Code Sec. 180.]

(b) **Oath and Bond, Suit on Bond.** Before entering upon his duties, the receiver shall be sworn to perform them faithfully, and shall execute, with one or more sureties, an undertaking with the people of the state of Colorado, in such sum as the court shall direct, to the effect that he will faithfully discharge his duties and will pay over and account for all money and property which may come into his hands as the court may direct, and will obey the orders of the court therein. The undertaking, with the sureties, must be approved by the court, or by the clerk thereof when so ordered by the court, and may be sued upon in the name of the people of the state of Colorado, at the instance and for the use of any party injured. [Supplants part of Code Sec. 183.]

- I. When Appointed.
 - A. General Consideration.
 - B. Power to Appoint.
 1. In General.
 2. Subdivision a (3).
 - C. Rights and Duties of Receiver.
- II. Oath and Bond.

Cross References.

As to appointment of receivers for corporations, see vol. 2, ch. 41, § 69 and the notes thereto. As to provisions forbidding appointment of receiver for bank, see vol. 2, ch. 18, § 91. As to provisions forbidding appointment of receiver for a building and loan association, see vol. 2, ch. 29, § 57.

For a discussion of this rule, see Address no. 12, appx. D.

I. WHEN APPOINTED.

A. General Consideration.

Editor's note.—As stated in the committee note, this rule is entirely state practice. The instant subdivision is taken almost verbatim from Code § 180. Hence, the cases construing that section are included in this note as applicable to the instant subdivision.

As to power of court after appointment of receiver over lands in another state, see *Schindelholz v. Cullum*, 55 F. 885.

B. Power to Appoint.

1. In General.

Appointment upon a preliminary hearing is discretionary.—Whether a receiver will

or will not be appointed upon a preliminary hearing is a matter which ordinarily rests in the sound discretion of the trial court and there will be no interference with the exercise of that discretion by an appellate court, save in a clear case of abuse. *Melville v. Weybrew*, 106 Colo. 121, 103 P. (2d) 7, 9.

But, courts have no jurisdiction to appoint receivers except in pending suits.—Hitherto it has been the universally accepted opinion that courts have no jurisdiction to appoint a receiver except in a suit pending in which the receiver is desired—unless in cases of idiots, lunatics and infants, which, as Lord Hardwicke says in *Ex parte Whitfield*, 2 Atkins 315, is “a particular jurisdiction.” The doctrine is applied in *Baker v. Backus*, 32 Ill. 79, 95; *Davis v. Flagstaff Silver Min. Co.*, 2 Utah 74, 92; *Hardy v. McClellan*, 53 Miss. 507; *Hugh v. McRea*, Chase's Dec. 466, Fed. Cas. 6840; *La Societe Francaise D'Espergnes, etc. v. District Court*, 53 Cal. 495, 550; *Kimball v. Goodburn*, 32 Mich. 10; *People v. Jones*, 33 Mich. 303; and *High on Receivers. Jones v. Bank*, 10 Colo. 464, 473, 17 P. 272, cited in notes, 72 Am. St. Rep. 71, 118 Am. St. Rep. 199, 20 L. R. A. 210, 22 L. R. A. 808, Ann. Cas. 1912B, 236, 84 A. L. R. 1448, 1464.

The plain intent of this provision is that there shall be a controversy between two or more adverse parties moved in the court, involving some conflicting and hostile claims to property that is, at least in part, the subject-matter of the litigation. It is evident that in the mind of the legislature it was necessary to this jurisdiction that

there should be some party in all these proceedings who was adverse to the defendant, and whose rights to certain property were to be protected and adjudicated. *Id.*

It is impossible by any process of reasoning to construe this provision so as to make it apply to any case in which an action (in the ordinary definition of the term) is not pending. To hold that courts of equity can entertain jurisdiction to appoint a receiver of property as the substantive ground and ultimate object and purpose of the suit, on the petition of the owner of the property to be controlled and protected, would be to make them the administrators of every estate where the owners thereof were incapable or unwilling to administer them themselves. *Id.*

Thus, the appointment of a receiver to impound assets of an estate to pay a claim that does not exist, is a nullity. *Wright v Halley*, 95 Colo. 148, 33 P. (2d) 966.

But the appointment of a receiver contrary to these provisions is only an error, and not a jurisdictional question, where it appears that the court had jurisdiction of the subject-matter and parties. *Riant Amusement Co. v Bailey*, 80 Colo. 65, 249 P. 7.

And an improper appointment cannot be considered in contempt proceedings.—In proceedings to foreclose a trust deed, where a receiver is appointed to take charge of the property, invalidity of the foreclosure decree, improper appointment of the receiver, or a claim that the receiver's tenure was terminated by the foreclosure sale, cannot be considered in contempt proceedings based upon interference with the receivership property. *Clear Creek Power, etc., Co. v Cutler*, 79 Colo. 355, 356, 245 P. 939, 48 A. L. R. 237.

A receiver should not be appointed for a corporation in an action by a simple contract creditor to prevent the corporation from fraudulently disposing of its property, and putting beyond its power the ability to respond to a judgment sought to be obtained on an unsecured debt. *International Trust Co. v United Coal Co.*, 27 Colo. 246, 60 P. 621, 83 Am. St. Rep. 59, cited in notes, 118 Am. St. Rep. 204, 128 Am. St. Rep. 107, Ann. Cas. 1913C, 42, 44, 45, 48, 53, 40 A. L. R. 245, 50 A. L. R. 147.

But, a minor may through guardian have receiver appointed to collect rents.—A minor may during his minority enter upon premises to which he has given a deed to another, and receive the rents and profits thereof until he arrives at an age when he has the capacity to affirm or disaffirm the deed at his election; or he may by his guardian or next friend procure the appointment of a receiver for the purpose of collecting the rents and profits of the premises.

Hutchinson v McLaughlin, 15 Colo. 492, 25 P. 317, 11 L. R. A. 287, cited in note, 66 L. R. A. 89.

Allegations of a complaint in a receivership proceeding held sufficient in *Riant Amusement Co. v Bailey*, 80 Colo. 65, 249 P. 7.

Complaint held insufficient.—In a proceeding by petition for the appointment of a receiver of a corporation for the purpose of an accounting where there was no complaint alleging the indebtedness of the corporation and no service of process upon the corporation, the court had no jurisdiction to enter a judgment against the corporation. *Paddock v Staley*, 13 Colo. App. 363, 58 P. 363, cited in notes, 117 Am. St. Rep. 784, 8 A. L. R. 453.

Sufficiency of evidence.—In a proceeding involving the appointment of a receiver, evidence reviewed, and held that the court did not abuse its discretion in making the appointment. *Riant Amusement Co. v Bailey*, 80 Colo. 65, 249 P. 7.

2. Subdivision (a)(3).

Power to appoint receivers should be exercised with caution.—While courts have jurisdiction to appoint receivers for corporations, the power should be exercised with the utmost caution, and only where a receiver is imperatively necessary to protect property rights. *Eureka Coal Co. v McGowan*, 72 Colo. 402, 212 P. 521, cited in notes, 43 A. L. R. 246, 260, 270.

Courts of equity have no jurisdiction to appoint a receiver except in a pending action in which the receiver is desired. *People v District Court*, 33 Colo. 293, 80 P. 908, cited in notes, 111 Am. St. Rep. 962, 39 L. R. A. (N. S.) 1033, Ann. Cas. 1912B, 236, Ann. Cas. 1915B, 581, Ann. Cas. 1915C, 898, 904, 43 A. L. R. 289.

Receiver for corporation may be appointed.—Where the two principal stockholders of a corporation were engaged in a contest over the control of the property, and the outstanding capital stock was so distributed that no board of directors could be elected to manage the affairs of the company, it is held that a receiver was properly appointed. *Eureka Coal Company v McGowan*, 72 Colo. 402, 212 P. 521, cited in notes, 43 A. L. R. 246, 260, 270.

But, this provision does not give an equity court authority to dissolve a corporation or to appoint a receiver at the suit of an individual stockholder who complains of fraud in the management of the affairs of the corporation. *People v District Court*, 33 Colo. 293, 80 P. 908, cited in notes, 111 Am. St. Rep. 962, 39 L. R. A. (N. S.) 1033, Ann. Cas. 1912B, 236, Ann. Cas. 1915B, 581, Ann. Cas. 1915C, 898, 904, 43 A. L. R. 289.

Therefore, the appointment of a receiver for a corporation does not work its dissolution. *Steinhauer v Colmar*, 11 Colo. App. 494, 55 P. 291, cited in notes, L. R. A. 1916E, 316, Ann. Cas. 1915C, 1248, 1249, 8 A. L. R. 443, 459, 47 A. L. R. 1418.

Where equity will sustain a creditor's bill, it will also grant the aid of the ancillary remedies of injunction and receiver. *Livingston v Swofford Bros. Dry Goods Co.*, 12 Colo. App. 320, 328, 56 P. 351, cited in notes, 23 L. R. A. (N. S.) 85, 38 A. L. R. 269.

C. Rights and Duties of Receiver.

A receiver is an officer of the court. *McClain v Saranac Machine Co.*, 94 Colo. 145, 28 P. (2d) 1009, cited in note, 92 A. L. R. 317; *Casserleigh v Malone*, 50 Colo. 597, 115 P. 520, cited in note, 44 L. R. A. (N. S.) 166.

His possession of property in his official capacity is the possession of the court and not of the party at whose instance he is appointed. *McClain v Saranac Machine Co.*, 94 Colo. 145, 28 P. (2d) 1009, cited in note, 92 A. L. R. 317.

And one who interferes with his possession is guilty of contempt.—One who interferes with receivership property in the custody of the law without permission of the court in whose custody it is, is guilty of contempt. *Clear Creek Power, etc., Co., v Cutler*, 79 Colo. 355, 356, 245 P. 939, 48 A. L. R. 237.

But this does not deprive stranger of right to have receiver institute suit to try title to property.—While the court which appoints a receiver exercises general control over the property that comes into the possession of the receiver as such, this power of control does not deprive a stranger, who claims by paramount title, of the right

to have a suit or proceeding instituted by the receiver to try the question of title, and the better practice is for the receiver to bring an independent adverse suit in the tribunal where the defendant has the right to have the controversy decided. *Pomeranz v National Beet Harvester Co.*, 82 Colo. 482, 261 P. 861.

And the receiver has only the right and title of the owner.—A receiver holds the property coming into his hands by the same right and title as the person for whose property he is receiver, subject to liens, priorities and equities existing at the time of his appointment. *Tolland Co. v First State Bank*, 95 Colo. 321, 322, 35 P. (2d) 867.

A receiver succeeds to no rights beyond those of company for which appointed. *Brown v Schleier*, 112 F. 577.

Supplemental order will be allowed to bring up order of court allowing receiver compensation.—A supplemental transcript will be allowed to bring up an order of the lower court made in the case after the case was at issue in the Supreme Court on appeal, allowing a receiver appointed under this section, compensation for his services and making the award therefor a first and prior lien upon the property in question. *Jorammon v McPhee*, 29 Colo. 135, 66 P. 882.

As to power of receiver to administer assets, see *Flint v Powell*, 18 Colo. App. 425, 72 P. 60, and the authorities therein cited.

As to duties as to management of railroad property, see *Frank v Denver, etc., Ry. Co.*, 23 F. 757.

II. OATH AND BOND.

See vol. 4, ch. 117, § 4.

This subdivision is taken verbatim from Code § 183.—Ed. note.

Rule 67. Deposit in Court.

C (a) By Party. In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, to be held by the clerk of the court subject to withdrawal in whole or in part at any time thereafter upon order of the court.

Committee Note.

Federal Rule 67 has only one unlettered subdivision.

C (b) By Trustee. When it is admitted by the pleadings or examination of a party that he has in his possession or under his control any money or other things capable of delivery which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, upon motion, the court may order the same to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court. [Supplants Code Sec. 179.]

For a discussion of this rule, see Address no. 12, appx. D.

Rule 68. Offer of Judgment.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. If the offer is not so accepted it shall be deemed withdrawn and evidence thereof is not admissible. If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the trial court from the time of the offer but shall pay costs from that time. [Supplants Code Sec. 313.]

Cross references.—For a similar provision applicable to proceedings before justices of the peace, see vol. 3, ch. 96, § 24. For a discussion of this rule, see Address no. 12, appx. D.

Editor's note.—The rule supplants code § 313 which was almost identical with the exception of the time limits prescribed. Thus, cases construing § 313 are included in this note.

Compromise of disputed claims is encouraged by the courts, supported so far as legally possible, and protected even in case of doubtful claims. *Staley v Nazarenus*, 86 Colo. 326, 281 P. 358.

Parties are always at liberty to compromise and settle matters of dispute. When such a settlement is clearly ascertained to have been fairly made, courts will not disturb it. *Berdell v Bissell*, 6 Colo. 162, cited in notes, 100 Am. St. Rep. 430, 15 L. R. A. 438, 20 L. R. A. 796, 800.

Where a party makes an offer of a certain sum to settle a claim, when the sum in controversy is open and unliquidated, and

attaches to his offer the condition that the same, if taken, must be received in full or in satisfaction of the claim, and the other party receives the money, he takes it subject to the condition, and it will operate as a full accord and satisfaction. *Id.*

Offer must be accepted within time limit.—Defendant is not bound by an offer to allow judgment for the sum specified unless the offer is accepted within the time limit. *Hagerman v Mutual Life Ins. Co.*, 45 Colo. 459, 103 P. 276.

Effect of failure to accept offer.—Where plaintiff failed to accept a tender made by defendant under this section and to give notice thereof as required, the tender must be considered as withdrawn and plaintiff is not entitled to a judgment therefor. *Mitchell v Pearson*, 34 Colo. 281, 82 P. 447.

A verdict less favorable than offer is wrong.—A verdict which is less favorable than the offer which was made by the defendant, because the amount of that offer, with interest thereon at the legal rate from the time it was made to the date of the verdict, exceeds the amount of the verdict,

is wrong, and a judgment upon such a verdict is vulnerable upon this ground. *Florence Oil, etc., Co. v. Farrar*, 119 F. 150, 151.

Service under this rule.—Under this rule, it was contemplated that party making offer should serve it as provided by the rule prescribing modes of service and authorizing it to be made upon the attorney unless the court directs otherwise, by mail, by handing it to him or leaving it at his office, and if his adversary serves written notice of acceptance it should then be filed, but if unaccepted all that the offeror need to do is to make proof of it at the proper time and save himself in the matter of costs if recovery does not exceed what was tendered. *Nabors v. Texas Co.*, 32 F. Supp. 91.

Answer held not an offer.—Answer admitting the sum claimed by plaintiff, and averring a readiness at all times to pay the same "upon delivery to defendant of a receipt, etc., and to keep said tender good, defendant has deposited in this court," the amount admitted "payable to the order of plaintiff upon delivery by plaintiff of said receipt." Held, neither a tender nor an offer of judgment under this rule. *Harvey v. Denver, etc., R. Co.*, 56 Colo. 570, 139 P. 1098.

Action on agreement.—Defendant, desiring to sell an interest in a mine, and to have accounts with her co-owners adjusted, consulted indiscriminately, with regard to the transaction, a firm of attorneys and an accountant, and a joint bill for their services was presented. The amount being objected to, a compromise was agreed upon, by which a certain sum was to be accepted in full for such services. Held, that the attorneys and accountant could maintain an action against defendant for the recovery of an unpaid balance of the sum agreed on. *Leichsenring v. Allen*, 12 Colo. 168, 20 P. 332.

In such action on the compromise agreement the amount of original liability is immaterial.—Where goods deposited with a warehouseman were stolen, and the depositor demanded payment for them from him, and he finally agreed to pay a less sum than that claimed, in settlement, but paid only a part of it, and suit was brought for the balance, held, that it was immaterial to the issue that he was not originally liable as warehouseman, the suit being brought upon the compromise agreement. *Swem v. Green*, 9 Colo. 358, 12 P. 202, cited in notes, 100 Am. St. Rep. 446, 7 L. R. A. 532, 15 L. R. A. 438, Ann. Cas. 1913A, 914, 918, 26 A. L. R. 265.

Consideration.—If a promise or agreement is accepted in satisfaction of a demand and the agreement is based on a sufficient consideration, the demand is extinguished and cannot be the foundation of an action. *Piggly Wiggly, Grimes Co. v.*

Lowell Packing Co., 94 Colo. 166, 29 P. (2d) 623.

There must be considerations to constitute an accord and satisfaction, whether the claim be liquidated or unliquidated, and in each these are mutual concessions. *Northern Assur. Co. v. Hunt*, 75 Colo. 21, 223 P. 1083, cited in notes, 96 A. L. R. 1007, 1012.

A compromise of a doubtful right is sufficient foundation for an agreement, and it is no defense to say that it was without consideration. *Swem v. Green*, 9 Colo. 358, 12 P. 202, cited in notes, 100 Am. St. Rep. 446, 7 L. R. A. 532, 15 L. R. A. 438, Ann. Cas. 1913A, 914, 918, 26 A. L. R. 265.

Effect of a partial payment.—There is no accord and satisfaction when the alleged settlement is made by paying less than the amount actually due, and the smaller sum is received under an express protest at the time it is paid. *Dresser v. Mullin Lbr. Co.*, 93 Colo. 271, 25 P. (2d) 936.

Payment of a less sum in satisfaction of a greater, which is not liquidated, is not a satisfaction of what remains unpaid; but the rule is confined strictly to cases within it, and departed from upon slight distinctions. Acceptance of the less sum, with full knowledge that it is tendered as full payment, without protest or objection, bars an action for the balance, where the claim is unliquidated or disputed,—there being no fraud or mistake. *New York Life Ins. Co. v. McDonald*, 62 Colo. 67, 160 P. 193, cited in notes, 4 A. L. R. 475, 34 A. L. R. 1036.

Avoidance of agreement on promise to dismiss suit.—Where a compromise agreement was made in settlement of a note upon the promise of the holder of the note to dismiss a suit then pending against the maker, the maker cannot avoid the compromise agreement on the ground that the payee failed to file the written stipulation, when the case was dismissed in accordance with the agreement. *Hamill v. Copeland*, 26 Colo. 178, 56 P. 901.

Parties to action.—One who, as agent of A, effected a compromise between him and B, by virtue of which a deed to certain real estate was executed to the latter party, is not a necessary party in an action subsequently brought by A against B for the establishment of a trust against said property, not being interested in the question litigated, although in the compromise settlement he received a certain interest in the property in question as compensation for his services. *Pollard v. Lathrop*, 12 Colo. 171, 20 P. 251.

Burden of proof.—In an action to foreclose a mortgage, defendant had the burden of proving the allegation of her cross-complaint that the mortgage indebtedness was to be fully discharged upon payment

to the creditor of a smaller sum than the principal indebtedness. *Gertner v Limon Nat. Bank*, 82 Colo. 13, 257 P. 247.

In an action to forfeit a contract of sale of real estate, and for possession, one defense being in effect accord and satisfaction, an affirmative plea, the burden was on the pleader to prove both constituent facts, the accord and the satisfaction. *Roller v Smith*, 76 Colo. 371, 231 P. 656, cited in note, 94 A. L. R. 1255.

Receipt terminates claim.—Acceptance of money by a co-owner and the giving of a receipt in full settlement of his claims to the fund collected on account of the property, held to terminate the co-owner's claim. *Murray v Stuart*, 79 Colo. 454, 247 P. 187.

In an action for damages under the federal employers' liability act, it is held, under the disclosed circumstances, that it was error for the court to instruct the jury that the company admitted its liability by the payment of money and taking a receipt; and further, that the receipt being subject to explanation, the court erred in excluding testimony offered for that purpose. *Chicago, etc., R. Co. v Cline*, 91 Colo. 255, 14 P. (2d) 495.

Acceptance of check bearing the words "balance in full" where the amount is in dispute, is an accord and satisfaction. *Winter Cigar Co. v Burman*, 67 Colo. 487, 186 P. 285, cited in note, 34 A. L. R. 1036.

It is not every use of the words "in full to date" or equivalent phrase which constitute an accord and satisfaction in connection with the payment of a controverted claim. *Pitts v National Independent Fisheries Co.*, 71 Colo. 316, 206 P. 571, 34 A. L. R. 1033.

Admissibility of offer in evidence.—Although the law favors amicable settlements of controversies and therefore prohibits evidence of negotiations made by a party for the purpose of buying his peace, when, during negotiations for a compromise, a fact is conceded, as in this case, without reservation, evidence of such admission is competent against the party making it.

Kutcher v Love, 19 Colo. 542, 36 P. 152, cited in notes, Ann. Cas. 1918E, 445, 80 A. L. R. 919, 930.

Applications.—Where a sugar company agreed to make checks for beets jointly to a lessor and lessee of land upon which they were grown, but made them payable to lessee alone, whereby lessor lost his rent, it is held that a settlement between lessor and lessee, who was insolvent, for a small sum, did not relieve the company from liability. *Bennett v American Beet Sugar Co.*, 81 Colo. 354, 255 P. 625.

A railroad company, while in the hands of a receiver, compromised with its creditors, and plaintiff, claiming a mechanic's lien for material furnished prior to the receivership, signed such compromise agreement, which provided a different basis of settlement for secured and unsecured creditors. Plaintiff was designated as unsecured, but signed such agreement upon condition that the difference between the amount received by it and the time, as an unsecured creditor, and the full amount of its debt should abide the final decree in its pending suit to enforce its lien. Held, that in an action for such balance, the action to enforce the alleged lien having failed, there can be no recovery, since, under the agreement as signed, the plaintiff is only an unsecured creditor. *Rio Grande Southern R. Co. v Colorado Fuel, etc., Co.*, 41 Colo. 3, 6, 91 P. 1114.

A widow brought suit to recover of the defendant damages for causing the death of her husband after a settlement with the defendant in relation to business transactions relating to the estate of the deceased, in which the plaintiff and defendant signed a paper reciting the transactions had between them, and stating that these are "in full demands of every name and nature whatsoever from one party to the other." This paper being produced in evidence under a plea of accord and satisfaction authorized the court to direct a verdict for the defendant. *Guldager v Rockwell*, 14 Colo. 459, 24 P. 556, cited in notes, 100 Am. St. Rep. 438, 21 L. R. A. 158, 34 L. R. A. 794, 10 A. L. R. 234.

CHAPTER VIII

EXECUTION AND SUPPLEMENTAL PROCEEDINGS; JUDGMENT FOR SPECIFIC ACTS; VESTING TITLE; PROCEEDINGS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES

Rule 69. Execution and Proceedings Subsequent Thereto.

Committee Note.

This rule is entirely state procedure, except subdivisions (a) and (h).

Perishable Property. For the sale of perishable property seized on execution, see Rule 102 (s). For the issuance of writ of execution on Sunday or holiday, see Code Sec. 453 [§ 23, appx. B] which is being left in the statutes.

(a) **In General.** Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. [This is part of Federal Rule 69 (a).]

Committee Note.

See 3 C. S. A., Chap. 93, and other statutes on execution.

(b) **Execution for Costs.** Whenever costs are finally awarded to a party by an order of any court, such party may have an execution therefor in like manner as upon a judgment. Whenever costs are awarded to a party by an appellate court, such party may have an execution for the same on filing a remittitur with the clerk of the court below, and it shall be the duty of such clerk, whenever the remittitur is filed, to issue the execution on application therefor. [From Code Sec. 461.]

(c) **Debtor of Judgment Debtor May Pay Sheriff.** After issuance of an execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much as may be necessary to satisfy the execution, and the sheriff's receipt shall be sufficient discharge for the amount so paid. [From Code Sec. 267.]

(d) **Order for Appearance of Judgment Debtor; Arrest.** At any time when execution may issue on a judgment, the judgment creditor shall be entitled to an order requiring the judgment debtor to appear before the court or a master at a specified time and place to answer concerning his property. A judgment debtor may be required to attend outside the county where he resides but the court may make such order as to mileage and expenses as is just. Upon proof to the satisfaction of the court, by affidavit or otherwise, that there is danger of the debtor absconding, the court may order the sheriff to arrest the debtor and bring him before the court, and order such judgment debtor to enter into an undertaking with sufficient surety that he will attend before the court or master, as shall be directed, pending final determination of the proceedings, and that meanwhile he will not dispose of any portion of his

property not exempt from execution, and in default of entering into such undertaking he may be committed to jail. [From Code Secs. 265 and 266.]

(e) **Order for Appearance of Debtor of Judgment Debtor.** At any time when execution may issue on a judgment, upon proof to the satisfaction of the court, by affidavit or otherwise, that any person or corporation has property of the judgment debtor or is indebted to him in an amount exceeding fifty dollars not exempt from execution, the court may order such person or corporation or any officer, managing agent, member, or stockholder thereof to appear before the court or master at a specified time and place and answer concerning the same. Witness fees and mileage, if any, may be awarded by the court. [From Code Sec. 268.]

(f) **Order for Property to be Applied on Judgment; Contempt.** The court or master may order any property of the judgment debtor not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment. If any person, party or witness disobeys an order of the master properly made in proceedings under this rule, he shall be punished by the court for contempt. Nothing in this rule shall be construed to prevent an action in the nature of a creditor's bill. [From Code Secs. 270 and 271.]

(g) **Witnesses.** Witnesses may be required to appear and testify in proceedings under this rule in the same manner as upon trial of an issue. [From Code Sec. 269.]

(h) **Depositions.** In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may, after obtaining an order of the court so to do, examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions. Such order may be obtained ex parte. [From Federal Rule 69 (a).]

- I. In General.
- II. Execution for Costs.
- III. Order for Appearance of Judgment Debtor.
- IV. Order for Appearance of Debtor of Judgment Debtor.
- V. Order for Property to Be Applied on Judgment.
- VI. Depositions.

Cross Reference.

For a discussion of this rule, see Address no. 13, appx. D.

I. IN GENERAL.

The "unless" clause does not give the court unlimited power to provide for the enforcement of a money judgment by means other than a writ of execution. See 3 Moore's Fed. Prac. 3369.

II. EXECUTION FOR COSTS.

In *Wallace Plumbing Co. v. Dillon*, 73 Colo. 10, 213 P. 130, cited in notes, 121 A. L. R. 481, 509, it was held that where a judgment is reversed on review and the cause remanded for a new trial, the plaintiff in error is entitled to costs in the appellate court; and where the defendant in error thereafter prevails in the trial court, the costs in one court may be set off against those in the other.

III. ORDER FOR APPEARANCE OF JUDGMENT DEBTOR.

Editor's note.—This subdivision combines certain portions of §§ 265, 266 of the code. Therefore, applicable cases construing the said sections are included in this note.

This provision is constitutional and defendant was clearly guilty of contempt of court in refusing to be sworn, and in his premature refusal to answer questions to

be propounded. If defendant, in any proceeding, is deprived of his constitutional right against self-incrimination, it does not follow that the statute requiring his presence in court is unconstitutional and void. *Sweeney v. Cregan*, 89 Colo. 94, 98, 299 P. 1058.

As the debtor cannot be required to answer questions which will subject him to criminal prosecution.—This provision does not purport to grant a judgment creditor the right to require his debtor to answer questions which might subject the latter to a criminal prosecution. *Sweeney v. Cregan*, 89 Colo. 94, 97, 299 P. 1058.

It must be presumed that every constitutional right of the debtor will be respected and safeguarded. *Sweeney v. Cregan*, 89 Colo. 94, 97, 299 P. 1058.

Supplemental proceedings are for the purpose of making effectual the judgment rendered in the main or original action, and, jurisdiction of the defendant having been acquired in the original proceeding, that action is considered as still pending until the judgment rendered thereon is fully discharged. *Sweeney v. Cregan*, 89 Colo. 94, 96, 299 P. 1058.

And are ancillary and auxiliary to the original action. *Sweeney v. Cregan*, 89 Colo. 94, 299 P. 1058.

The "supplemental proceedings" appear to be chiefly directed to discovery, and in this respect at least, they are to be regarded as taking the place of the former bill of discovery. *Allen v. Tritch*, 5 Colo. 222, cited in note, 100 Am. Dec. 501.

They are not, however, adapted to reach the disputed property of the judgment debtor; no contested title to property can be determined. *Allen v. Tritch*, 5 Colo. 222, cited in note, 100 Am. Dec. 501.

And contingent fees not yet earned cannot be reached in proceedings supplementary to execution. *Walker v. Staley*, 89 Colo. 292, 1 P. (2d) 924.

When trust funds may be reached.—The fact that the property sought is a trust fund, interposes no obstacle in subjecting it to the satisfaction of the judgment, when the fund was created by the debtor himself, and the fund sought to be reached has risen from the sale of his own property. *Hexter v. Clifford*, 5 Colo. 168, cited in notes, 100 Am. Dec. 501, 502, 509, Ann. Cas. 1914B, 953, 92 A. L. R. 1436.

IV. ORDER FOR APPEARANCE OF DEBTOR OF JUDGMENT DEBTOR.

The debtor must be regarded as in court.—Jurisdiction being acquired over the debt-

or in the original action, that action is considered as still pending so long as the judgment remains unsatisfied. Proceedings to compel the application of money or property in the hands of other parties to the satisfaction of the judgment, are proceedings in the action. *Hexter v. Clifford*, 5 Colo. 168, 173, cited in notes, 100 Am. Dec. 501, 502, 509, Ann. Cas. 1914B, 953, 92 A. L. R. 1436.

Hence, no notice to him is necessary.—*Hexter v. Clifford*, 5 Colo. 168, 173, cited in notes, 100 Am. Dec. 501, 502, 509, Ann. Cas. 1914B, 953, 92 A. L. R. 1436.

But persons claiming property of debtor must be given day in court.—In supplementary proceedings in aid of execution, the only testimony given being that of the judgment debtor, from which it appeared that the property involved was in his wife's name and belonged to her, the court had no power to order a receiver to take possession of and sell the property without according to the wife her day in court. *Walker v. Staley*, 89 Colo. 292, 1 P. (2d) 924.

V. ORDER FOR PROPERTY TO BE APPLIED ON JUDGMENT.

The purpose of supplementary proceedings in aid of execution is to discover what property the judgment debtor has that is subject to execution, and to apply to the satisfaction of the judgment any such property that is "in the hands of such debtor or any other person, or due to the judgment debtor." *Walker v. Staley*, 89 Colo. 292, 295, 1 P. (2d) 924.

Contested title to real property cannot be tried.—It is beyond the purpose of supplementary proceedings to try contested title to real property. Where title to real property claimed to belong to a judgment debtor stands in the name of another, a creditor's suit is the proper proceeding to subject the property to the satisfaction of a judgment. *Walker v. Staley*, 89 Colo. 292, 295, 1 P. (2d) 924, citing *Allen v. Tritch*, 5 Colo. 222, cited in note, 100 Am. Dec. 501; *O'Connell v. Taney*, 16 Colo. 353, 27 P. 888, 25 Am. St. Rep. 275, cited in notes, 46 Am. St. Rep. 759, 49 A. L. R. 122; *Robinson v. Gumaer*, 43 Colo. 310, 95 P. 935, cited in notes, 23 L. R. A. (N. S.) 30, Ann. Cas. 1914B, 951, 30 A. L. R. 527; *Shuck v. Quackenbush*, 75 Colo. 592, 227 P. 1041, 38 A. L. R. 259; *Case Threshing Machine Co. v. Packer*, 81 Colo. 195, 254 P. 779; *Roberts v. Dietz*, 88 Colo. 594, 298 P. 1062.

Nor can real property be sold under order made in supplementary proceeding.—This subdivision does not contemplate that real property may be sold under order of court

made in a supplementary proceeding, even when title stands in the name of the judgment debtor. In such case, the judgment creditor may cause execution to be levied upon the property; it requires no order of court. *Walker v. Staley*, 89 Colo. 292, 295, 1 P. (2d) 924.

VI. DEPOSITIONS.

Parties who were not named as defendants in action wherein judgment was recovered could not, under this rule or Rule 30, be required to make disclosure of their individual assets. *Burak v. Scott*, 29 F Supp. 775.

Rule 70. Judgment for Specific Acts; Vesting Title.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution upon application to the clerk.

For a discussion of this rule, see Address no. 13, appx. D.

This rule is intended primarily to pre-

clude recalcitrant parties from frustrating court orders for the performance of specific acts. See 3 Moore's Fed. Prac. 3373.

Rule 71. Process in Behalf of and Against Persons Not Parties.

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

For discussion of this rule, see Address no. 13, appx. D.

The purpose of this rule is to make all orders fully enforceable in favor of and

against all parties who are properly affected thereby, even though they are not parties to the action. See 3 Moore's Fed. Prac. 3377.

There Are No Rules 72 to 76.**Committee Note.**

Rules 72 to 76 apply only to Federal appellate procedure and are omitted. However, some of the wording in those rules has been amended and incorporated into the writ of error practice. Subdivisions (d) and (f) of Rule 73 become (c) and (f) of Rule 113; Rule 74 becomes Rule 111 (d); subdivisions (a) and (e) of Rule 75 are in subdivision (a) of Rule 112, (f) and (k) of Rule 75 become (c) and (g) of Rule 112.

CHAPTER IX
COURT ADMINISTRATION

Rule 77. Courts and Clerks.

Committee Note.

This rule does not follow the federal rule.

(a) **Courts Always Open.** Courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning process, and of making and directing all interlocutory motions, orders and rules. Each term shall be deemed open and continuous until the commencement of the next succeeding term. [Supplants Code Sec. 172 and part of Sec. 445.]

(b) **Proceedings in Court and Chambers.** All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted in open court or by a judge in chambers without the attendance of the clerk or other court officials and at any place within the state, but without the consent of all parties affected thereby who are not in default no hearing shall be conducted outside the district when the action is pending in a district court or outside the county when the action is pending in a county court. [Supplants part of Code Sec. 407, and Code Secs. 174, 445, and 472.]

(c) **Clerk's Office and Orders by Clerk.** The clerk's office with the clerk or a deputy in attendance shall be open at such hours and on such days as may be provided by law, and by local rule not in conflict with law. The office of the clerk of the Supreme Court shall close at noon Saturday. All motions and all applications in the clerk's office for issuing process, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court or judge upon cause shown.

(d) **Orders in Any County.** Any ex parte order in any pending action may be entered by the court, or by any judge thereof in any county of the district, irrespective of the county in which said action is pending. [From 1939 Session Laws, Chap. 95, Sec. 2.]

As to motions and other pleadings, see Rule 7 (b) (1). For a discussion of this rule, see Address no. 13, appx. D.

Rule 78. Motion Day.

C Unless local conditions make it impracticable, courts shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions. To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition. Trial courts may also provide by local rule for notices to set motions for hearing or for calling up motions for hearing without prior setting.

For a discussion of this rule, see Address
no. 13, appx. D.

Rule 79. Books Kept By the Clerk and Entries Therein.

(a) **Civil Docket.** The clerk shall keep a book known as "civil docket", and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdict, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When trial by jury has been demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action. [Supplants Code Secs. 222 and 416.]

C (b) Civil Order Book. The clerk shall also keep a book for civil actions entitled "civil order book" in which shall be kept in the sequence of their making exact copies of all judgments and orders. [From Federal Rule 79 (b).]

C (c) Indices; Calendars. The clerk shall keep suitable indices of all books under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial which shall distinguish "jury actions" from "court actions."

Committee Note.

For indices see 2 C. S. A., Chap. 46, Secs. 1 and 2.

C (d) Judgment Docket. The clerk shall keep a book known as the judgment docket in which, immediately after entry of the judgment, he shall make proper entries thereof under appropriate heads. The pages of such docket shall be divided into suitable columns headed as follows: Judgment debtors, judgment creditors, judgment, time of entry, where entered in the civil order book, motion for new trials, appeals, or writs of error, when taken, judgment of appellate court, satisfaction of judgment, when entered. If judgment be for the recovery of money or damages, the amount shall be stated in the docket under the head of judgments; if the judgment be for any other relief, a memorandum of the general character of the relief granted shall be stated. The names of the judgment debtors shall be entered in the docket in alphabetical order. [From Code Secs. 248 and 250.]

Committee Note.

There is no Federal subdivision 79 (d).

For clerk keeping list of jurors see Rule 47 (q).

Cross reference.—For a discussion of this rule, see Address no. 13, appx. D.

Admissibility of register in action upon bond of clerk.—In an action upon the official bond of a clerk of the District Court for fees collected and not paid over, where it appears that he made entries of fees col-

lected by him in his register of actions such register is admissible in evidence and the entries therein are prima facie evidence against the clerk and also against the sureties on his bond. *Cooper v. People*, 28 Colo. 87, 63 P. 314, cited in notes, 90 Am. St. Rep. 197, 199, 91 Am. St. Rep. 565.

Rule 80. Reporter; Stenographic Report or Transcript As Evidence.

C (a) Reporter. Unless the parties stipulate to the contrary, a master or district court shall, and any other court in its discretion may, direct that evidence be taken stenographically and appoint a reporter for that purpose. His fee shall be fixed by the court subject to limitations imposed by law, and shall be paid in the manner provided by law; and if taxed to litigant may be taxed ultimately as costs in the discretion of the court. The cost of a transcript shall be paid in the first instance by the party ordering the same, except as provided by Rule 112 (b). [Supplants Code Sec. 460.]

C (b) Official Reporters. Each court of record may designate one or more official court reporters.

(c) Stenographic Report or Transcript as Evidence. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

Cross references.—As to appointment of stenographer by judge of Supreme Court, see vol. 2, ch. 46, § 26; by judge of District Court, see vol. 2, ch. 46, § 91; by judge of county court, see vol. 2, ch. 46, § 192.

For a discussion of this rule, see Address no. 13, appx. D.

Stenographic costs must be paid by the party utilizing note of evidence. Check *v.*

Thompson, 33 F. Supp. 497. Thus, where plaintiff suing in forma pauperis did not desire to have case stenographically reported, and the defendant directed court reporter to take notes at defendant's expense, and plaintiff applied for rehearing and new trial after his claim was rejected, plaintiff would be required to pay costs of taking the evidence stenographically, and cost of transcription of notes into typed record.

CHAPTER X

GENERAL PROVISIONS

Rule 81. Applicability in General.

Committee Note.

This rule is entirely distinct from the Federal Rule and does not incorporate any sections found in the Colorado Code or statutes.

(a) **Special Statutory Proceedings.** These rules do not govern procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute. Where the applicable statute provides for procedure under a former Code of Civil Procedure, such procedure shall be in accordance with these rules.

(b) **Divorce and Separate Maintenance.** These rules do not govern procedure and practice in actions in divorce or separate maintenance insofar as they are inconsistent or in conflict with the procedure and practice provided by the present applicable statutes.

(c) **Appeals from County to District Court.** These rules do not supersede the provisions of the statutes of this state now or hereafter in effect relating to appeals from final judgments and decrees of the county court to the district court.

For a discussion of this rule, see Address no. 13, appx. D.

Rule 82. Jurisdiction Unaffected.

These rules shall not be construed to extend or limit the jurisdiction of any court.

Cross references.—For jurisdiction of county courts, see vol. 2, ch. 46; § 156. As to service of process, see Rule 4. For a discussion of this rule, see Address no. 13, appx. D.

Editor's note.—Since the reported federal cases deal with the question of federal jurisdiction and venue they are of little value in construing the state rule. However, those which contain constructions of general application or which may prove useful by way of analogy are included in this note. It should be noted that this rule deals only with jurisdiction as contrasted

to the Federal Rule which deals with both jurisdiction and venue.

The Civil Procedure Rules relate to procedural matters only and do not affect substantive rights. *Tullgren v. Jasper*, 27 F. Supp. 413.

This rule is a definite statement that the long-established and well-settled principles of substantive rights of civil litigants remain intact. *Melekov v. Collins*, 30 F. Supp. 159, 160.

In construing the Federal Rule, it was held that it was not the intention of the

new rules to affect the substantive rights of individuals which are fixed by federal statute. *United States Fid., etc., Co. v Alley & Co.*, 34 F. Supp. 604, 607.

Thus, right to "counterclaim" is unchanged.—The right to "counterclaim" is a "substantive right" which cannot be asserted if the right did not exist prior to adoption of the rules, since the new rules do not confer any substantive rights. *Barnsdall Refining Corp. v Birnamwood Oil Co.*, 32 F. Supp. 314.

Nor do the rules purport to deal with matters of jurisdiction, and hence are not strictly binding for purpose of determining whether judgment is "final" in a jurisdictional sense and hence appealable. *Collins v Metro-Goldwyn Pictures Corp.*, 106 F. (2d) 83.

And therefore cannot nullify a perfected jurisdiction.—Where effect of new rules is to nullify retroactively a jurisdiction perfected and complete in accordance with existing law, and possibly in circumstances such that it could not be reestablished by subsequent action, the application goes beyond the purpose and intent of the rule. *Schlaefter v Schlaefter*, 112 F. (2d) 177, 182.

The method of serving a summons is procedural; the effect of such service when made is jurisdictional. *Carby v Greco*, 31 F. Supp. 251, 254, citing *Sewchulis v Lehigh Valley Coal Co.*, 233 F. 422; *Keller v American Sales Book Co.*, 16 F. Supp. 189.

In *Sewchulis v Lehigh Valley Coal Co.*, 233 F. 422, Judge Hough, writing for the court, said: "But there is a wide difference between the method of serving a summons and the effect of such service when made. The first relates to the 'form, manner, and order of conducting and carrying on suits.' The effect of the formal act called 'service' is not a question of practice at all, but one of jurisdiction, and jurisdiction in turn must be tested by substantive law." *Melekov v Collins*, 30 F. Supp. 159, 161.

Third-party claim does not need independent jurisdictional grounds for support.—*Seemer v Ritter*, 25 F. Supp. 688; *Crum v Appalachian Elec. Power Co.*, 27 F. Supp. 138; *Bossard v McGwinn*, 27 F. Supp. 412, and *Krivas v Great Atlantic, etc., Tea Co.*, 28 F. Supp. 66, hold that the third-party claim does not need independent jurisdictional grounds for support, as the claim is only ancillary to the primary claim. *Satink v Holland Tp.*, 28 F. Supp. 67, 71.

Thus, a defendant may bring in third-party defendant by third-party complaint, setting out claim which might have been asserted against such third-party defendant had he been joined originally as defendant. *Id.*

Rule 15 is subject to this rule.—Rule 15 providing for one amendment of course is subject to the necessary constriction provided by this rule. *Radio Electronic Television Corp. v Bartniew Distributing Corp.*, 32 F. Supp. 431, 432.

Rule 83. Rules By Trial Courts.

Each trial court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any court shall upon their promulgation be furnished to the supreme court. In all cases not provided for by rule, trial courts may regulate their practice in any manner not inconsistent with these rules. [Supplants Supreme Court Rule 14.]

Cross reference.—For a discussion of this rule, see Address no. 13, appx. D.

The new rules did not repeal or abrogate local rules not inconsistent with the general rules and in effect at the time of their passage. *Stockton v Consolidated Feldspar Corp.*, 1 F. R. D. 411.

And those not inconsistent with the new rules remain in force. *Clair v Philadelphia Storage Battery Co.*, 29 F. Supp. 299, 300.

Thus, non-residents may by local rule be required to give bond.—Defendant's motion to require plaintiffs to file bond for costs because of their being non-residents of jurisdiction will be granted. *Schuldt v Schumann*, 26 F. Supp. 358.

The District Court rule, requiring non-resident plaintiff to give bond for payment of costs, is not inconsistent with new rules, and hence remains in force. *Clair v Philadelphia Storage Battery Co.*, 29 F. Supp. 299.

Rule 84. Forms.

The forms contained in the Appendix of Forms are intended to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate.

Editor's note.—These forms are contained in appx. A.

A plaintiff need not plead evidence since he sets forth a claim for relief when he makes a short and plain statement showing that he is entitled to relief. *Sierocinski v. E. I. Du Pont De Nemours & Co.*, 103 F. (2d) 843.

Since detailed information may be obtained by depositions and discovery.—Complaint, stating facts on which was based action for damages allegedly sustained in automobile collision, was sufficient, notwithstanding that complaint did not state which of two defendants was driving automobile or show any relation between defendants and did not state with particularity the time, place, or circumstances of accident, since any further and more detailed information which defendants desired was available to them under rules relating to depositions and discovery. *Fowler v. Baker*, 32 F. Supp. 783.

However, a mere copying of the form will not suffice.—The forms of complaint are merely to indicate the simplicity and brevity of statement which the rules contemplate, and alleged copying thereof in effect will not bar dismissal for failure to state sufficient facts. *Washburn v. Moorman Mfg. Co.*, 25 F. Supp. 546.

Since facts sufficient to support complaint must be set out.—A complaint alleging that defendant became indebted to plaintiff on an implied contract for the exclusive use of the photograph and name of plaintiff's steer "Big Jim" in advertising of defendant's animal food and products was subject to dismissal for failure to allege facts supporting the conclusion of "implied contract" to pay, since the complaint must allege facts simply and concisely in lucid fashion, supporting the conclusion of implied contract. *Washburn v. Moorman Mfg. Co.*, 25 F. Supp. 546.

Rule 85. Title.

These rules shall be known and cited as the Colorado Rules of Civil Procedure, or R. C. P. Colo.

CHAPTER XI

CHANGE OF JUDGE; PLACE OF TRIAL; WATER RIGHTS

Rule 97. Change of Judge.

Upon motion a judge shall be disqualified in an action if he is interested or prejudiced, or is related to or has been of counsel for any party, or is related to counsel for any party. Such motion shall be supported by affidavit and thereupon all other proceedings in the case shall be suspended until a ruling is made thereon. If the motion is sustained the court, within 10 days thereafter, shall call in another judge, if available, and agreed upon by the parties. otherwise it shall forthwith certify the fact of disqualification to the chief justice of the supreme court, who shall thereupon assign a judge of the proper court to hear the action. [From Supreme Court Rule 14 C; Code Secs. 32, 159; 2 C. S. A. Chap. 46, Sec. 98. 4 C. S. A. Chap. 170, Secs. 19, 21, 29, 31, 32 supplanted by this subdivision. See Code Sec. 474.]

Cross reference.—For a discussion of this rule, see Address no. 14, appx. D.

Editor's note.—This rule is a combination and condensation of many sections and hence cases construing those sections may not be applicable to the instant rule. However, those that still appear to be valuable, as an aid to construction, are placed in this note.

No application to ordinary transfer for convenience.—This rule, providing for designation by the chief justice of a justice to try a cause wherein the trial judge is disqualified, has no application to the ordinary transfer of causes for convenience from one division to another in a district court having more than one judge. *Smaldone v. People*, 102 Colo. 500, 81 P. (2d) 385, construing Supreme Court Rule 14C.

In all cases necessary material or pertinent facts should be set out; in case of the prejudice of the judge, his attention would thus be called to some circumstance which he may have forgotten, or of which he was entirely ignorant, but which the petitioner might conceive to be a cause of prejudice, and a sense of justice requires that he should not be baldly charged with prejudice against a suitor while left in surprise and wonder-

ment at a cause he may not imagine, or may believe exists only in the imagination or wicked invention of the applicant, and without the necessary knowledge upon which to act in the exercise of that discretion to allow or deny the charge. *Hughes v. People*, 5 Colo. 436, 451, cited in notes, 115 Am. St. Rep. 218, 117 Am. St. Rep. 951, 36 L. R. A. 255, 9 L. R. A. (N. S.) 1121, 8 A. L. R. 1561, 29 A. L. R. 1277, 121 A. L. R. 216, 219.

But they are not to be set out beyond what is necessary where they involve the judicial acts or character of the judge. *Id.*

Which should be sufficient to inform judge of causes relied on.—The law contemplates that upon application for change of venue, facts shall be stated sufficient to inform the judge of the nature of the causes for the change, and their alleged foundation. *Hughes v. People*, 5 Colo. 436, cited in notes, 115 Am. St. Rep. 218, 117 Am. St. Rep. 951, 36 L. R. A. 255, 9 L. R. A. (N. S.) 1121, 8 A. L. R. 1561, 29 A. L. R. 1277, 121 A. L. R. 216, 219.

A district court is without jurisdiction to transfer a cause to another judge for hearing while the case is pending in the Supreme Court. *Sparling Coal Co. v. Colorado Pulp, etc., Co.*, 88 Colo. 523, 524, 299 P. 41.

Rule 98. Place of Trial.

(a) **Venue for Property, Franchises and Utilities.** All actions affecting property, franchises or utilities shall be tried in the county in which the subject of the action, or a substantial part thereof, is situated. [From Code Secs. 25 and 26.]

(b) **Venue for Recovery of Penalty, etc.** Actions upon the following claims shall be tried in the county where the claim, or some part thereof, arose:

(1) For the recovery of a penalty or forfeiture imposed by statute, except that when it is imposed for an offense committed on a lake, river or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream and opposite the place where the offense was committed.

(2) Against a public officer or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who by his command, or in his aid, does anything touching the duties of such officer, or for a failure to perform any act or duty which he is by law required to perform. [From Code Sec. 28.]

(c) **Venue for Tort, Contract and Other Actions.** Actions on book accounts or for goods sold and delivered, may be tried in the county where the plaintiff resides or in the county where the goods were sold. Actions upon contracts may be tried in the county in which the contract was to be performed; actions upon notes or bills of exchange in the county where the same are made payable; and actions for torts in the county where the tort was committed. In all other cases the action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county; or if the defendant be a non-resident of this state, the same may be tried in any county in which the defendant may be found in this state or in the county designated in the complaint, and if any defendant is about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had. [From Code Sec. 29.]

(d) **Venue for Injunction to Stay Proceedings.** When any injunction shall be granted to stay a suit or judgment, the proceedings shall be had in the county where the judgment was obtained or the suit is pending. [From Code Sec. 162.]

(e) **Power to Change Venue.** The court shall have the power to change the venue in any of subdivisions (a) to (c) inclusive under any of the conditions specified in subdivisions (f) to (k) of this rule. [New.]

(f) **Causes of Change.** The court may, on good cause shown, change the place of trial in the following cases: (1) When the county designated in the complaint is not the proper county; (2) when the convenience of wit-

nesses and the ends of justice would be promoted by the change. [From Code Secs. 27 and 31. Sec. 182 supplanted.]

(g) **Change from County.** If either party fears that he will not receive a fair trial in the county in which the action is pending, because the adverse party has an undue influence over the minds of the inhabitants thereof, or that they are prejudiced against him so that he cannot expect a fair trial, he may file a motion supported by an affidavit for a change of venue. The opposite party may file a counter motion and affidavit. If the motion is sustained the venue shall be changed. [From Supreme Court Rule 3, Code Secs. 31, 32, 33. 2 C. S. A., Chap. 170, Secs. 19, 21, 31, 32 supplanted by this subdivision.]

(h) **Transfers Where Concurrent Jurisdiction.** All actions or proceedings in which district and county courts have concurrent jurisdiction, may, by stipulation of the parties and order of court, be transferred by either court to such other court of the same county. Upon transfer, the court to which such cause is removed shall have and exercise the same jurisdiction as if originally commenced therein. [From Code Sec. 473.]

(i) **Place Changed if all Parties Agree.** When all parties assent, or when all parties who have entered their appearance assent and the remaining non-appearing parties are in default, the place of trial of an action in a district court may be changed to any other county in the district. The judgment entered therein, if any, shall be transmitted to the clerk of the district court of the original county for filing and record in his office. [From Session laws 1939, Chap. 95, Sec. 1, and 4 C. S. A., Chap. 170, Sec. 34, supplanted by this subdivision.]

(j) **Parties Must Agree on Change.** Where there are two or more plaintiffs or defendants, the place of trial shall not be changed unless the motion is made by or with the consent of all of the plaintiffs or defendants, as the case may be. [From 4 C. S. A., Chap. 170, Sec. 22, and supplants civil portion only.]

(k) **Only One Change; No Waiver.** In case the place of trial is changed the party securing the same shall not be permitted to apply for another change upon the same ground. A party does not waive his right to change of judge or place of trial if his objection thereto is made in apt time. [From Supreme Court Rule 3, Code Sec. 33. 4 C. S. A., Chap. 170, Sec. 33 supplanted by this subdivision.]

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| I. Venue for Property, Franchise and Utilities. | B. Actions on Contracts. |
| A. General Consideration. | 1. In General |
| B. Actions to Which Subdivision Is Applicable. | 2. Contracts of Guaranty. |
| II. Venue for Recovery of Penalty, etc. | 3. Bonds. |
| III. Venue for Tort, Contract and Other Actions. | C. Actions on Bills and Notes. |
| A. General Consideration. | D. Tort Actions. |
| | E. Actions against Corporations. |
| | F. Other Actions. |
| | 1. Suits for Divorce |
| | 2. Miscellaneous. |

- IV. Venue for Injunction to Stay Proceedings.
- V. Power to Change Venue.
- VI. Causes of Change.
 - A. Right to Change Venue in General.
 - 1. Nature of Right.
 - 2. Effect of Motion on Jurisdiction of Court.
 - 3. Sufficiency of Pleading.
 - B. When County Is Improper.
 - C. When Convenience of Witnesses and Ends of Justice Are Promoted.
- VII. Change from County.
- VIII. Transfer Where Concurrent Jurisdiction.
- IX. Place Changed if All Parties Agree.
- X. All Parties Must Agree on Change.
- XI. Only One Change; No Waiver.

Cross Reference.

For a discussion of this rule, see Address no. 14, appx. D.

I. VENUE FOR PROPERTY, FRANCHISES AND UTILITIES.

A. General Consideration.

Editor's note.—This subdivision combines certain portions of code sections 25 and 26. Cases construing those portions are applicable to the instant rule, and hence are included in this note.

It should be noted that the action may now be brought in the county where a substantial portion of the property, etc., is located. This eliminates the difficult question of where the greater portion of franchise is located, which was formerly presented by the wording of § 26. See *People v. District Court*, 80 Colo. 538, 253 P. 24.

This provision has reference exclusively to actions in rem, where specific property is to be directly affected. *Kirby v. Union Pac. Ry. Co.*, 51 Colo. 509, 535, 119 P. 1042, Ann. Cas. 1913B, 461, cited in notes, 4 A. L. R. 66, 84 A. L. R. 86.

Its language is explicit.—In *Campbell v. Equitable Securities Co.*, 12 Colo. App. 544, 547, 56 P. 88, the court presumed that the design of the legislature in making the provision which it did for the place of trial of causes involving real estate, was that all records affecting the title to land should be made in the county in which the land lies; but whatever the purpose may have been, the language is explicit and, in a proper case, upon a proper motion, the duty of the court is plain.

And is applicable to county courts as well as to District Courts. *Fletcher v. Stowell*, 17 Colo. 94, 96, 28 P. 326.

Thus, the provisions are subject to the power of the court to change the place of trial as elsewhere provided in the act. *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158, 161, 45 P. 285, cited in note, Ann. Cas. 1913C, 336. This power is retained by subdivision (e) of this rule.—Ed. note.

And, there is nothing in chapter 61, vol. 3, inconsistent with the right of change of venue. Its effect is that the action must be brought in the county of the plaintiff municipality, but this court, ever since the case of *Fletcher v. Stowell*, 17 Colo. 94, 28 P. 326, has stood to the proposition that bringing an action and trying it were two different things; that the statute as to place of trial meant what it said, and its provisions were not jurisdictional but that an action might be brought in a county where, if objection were made, it could not be tried. Conversely, we must say that a statute fixing the place where an action must be brought cannot be said to control the place where it must be tried. *People v. District Court*, 78 Colo. 526, 529, 242 P. 997.

But, a District Court is without jurisdiction to transfer a cause involving a receivership while the case is pending in the Supreme Court. *Sparling Coal Co. v. Colorado Pulp, etc., Co.*, 88 Colo. 523, 524, 299 P. 41.

B. Actions to Which Subdivision Is Applicable.

This subdivision deals with a specified class of cases. *Welborn v. Bucci*, 95 Colo. 478, 37 P. (2d) 399.

An action against an irrigation district is controlled by this subdivision.—An action for an injury to lands by seepage from the ditch of an irrigation district is properly brought in the county in which the lands are situated. *North Sterling Irrigation Dist. v. Dickman*, 66 Colo. 8, 178 P. 559, cited in note, 93 A. L. R. 504.

The bare fact that defendant irrigation district happens to be a quasi-municipal corporation cannot abrogate the provision of this subdivision as to venue. In *Board of County Com'rs v. Board of County Com'rs*, 3 Colo. App. 137, 32 P. 346, cited in note, 93 A. L. R. 508, the court of appeals in effect declared that the code provisions as to venue applied to municipal corporations by refusing a change of venue when suit was brought in the county where the action accrued according to the provisions of the code. See also, *Board of County Com'rs v. Board of County Com'rs*, 2 Colo. App. 412, 31 P. 183. *Id.*

Also, an action to cancel real estate mortgage.—In an action to cancel a real estate mortgage indemnifying a surety against loss on a contractor's bond, under this subdivision, the action was triable in the county where the property was situated, although the responsibility of the contractor was a

question to be determined in another county. *Allen v Sterling*, 76 Colo. 122, 230 P. 113.

Actions for injury due to flooding.—In view of this subdivision, an action for damages resulting from flooding plaintiff's land is triable in the county in which the subject of the action is situated. *Twin Lakes Reservoir, etc., Co. v Sill*, 104 Colo. 215, 89 P. (2d) 1012.

And, actions concerning water rights.—An action to quiet title to a water right is triable in the county in which the water right is situated. *People v District Court*, 80 Colo. 538, 253 P. 24.

A water right can be said to be "situated" under this subdivision only at the point of diversion or at the place of use, we do not decide which. In the instant case the rights of the plaintiffs are all diverted and used and therefore "situated" in Huerfano county, and those of the defendants in Pueblo county. *Field v Kincaid*, 67 Colo. 20, 23, 184 P. 832.

Where the plaintiffs claimed under a decree adjudicating water rights first entered in Huerfano county, and the defendants under a decree entered in Pueblo county, it was held that the subject-matter of the action was in both counties, and therefore the defendant's petition for change of the place of trial was properly denied. *Id.*

But, this subdivision does not apply to an action to restrain interference with the business of a railway company by unlawfully dealing in its non-transferable tickets. Such an action is a transitory action in personam. *Kirby v Union Pac. Ry. Co.*, 51 Colo. 509, 119 P. 1042, Ann. Cas. 1913B, 461, cited in notes, 4 A. L. R. 66, 84 A. L. R. 86.

Because railroad tickets do not have the characteristics of property as that term is used in this subdivision. At most a railroad ticket is mere evidence of a contract. By the great weight of authority, where the exact character of a railroad ticket is discriminately considered and exactly defined, it is held that it does not even rise to the dignity of the evidence of a contract, but is a mere token to show that the person properly in possession of it has paid his fare between the stations named in the ticket. *Kirby v Union Pac. Ry. Co.*, 51 Colo. 509, 538, 119 P. 1042, Ann. Cas. 1913B, 461, cited in notes, 4 A. L. R. 66, 84, A. L. R. 86, citing *Quimby v Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469; *People v Warden*, 157 N. Y. 116, 51 N. E. 1006.

Nor is it applicable to an action on an oral contract for leasing sheep.—This subdivision dealing with specified classes of cases, does not apply to an action on an oral contract for the leasing of sheep. *Welborn v Bucci*, 95 Colo. 478, 37 P. (2d) 399.

But water stored in a reservoir is property.—A priority of appropriation to divert

water flowing in a natural stream has been declared by us to be one of the most valuable property rights known to the law, and surely water that has been captured over night, and stored in a reservoir to be used shortly after, for irrigation, is at least of equal dignity. The reservoir including the water stored therein, was property. *Greeley, etc., Irrigation Co. v Farmers Pawnee Ditch Co.*, 58 Colo. 462, 480, 146 P. 247, cited in note, Ann. Cas. 1916A, 423, dissenting opinion of Justice Garrigues.

Action by lessee of mine for conversion of machinery.—In an action by a lessee of a mine against his lessors for damage for an alleged conversion of machinery and appliances placed by the lessee for the purpose of working the mine, where the complaint charged the wrongful conversion by defendants of personal property belonging to plaintiff, the venue will not be changed to the county in which the mine is located on the ground that it involved an interest in real estate, since if it should be determined that the subject-matter of the action is real estate, no recovery could be had under the complaint. *Updegraff v Lesem*, 15 Colo. App. 297, 62 P. 342, cited in notes, 84 Am. St. Rep. 884, 39 A. L. R. 1100, 96 A. L. R. 81.

II. VENUE FOR RECOVERY OF PENALTY, ETC.

Editor's note.—This subdivision is substantially the same as Code § 28. The word "cause" has been changed to "claim" in order to conform to the general phraseology of the rules.

This subdivision deals with a specified class of cases. *Welborn v Bucci*, 95 Colo. 478, 37 P. (2d) 399.

Its provisions are subject to the power of the court to change the place of trial as elsewhere provided. *Denver, etc., R. Co. v Cahill*, 8 Colo. App. 158, 161, 45 P. 285, cited in note, Ann. Cas. 1913C, 336. This power is retained by subdivision (e) of this rule.—Ed. note.

And application to change place of trial to proper county ousts court of jurisdiction.—Where an action for a penalty is brought in a different county than that fixed by this subdivision as the proper place of trial and an application is made in due time for a change of the place of trial to the proper county, the application ousts the court in which the action is pending of jurisdiction except for the purpose of granting the application and any further proceedings by such court is void. *Woodworth v Henderson*, 28 Colo. 381, 65 P. 25, citing *Pearse v Bordeleau*, 3 Colo. 351, cited in notes, 91 Am. St. Rep. 854, 858, 863, 865, 881, 23 L. R. A. 565, 27 L. R. A. 351, 468, 28 L. R. A. 130, 22 L. R. A. (N. S.) 213, 1 L. R. A. 1916D, 1161, Ann. Cas. 1917A, 270, 25 A. L. R. 390.

54 A. L. R. 876; *Brewer v Gordon*, 27 Colo. 111, 59 P. 404, 83 Am. St. Rep. 45; *Campbell v Equitable Securities Co.*, 12 Colo. App. 544, 56 P. 88.

An action to recover a penalty, whether it be one *ex contractu* or *ex delicto*, comes under the provisions of this subdivision. *Woodworth v Henderson*, 28 Colo. 381, 382, 65 P. 25.

But an action to recover damages for personal injury is not an action to recover a penalty.—In *Robbins v McAlister*, 91 Colo. 505, 509, 16 P. (2d) 431, defendant filed a motion to change the place of trial upon the theory that the action to recover damages for personal injuries is to recover a penalty, because punitive damages were asked and awarded, and, under this subdivision actions to recover penalties must be tried where the cause arose. Such an action is not one to recover a penalty; it is to recover compensatory damages; exemplary damages are only an incident, not the basis, of the cause of action. See 17 C. J., p. 974, § 270; *Stockwell v Brinton*, 26 N. D. 1, 15, 142 N. W. 242, 247.

Action against officer must be brought in county where official act was performed.—Where a cause of action, if any, arose in Larimer county by reason of the defendant in his official capacity as water commissioner authorizing and permitting the irrigation company to raise its headgate in Larimer county during a flood, and divert the water into the reservoir in Larimer county, in which county he resided and was served with summons, the injury complained of against the official defendant, grows out of an official act by defendant as water commissioner performed in Larimer county, under all these circumstances it is clear that the motion to transfer the case to Larimer county for trial, should have been granted, irrespective of the conflict of jurisdiction and the court lost jurisdiction over the case when the motion was interposed, except to enter an order transferring it to the proper county for trial. *Greeley, etc., Irrigation Co. v Farmers Pawnee Ditch Co.*, 58 Colo. 462, 481, 146 P. 247, cited in note, Ann. Cas. 1916A, 423, dissenting opinion of Justice Garrigues.

III. VENUE FOR TORT, CONTRACT AND OTHER ACTIONS

A. General Consideration.

Editor's note.—This subdivision is the same as Code § 29, with the exception that the word order has been reversed. As this would not seem to have any substantial effect upon the law contained therein (see Address no. 14, appx. D), the cases construing that section are placed in this note.

It should be noted that formerly the first sentence was construed as a general rule, which was modified in particular instances

by the succeeding sentences. See *Brewer v Gordon*, 27 Colo. 111, 113, 59 P. 404, 83 Am. St. Rep. 45, citing *Denver, etc., R. Co. v Cahill*, 8 Colo. App. 158, 45 P. 285, cited in note, Ann. Cas. 1913C, 336. It does not seem that the change in sentence order was intended to affect this construction. See Address no. 14, appx. D.

Purpose of subdivision.—The legislature by the provisions of this subdivision intended to limit the right to bring actions in any court having competent jurisdiction and imposed a limitation as to the forum in which the action should be commenced. *People v District Court*, 30 Colo. 123, 126, 69 P. 597, cited in notes, 111 Am. St. Rep. 962, Ann. Cas. 1917A, 940, citing *Warner v Warner*, 100 Cal. 11, 34 P. 523.

It is substantially the same as the Texas statute. *Brewer v Gordon*, 27 Colo. 111, 59 P. 404, 83 Am. St. Rep. 45.

General rule.—The general rule is that personal actions, such as actions for breach of warranty, shall be tried in the county in which the defendants, or any of them, reside at the time of the commencement of the action, or in the county where plaintiff resides when service is made on the defendant in such county, unless the case is brought within some of the exceptions of this subdivision. *Lamar Alfalfa Milling Co. v Bishop*, 80 Colo. 369, 372, 250 P. 689, citing *Brewer v Gordon*, 27 Colo. 111, 59 P. 404, 83 Am. St. Rep. 45; *Maxwell-Chamberlain Motor Co. v Piatt*, 65 Colo. 140, 144, 173 P. 867; *People v District Court*, 66 Colo. 330, 182 P. 7; *People v District Court*, 74 Colo. 121, 218 P. 1047.

Non-resident of defendant is no objection to court's jurisdiction of cause.—Non-residence of the defendant within the territorial jurisdiction of the court is no objection to the jurisdiction of the court of the cause, if actual jurisdiction of the person of such defendant is obtained by service of process within the territorial jurisdiction of such courts. *Weiner v Rumble*, 11 Colo. 607, 609, 19 P. 760, citing *Adams v Lamar*, 8 Ga. 83, 90; *Board of Public Works v Columbia College*, 84 U. S. (17 Wall.) 521, 532, 21 L. Ed. 687; *Bissel v Briggs*, 9 Mass. 462, 468, 6 Am. Dec. 88; *McMullen v Guest*, 6 Tex. 275, 279; *Barnes v Harris*, 4 N. Y. 374, 375.

There are no statutory provisions in this state affecting the question of obtaining jurisdiction of the person of the defendant, in an action to foreclose a mechanic's lien, except the provisions of the code relating to the place of trial in civil actions; and there is nothing in these provisions of the code to prevent the court from obtaining jurisdiction of the person of the appellee by service of its process within its territorial jurisdiction. *Weiner v Rumble*, 11 Colo. 607, 609, 19 P. 760.

Presumption is that suit is brought in proper county.—It will be presumed that the county in which the suit was brought is the proper county for trial unless there should be a disclosure of something to the contrary; and the court commences the consideration of an application for a change of venue with the assumption of the existence of the necessary conditions requiring the retention of the case in that county, except in so far as the contrary may appear from the application. *Adamson v Bergen*, 15 Colo. App. 396, 400, 62 P. 629.

And to sustain a motion for change of place of trial, it must appear that no defendants reside where the suit is brought, where the motion is made on the ground that some of the defendants reside in another county. *People v County Court*, 72 Colo. 395, 211 P. 102.

Necessity for affidavit showing case is not included in specified cases.—If the facts appearing upon the face of a complaint show that the case is not one included in any of the specified cases in this subdivision, there is no reason either in common sense or law, why the moving party should be compelled to reiterate them in an affidavit. *Smith v Post Printing, etc., Co.*, 17 Colo. App. 238, 243, 68 P. 119.

Where trial may be lawfully had in either of two counties under this subdivision, the selection rests with the plaintiff. *Welborn v Bucci*, 95 Colo. 478, 37 P. (2d) 399.

B. Actions on Contracts.

1. In General.

Editor's note.—For an interesting and instructive discussion on change of venue in actions involving performance of contracts, see article by Mr. Royal C. Rubright, of the Denver Bar, *Dicta XVI*, no. 1, p. 13.

General rule.—Actions on contracts are triable in the county in which the defendants or any of them may reside at the commencement of the action, or in the county where the plaintiff resides, when service is had on the defendants in such county, or in the county where the contract is to be performed. *Coulter v Bank of Clear Creek County*, 18 Colo. App. 444, 445, 72 P. 602, cited in notes, *Ann. Cas.* 1912D, 1332, 59 A. L. R. 932, 71 A. L. R. 396, 84 A. L. R. 148.

Action may be tried in county where contract is to be performed.—Where, under the terms of an agency contract, plaintiff, suing for commissions on the sale of his principal's products, was required to and did, confine his business activities within the limits of a specified county, his action was properly instituted in such county, and there was no error in the refusal of the court to change the venue to another county wherein the principal maintained its offices and

where it was served with summons. *Navy Gas, etc., Co. v Schoech*, 105 Colo. 374, 98 P. (2d) 860.

Generally, unless service is made in the county of plaintiff's residence, trial shall be in the county of defendant's residence; regardless of residence and place of service, actions upon contract may be tried in the county in which the contract is to be performed. *Grimes Co. v Nelson*, 94 Colo. 487, 31 P. (2d) 488.

One of the exceptions to the general rule of place of trial, is that actions on contracts may be tried in the county in which the contract is to be performed, where by its terms it is to be performed at a particular place. *Lamar Alfalfa Milling Co. v Bishop*, 80 Colo. 369, 250 P. 689.

And this is true although defendant resides in another county.—Under this subdivision an action upon contract may be instituted and prosecuted in the county where the contract was to be performed. Even though defendant resides in another county he is not entitled to a change of venue. *Gould v Mathes*, 55 Colo. 384, 135 P. 780, citing *Brewer v Gordon*, 27 Colo. 111, 59 P. 404, 83 Am. St. Rep. 45; *Denver, etc., R. Co. v Cahill*, 8 Colo. App. 158, 45 P. 285, cited in note, *Ann. Cas.* 1913C, 336; *Peabody v Oleson*, 15 Colo. App. 346, 62 P. 234, cited in notes, 43 L. R. A. (N. S.) 542, *Ann. Cas.* 1918D, 1136.

Where a complaint alleges that the contract upon which recovery is sought was to be performed in the county in which the action is brought, a motion to change the place of trial on the ground that defendant resides in another county and was served with summons there, and which fails to negative the allegation of the complaint that the contract was to be performed in the county where the action is brought is insufficient and is properly denied. *Peabody v Oleson*, 15 Colo. App. 346, 62 P. 234, cited in notes, 43 L. R. A. (N. S.) 542, *Ann. Cas.* 1918D, 1136.

It would have been proper for the plaintiff to have brought and tried the action in the county of defendant's residence; but he was not obliged to do so. He had a right to bring it in Teller county, and having done so, and the code expressly providing that if the action is upon contract it may be tried where the contract was to be performed, there was no error in denying the motion for a change of venue. *Gould v Mathes*, 55 Colo. 384, 385, 135 P. 780.

But fact that action may be brought where contract is to be performed does not give defendant an absolute right to change of venue.—The provision in this subdivision that suit may be brought on a contract where it is to be performed, does

not give the defendant, if served with summons elsewhere, an absolute right to a change of venue to the county in which it is to be performed; for, notwithstanding this provision, an action on such contract may be tried in the county in which the defendant resides at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county. *Bales v. Cannon*, 42 Colo. 275, 278, 94 P. 21, citing *Reed v. First Nat. Bank*, 23 Colo. 380, 48 P. 507; *Brewer v. Gordon*, 27 Colo. 111, 59 P. 404, 83 Am. St. Rep. 45; *Denver, etc., R. Co., v. Cahill*, 8 Colo. App. 158, 45 P. 285, cited in note, *Ann. Cas.* 1913C, 336.

As this rule applies only where the contract is, by express terms, to be performed at a certain place.—*People v. District Court*, 66 Colo. 330, 182 P. 7.

The words in this subdivision, "the county in which the contract is to be performed," refer to contracts which by their terms are to be performed at a particular place. *Lamar Alfalfa Milling Co. v. Bishop*, 80 Colo. 369, 372, 250 P. 689, citing *Brewer v. Gordon*, 27 Colo. 111, 59 P. 404, 83 Am. St. Rep. 45; *Maxwell-Chamberlain Motor Co. v. Piatt*, 65 Colo. 140, 144, 173 P. 867; *People v. District Court*, 66 Colo. 330, 182 P. 7; *People v. District Court*, 74 Colo. 121, 218 P. 1047.

Where a contract is silent as to place of performance the provision relative to the right of trial in the county where the contract is to be performed is not applicable. Such provision has reference to contracts which by their terms are to be performed at a particular place. *Kimberlin v. Rutliff*, 93 Colo. 99, 100, 23 P. (2d) 583, citing *Lamar Alfalfa Milling Co. v. Bishop*, 80 Colo. 369, 250 P. 689; *People v. District Court*, 74 Colo. 121, 218 P. 1047; *People v. County Court*, 72 Colo. 395, 211 P. 102; *People v. District Court*, 66 Colo. 330, 182 P. 7; *Brewer v. Gordon*, 27 Colo. 111, 59 P. 404, 83 Am. St. Rep. 45.

And where there is no place of performance expressed in a contract, no change of venue can be granted on that ground. *Enyart v. Orr*, 78 Colo. 6, 238 P. 29.

Action may be brought in county where plaintiff resides.—Under this subdivision action upon a contract, wherein no place of performance is specified, may be brought in the county where the plaintiff resides. *Bean v. Gregg*, 7 Colo. 499, 4 P. 903, cited in notes, 21 A. L. R. 34, 52, 100, citing *Law v. Brinker*, 6 Colo. 555.

This subdivision should be construed in connection with chapter 41, § 18, vol. 2, if the county in which the plaintiff resides, or a county in which a contract was to be performed, is the proper county for the trial, the action may be properly brought in that

county in the first instance. *Denver, etc., Const. Co. v. Stout*, 8 Colo. 61, 5 P. 627, cited in notes, 15 L. R. A. 144, 47 L. R. A. (N. S.) 342, 388, 412.

In an action on contract for the payment of money, there being no agreement as to where payment is to be made, the action was properly brought in the county of the creditor's residence, under this subdivision. *People v. District Court*, 70 Colo. 540, 203 P. 268. See also, *Chutkow v. Wagman Realty, etc., Co.*, 80 Colo. 11, 248 P. 1014.

Under this subdivision it seems that in an action for the price of goods sold it is the privilege of the plaintiff to designate the county of his residence as the place of trial. An application for a change of venue, in such case, solely upon the ground that such county is not the proper county, should be denied. *Raymond v. Harrison*, 27 Colo. App. 484, 150 P. 727.

Or in the county of defendant's residence.—Personal actions on contracts which are silent as to place of performance, are triable in the county of defendant's residence. *Kimberlin v. Rutliff*, 93 Colo. 99, 23 P. (2d) 583, citing *Maxwell-Chamberlain Motor Co. v. Piatt*, 65 Colo. 140, 173 P. 867, and distinguishing *Peabody v. Oleson*, 15 Colo. App. 346, 62 P. 234, cited in notes, 43 L. R. A. (N. S.) 542, *Ann. Cas.* 1918D, 1136.

In an action on contract, no place of performance being expressly specified, the action should be tried in the county where defendant resides unless the case is brought within some of the exceptions of the statute. *People v. District Court*, 74 Colo. 121, 218 P. 1047.

In an action on contract, it appearing that defendant was entitled to have the case tried in the county of his residence, prohibition is allowed against the trial in another county. *Id.*

Defendant corporation, whose principal place of business was in Denver, entered into a contract with plaintiff, who resided in Mesa county, to the effect that it would sell and deliver to plaintiff, at Denver, certain motor cars. Plaintiff deposited a sum specified as a guarantee, to be refunded at the expiration of the contract, if plaintiff had faithfully discharged his obligations thereunder. Save as above set forth there was no express provision as to where anything was to be done by defendant, under the contract. In an action in Mesa county to recover the deposit, it was held that the terms of the contract were not sufficient to indicate an intent to perform in Mesa county and defendant was entitled to change of venue to Denver county, its place of residence. *Maxwell-Chamberlain Motor Co. v. Piatt*, 65 Colo. 140, 173 P. 867.

Where action is properly brought in either one of two counties, change of venue

will not be granted.—Where an action on an accident insurance policy might, under this subdivision, be commenced either in the county of the defendant's residence, when service is had there, or in the county where the contract was to be performed, either county was the proper one, and from neither can a change of venue be properly granted. *Progressive Mut. Ins. Co. v. Mihoover*, 87 Colo. 64, 66, 284 P. 1025, citing *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158, 162, 45 P. 285, cited in note, *Ann. Cas.* 1913C, 336; *Brewer v. Gordon*, 27 Colo. 111, 113, 59 P. 404, 83 Am. St. Rep. 45; *Chutkow v. Wagman Realty, etc., Co.*, 80 Colo. 11, 13, 248 P. 1014; *Enyart v. Orr*, 78 Colo. 6, 10, 238 P. 29.

In *Coulter v. Bank of Clear Creek County*, 18 Colo. App. 444, 446, 72 P. 602, cited in notes, *Ann. Cas.* 1912D, 1332, 59 A. L. R. 932, 71 A. L. R. 396, 84 A. L. R. 148, from the showing made, it sufficiently appeared that the county in which the action was brought was the county in which the contract was to be performed, and was therefore the proper county for trial. The motion was correctly denied.

There was no error in denying a motion for change of venue on the ground that defendants were non-residents of the county, where from the allegations of the complaint it appeared that one of the defendants did reside in the county where the action was commenced. *Newland v. Frost*, 83 Colo. 207, 263 P. 715.

A breach of the contract does not abrogate this subdivision as to the place of trial of an action thereon, nor spell anything as to what the contract says as to place of performance. *Lamar Alfalfa Milling Co. v. Bishop*, 80 Colo. 369, 370, 250 P. 689.

In a suit for breach of contract, where the defendant is a non-resident, the proper county in which to institute the action is that "designated in the complaint." *Great American Ins. Co. v. Scott*, 89 Colo. 99, 299 P. 1051, citing *New York Life Ins. Co. v. Pike*, 51 Colo. 238, 117 P. 899, cited in notes, *Ann. Cas.* 1916B, 680, 682, 684, 53 A. L. R. 493.

The place where a cause of action for a breach of contract arises is generally—almost universally—the place where the contract is to be performed. *Grimes Co. v. Nelson*, 94 Colo. 487, 31 P. (2d) 488.

In determining the place of trial of an action for breach of warranty, under the facts in the instant case, the question is, where were defendants required to perform the things they were to do under the contract. What plaintiff was to do, is not in the case. *Lamar Alfalfa Milling Co. v. Bishop*, 80 Colo. 369, 370, 250 P. 689.

Action against school district.—An action upon a contract against a school district

must be tried in the county of that district, unless the case is within one of the exceptions provided for in this subdivision. *People v. District Court*, 66 Colo. 330, 182 P. 7.

In an action in El Paso county, by a firm of architects, against a school district of Mesa county, for services rendered in the building of a school house, the contract not specifying the place of performance, or payment, a motion for a change of venue having been denied by the district court, prohibition was granted. *Id.*

Action on insurance policy.—Unless an insurance policy contains a provision definitely fixing the place of payment elsewhere, the county of plaintiff's residence is a proper place for the trial of an action to collect thereon. *Progressive Mut. Ins. Co. v. Mihoover*, 87 Colo. 64, 284 P. 1025.

2. Contracts of Guaranty.

The fact that a contract of guaranty was executed and dated in the county where suit was brought upon it does not make it a contract to be performed in that county so as to deprive the defendants of the right to remove the cause for trial to the county of their residence. *Smith v. Post Printing, etc., Co.*, 17 Colo. App. 238, 239, 68 P. 119, citing *Brewer v. Gordon*, 27 Colo. 111, 112, 59 P. 404, 83 Am. St. Rep. 45.

Action of guaranty distinguished from action for goods sold and delivered.—An action by a publishing company against a party who contracted for a route for the circulation and sale of its paper and against other parties who guaranteed the contract of the circulator, is an action upon the guaranty contract, and not an action for goods sold and delivered, and the provision authorizing an action for goods sold and delivered to be brought in the county where the plaintiff resides or where the goods were sold does not apply. *Smith v. Post Printing, etc., Co.*, 17 Colo. App. 238, 239, 68 P. 119.

3. Bonds.

Signers of bond must be sued in county of their residence where bond is silent as to place of payment.—The supreme court of Iowa in *Prader v. National Masonic Acci. Ass'n*, 107 Iowa 431, 78 N. W. 60, in an action upon a bond given in a certiorari proceeding, held under the provisions of their code (substantially the same as ours) that the signers of the bond must be sued in the county of their residence, unless the bond itself specifically provides that the place of performance is elsewhere. So, also, to the same effect is *Independent School Dist. v. Reichard*, 39 Iowa 168, holding that an action on a bond, conditioned for the payment of a penalty, if the principal failed to erect a schoolhouse according to the terms of a written contract, must be

brought in the county where some of the defendants reside, if the bond is silent as to the place of payment. *Brewer v Gordon*, 27 Colo. 111, 115, 59 P. 404, 83 Am. St. Rep. 45.

The argument *ab inconvenienti* of the defendant that this construction of this subdivision practically requires a sheriff to refuse a bond unless the sureties reside in his county, should not prevail against the plain language of the subdivision. But, as a matter of fact, he may protect himself against the necessity of bringing an action on bonds given to him in his official capacity in a county other than that of his residence by inserting therein a provision that they are to be specifically performed, or made payable, in his county; and if sureties will not consent thereto, then by accepting only of sureties who live in his county. *Id.*

Action on indemnity bond.—Where an indemnity bond was given to a sheriff to indemnify him against damage for seizing personal property under a writ of attachment and the obligors in the bond resided in a different county from that in which the obligee resided and in which the attachment was levied, and an action was brought upon the bond in the county of the residence of the obligee and summons was served on the obligors in the county of their residence, the defendants had a right to have the cause removed for trial to the county of their residence, and a refusal by the court to remove such cause to the county wherein the defendants resided upon application by defendants was reversible error. *Brewer v Gordon*, 27 Colo. 111, 59 P. 404, 83 Am. St. Rep. 45, citing *Lindheim & Bros. v Buschamp*, 72 Tex. 33, 12 S. W. 125; *Cohen v Munson*, 59 Tex. 236; *McInnes v Wallace* (Tex. Civ. App.), 44 S. W. 537.

An indemnity bond given to a sheriff to indemnify him against damage for seizing personal property under a writ of attachment, and which contains no provision making it payable in any particular county, is not a contract to be performed in the county wherein the attachment is levied, within the meaning of this subdivision providing that actions upon contracts may be tried in the county in which the contract was to be performed. *Brewer v Gordon*, 27 Colo. 111, 59 P. 404, 83 Am. St. Rep. 45.

C. Actions on Bills and Notes.

The county in which a note is payable is the proper county for trial of an action thereon.—Where a promissory note was made payable at a certain bank, the county in which such bank is situated was the proper county for trial of an action thereon, although defendants resided and were served with summons in another county and an application to change the place of trial to the county of defendants' residence was properly denied. *Coulter v Bank of*

Clear Creek County, 18 Colo. App. 444, 72 P. 602, cited in notes, *Ann. Cas.* 1912D, 1332, 59 A. L. R. 932, 71 A. L. R. 396, 84 A. L. R. 148.

But this rule is only applicable where the place of payment is expressed in the instrument.—*People v County Court*, 72 Colo. 395, 211 P. 102, citing *Brewer v Gordon*, 27 Colo. 111, 113, 114, 59 P. 404, 83 Am. St. Rep. 45; *People v District Court*, 66 Colo. 330, 182 P. 7.

And defendant does not have an absolute right to have action tried in county where note is payable.—The provision in this subdivision that an action on a promissory note may be tried in the county where the same is made payable does not give a defendant sued elsewhere an absolute right to a change of venue. *Reed v First Nat. Bank*, 23 Colo. 380, 48 P. 507.

As action may be brought in county of plaintiff's residence.—Under this subdivision providing that actions on notes may be tried in the county where made payable, an action on a note may be brought in the county of plaintiff's residence, though defendant resides, and the note is made payable, in another; and defendant, having elected to stand on his assertion that the court is without jurisdiction, is in default, and judgment may be entered against him. *Thomas v Colorado Nat. Bank*, 11 Colo. 511, 19 P. 501.

Where appellant having elected to stand by his assertion that the court was without jurisdiction in the premises, to which question his appearance was specially limited, and having declined to plead to the complaint, the court was warranted in proceeding with the case the same as if there had never been any appearance for appellant. *Thomas v Colorado Nat. Bank*, 11 Colo. 511, 514, 19 P. 501, citing *Graham v Spencer*, 14 F. 603, 607.

Under this subdivision an action may be brought upon a bill of exchange in the county where the plaintiff resides. *Law v Brinker*, 6 Colo. 555.

And where note is not payable in county where action is brought, defendant may have action changed to county of his residence.—This subdivision expressly provides that all cases, unless otherwise provided, shall be tried in the county of defendant's residence, unless service of summons is made upon defendant in the county where plaintiff resides, with an exception, among others, that actions upon notes or bills of exchange may be tried in the county where the same are made payable. *Ashton v Garretson*, 37 Colo. 90, 92, 85 P. 831.

D. Tort Actions.

General rule.—In an action for a tort, the county where the defendant resides, and the

county where the plaintiff resides and the defendant is served, and the county where the tort was committed, are equally proper counties for trial; and if the action is commenced in any one of those counties, the place of trial cannot be changed on the ground that the county designated is not the proper county. *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158, 163, 45 P. 285, cited in note, *Ann. Cas. 1913C, 336*.

Word "may" is to be given same construction in tort actions as in contract actions.—In *Newell v. Giggey*, 13 Colo. 16, 17, 21 P. 904, it was contended that the word "may" must be construed as meaning "shall." The court, however, did not discuss this objection, for the reason that the question is practically *stare decisis* in this state. *Bean v. Gregg*, 7 Colo. 499, 4 P. 903, cited in notes, 21 A. L. R. 34, 52, 100; *Law v. Brinker*, 6 Colo. 555, were suits upon contracts, and hence fall within a different clause of this subdivision; but this fact in no wise alters the conclusion reached, or affects the reasons upon which it is founded. It is not perceived how a distinction could be made between torts and contracts, whereby the word "may" shall be construed as merely permissive in one case and as mandatory in the other. The objection was therefore overruled.

Under this subdivision an action to recover damages for tort may be brought in the county where the plaintiff resides, though the tort be committed elsewhere. *Newell v. Giggey*, 13 Colo. 16, 21 P. 904.

Where an action was brought in Logan county by a resident of that county against a resident of Weld county to recover damages for a tort committed in Morgan county, with service of summons in Logan county, a motion for change of place of trial from Logan county to Weld county was properly denied. *Robbins v. McAlister*, 91 Colo. 505, 16 P. (2d) 431, citing *Denver, etc., R. Co., v. Cahill*, 8 Colo. App. 158, 45 P. 285, cited in note, *Ann. Cas. 1913C, 336*; *Carlson v. Rensink*, 65 Colo. 11, 173 P. 542, 3 A. L. R. 72.

Plaintiff must bring case within the exception to this subdivision to prevent change to county of defendant's residence.—In an action for tort brought against a defendant in another county where the summons was served in the county in which defendant lived, it was incumbent upon plaintiff in resisting a motion for a change of venue to bring the case within the exception to this subdivision that actions for torts can be brought in the county in which the tort was committed. *Byram v. Piggot*, 38 Colo. 70, 89 P. 809.

Exemplary damages have no bearing upon question of venue.—Where a plaintiff asks for both compensatory and exemplary damages in a tort action, exemplary dam-

ages is only an incident, not the basis, of the cause of action, and has no bearing upon the question of venue. *Robbins v. McAlister*, 91 Colo. 505, 16 P. (2d) 431.

Action for breach of warranty.—In an action for the breach of the warranty of a stallion where fraudulent misrepresentations inducing the purchase were alleged and plaintiffs were farmers residing at the county of Lincoln, it was held that under this subdivision the action was properly brought in the county of Lincoln, both because that was the county where the contract was to be performed, and because of the character of the action as one of tort; and that defendant was not entitled as of right, to change the venue to the county of its residence. *Denver Horse Importing Co. v. Schafer*, 58 Colo. 376, 147 P. 367, cited in note, *Ann. Cas. 1915D, 1159*.

Action for conversion of machinery.—In an action by a lessee of a mine against his lessors for damages for an alleged conversion of machinery and appliances placed by the lessee for the purpose of working the mine, where the complaint charged the wrongful conversion by defendant of personal property belonging to plaintiff, the cause is properly brought in the county where defendants or any of them reside. *Updegraff v. Lesem*, 15 Colo. App. 297, 62 P. 342, cited in notes, 84 Am. St. Rep. 884, 39 A. L. R. 1100, 96 A. L. R. 81.

Action for recovery of penalty.—In *Woodworth v. Henderson*, 28 Colo. 381, 382, 65 P. 25, defendant attempted to bring an action for the recovery of a penalty within the provisions of this subdivision, one clause of which provides that an action for tort may be tried in the county where the tort was committed. This argument is wholly inapplicable to the facts of the case, for, if it be conceded that the present action is one of tort, nevertheless it is of that species expressly provided for in the preceding subdivision.

E. Action Against Corporation.

Residence of corporation is place where principal office is to be kept.—The residence of a corporation is the place where, by the certificate of incorporation, its principal office is to be kept; and that county is the proper county in which to institute an action against it. *Woods Gold Min. Co. v. Royston*, 46 Colo. 191, 103 P. 291.

And that is proper place to bring action against the corporation.—An action begun in the courts of Mesa county, by a resident of that county, against a corporation resident of another county, summons in which is served in a third county, where the corporation carries on business, must, on proper application, be removed to the county in which the defendant has its residence. The fact that the corporation filed its certificate

of incorporation in the county of its business, and failed to file one in the county where its office was to be kept, is immaterial. *Woods Gold Min. Co. v. Royston*, 46 Colo. 191, 103 P. 291.

A creditor of a corporation cannot take advantage of its failure to file the certificate of incorporation in the county where its principal office is to be kept, in order to prosecute an action against it in another county. *Woods Gold Min. Co. v. Royston*, 46 Colo. 191, 103 P. 291.

F. Other Actions.

1. Suits for Divorce.

Cross reference.—As to provisions regulating divorces and actions therefore, see vol. 2, ch. 56.

This subdivision applies to actions for divorce.—The provisions of this subdivision that in certain circumstances civil actions shall be tried in the county of the defendant's residence applies to actions for divorce. *People v. District Court*, 30 Colo. 123, 69 P. 597, cited in notes, 111 Am. St. Rep. 962, Ann. Cas. 1917A, 940.

And the divorce act must be read in connection with this and following subdivisions.—In view of the fact that the divorce act provides the civil code shall apply, except as expressly modified by its own provisions, the mandate of the act with respect to where actions for divorce shall be brought must be read in connection with this and the following subdivisions. *People v. District Court*, 30 Colo. 123, 126, 69 P. 597, cited in notes, 111 Am. St. Rep. 962, Ann. Cas. 1917A, 940, citing *Warner v. Warner*, 100 Cal. 11, 34 P. 523; *Evans v. Evans*, 105 Ind. 204, 5 N. E. 24, 768; *Powell v. Powell*, 104 Ind. 18, 3 N. E. 639.

Any other construction would inject into the act a limitation as to the place of trial wholly unwarranted by any express or implied provisions. In fact, if it were held that a defendant in a divorce action is not entitled to the right to have the case tried in the county of his residence, when the conditions mentioned in this subdivision exist, it would be equally as logical to hold that the other provisions of this rule relative to a change of venue for the convenience of witnesses or the prejudice of the judge were not applicable. *People v. District Court*, 30 Colo. 123, 126, 69 P. 597, cited in notes, 111 Am. St. Rep. 962, Ann. Cas. 1917A, 940.

A suit for divorce may be brought in the county of plaintiff's residence under chapter 56, § 6, vol. 2. *People v. County Court*, 72 Colo. 374, 211 P. 102.

But on motion must be tried in the county of defendant's residence unless service is had in the county of plaintiff's residence.

People v. County Court, 72 Colo. 374, 211 P. 102.

2. Miscellaneous.

Action against foreign corporation.—A corporation organized under the laws of New York was conducting business in Colorado, maintaining its principal office in the city of Denver. In an action instituted in another county, the process in which was served in Denver, it applied for a change of venue to the county of Denver, on the ground that its residence was in that county. Held, that under this subdivision the motion was properly denied. As the corporation was a resident of New York and a non-resident of Colorado within the meaning of this subdivision. *New York Life Ins. Co. v. Pike*, 51 Colo. 238, 117 P. 899, cited in notes, Ann. Cas. 1916B, 680, 682, 684, 53 A. L. R. 493.

Action by receivers.—Where a receiver sought to obtain possession of property in the hands of a stranger to the receivership proceeding who claimed a superior right thereto, by having him brought in by summons issued in the main action, it is held that such a party—if he accepted that method of procedure—had the right to have the matter determined in the county of his residence, where he was served, and where the tort, if any, was committed, and was not compelled to submit to a trial in the county where the receivership proceeding was pending. *Pomeranz v. National Beet Harvester Co.*, 82 Colo. 482, 261 P. 861.

The court's power of control in receivership proceedings does not deprive a stranger who claims by paramount title, of the right to have the suit or proceedings instituted by the receiver to try the question of title, determined as are other actions under our code of procedure, in the appropriate court of the county where the defendant resides, and where, as here, process is served upon him, where the cause of action arises, in the county of the defendant's residence. The better practice is for the receiver to bring an independent adverse suit in the tribunal where the defendant has the statutory right to have the controversy decided. *Id.*

Action for wrongful conversion of ore.—An action for the wrongful conversion of ore does not come within the provisions contained in this subdivision that "Actions on book accounts or for goods sold and delivered, may be tried in the county where the plaintiff resides, or in the county where the goods were sold," but does come clearly within that provision of this subdivision that: "In all other cases the actions shall be tried in the county in which the defendants, or any of them may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county."

Price v. Lucky Four-Gold Min. Co., 56 Colo. 163, 168, 136 P. 1021.

Actions to determine county boundaries.—An action to determine county boundaries does not come within the category "in all other cases," mentioned in this subdivision. The venue of such an action is controlled by subdivision (a) of this rule. *People v. District Court*, 66 Colo. 40, 42, 179 P. 875.

IV. VENUE FOR INJUNCTION TO STAY PROCEEDINGS.

Editor's note.—This subdivision is taken from the first part of § 162 and cases construing that section are included in this note. The words "at law" have been deleted.

Subdivision does not specify where action must be brought.—This subdivision, even giving to it the most strict and limited construction permissible, simply specifies, like the provision upon places of trial, the county in which the action may or shall be tried, subject to change of the place of trial, and not where it must or shall be brought. If commenced in another county, it is not a jurisdictional or fatal defect. *Smith v. Morrill*, 12 Colo. App. 233, 244, 55 P. 824, cited in notes, 124 Am. St. Rep. 762, L. R. A. 1918D, 476, Ann. Cas. 1914B, 82.

Even conceding that by the terms of this subdivision, the proceedings to enjoin must be had in the county where the judgment was rendered, it is clear from the language of the subdivision, from principle, and from a consideration of the extensive jurisdiction of the district courts, that the proceedings referred to could in any event be only those subsequent to the mere commencement of the suit by the filing of a complaint and to the issuance of a temporary restraining order. *Id.*

And privilege of having proceedings conducted in county where judgment was rendered may be waived.—The district court has jurisdiction to entertain an application for writ of injunction to restrain the enforcement of an invalid judgment rendered in another county, and in the absence of an application for change of venue seasonably made the parties waive their privilege to have the proceedings conducted in the county where the judgment was rendered. *Smith v. Morrill*, 12 Colo. App. 233, 244, 55 P. 824, cited in notes, 124 Am. St. Rep. 762, L. R. A. 1918D, 476, Ann. Cas. 1914B, 82, citing *Fletcher v. Stowell*, 17 Colo. 94, 28 P. 326; *Denver, etc., R. Co. v. Roberts*, 6 Colo. 333, cited in note, 14 L. R. A. (N. S.) 860; *Wasson v. Hoffman*, 4 Colo. App. 491, 36 P. 445.

V. POWER TO CHANGE VENUE.

This is a new subdivision, which renders unnecessary the inclusion of provisions for removal in each of the first three subdivisions of this rule.—Ed. note.

VI. CAUSES OF CHANGE.

A. Right to Change Venue in General.

1. Nature of Right.

Cross references.—As to change of judge, see Rule 97. As to change of venue in the administration of estates, see vol. 4, ch. 176, § 71. As to change of venue in criminal cases, see vol. 4, ch. 170.

Editor's note.—This subdivision is taken from portions of Code § 31, and cases construing those portions are included in this note.

The right to have the place of trial changed because the action is brought in an improper county is not jurisdictional. *Kirby v. Union Pac. Ry. Co.*, 51 Colo. 509, 541, 119 P. 1042, Ann. Cas. 1913B, 461, cited in notes, 4 A. L. R. 66, 84 A. L. R. 86.

The jurisdiction of courts of record is co-extensive with the state, and where an action is brought in a county other than that in which it should be tried, the defendant's only remedy, if he objects to the venue, lies in an application to remove the case to the proper county. *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158, 162, 45 P. 285, cited in note, Ann. Cas. 1913C, 336, citing *Fletcher v. Stowell*, 17 Colo. 94, 28 P. 326; *Wasson v. Hoffman*, 4 Colo. App. 491, 36 P. 445.

It is apparent that the bringing of an action in an improper county is not regarded as a jurisdictional or fatal defect. If it were so regarded, a plea in abatement or to the jurisdiction of the court would be the proper remedy. Instead of this, the subdivision expressly provides for a change of the place of trial. *Fletcher v. Stowell*, 17 Colo. 94, 96, 28 P. 326.

The fact that an action is brought in a county other than the one in which the real property is situate, does not affect the jurisdiction of the court to hear and determine the case unless the defendant moved to change the place of trial. *Burton v. Graham*, 36 Colo. 199, 200, 84 P. 978.

But a mere personal privilege.—*Smith v. People*, 2 Colo. App. 99, 106, 29 P. 924, cited in notes, 9 L. R. A. (N. S.) 1226, 16 L. R. A. (N. S.) 1064, 1068; *Fletcher v. Stowell*, 17 Colo. 94, 28 P. 326; *Kirby v. Union Pac. Ry. Co.*, 51 Colo. 509, 119 P. 1042, Ann. Cas. 1913B, 461, cited in notes, 4 A. L. R. 66, 84 A. L. R. 86; *Burton v. Graham*, 36 Colo. 199, 84 P. 978; *Smith v. Morrill*, 12 Colo. App. 233, 243, 55 P. 824, cited in notes, 124 Am. St. Rep. 762, L. R. A. 1918D, 476, Ann. Cas. 1914B, 82, citing *Pearse v. Bordeleau*, 3 Colo. App. 351, 33 P. 140.

Which may be waived.—*Fletcher v. Stowell*, 17 Colo. 94, 97, 28 P. 326; *Smith v. People*, 2 Colo. App. 99, 29 P. 924, cited in

notes, 9 L. R. A. (N. S.) 1226, 16 L. R. A. (N. S.) 1064, 1068; Kirby *v* Union Pac. Ry. Co., 51 Colo. 509, 119 P. 1042, Ann. Cas. 1913B, 461, cited in notes, 4 A. L. R. 66, 84 A. L. R. 86; People *v* District Court, 30 Colo. 123, 69 P. 597, cited in notes, 111 Am. St. Rep. 962, Ann. Cas. 1917A, 940; Smith *v* Morrill, 12 Colo. App. 233, 55 P. 824, cited in notes, 124 Am. St. Rep. 762, L. R. A. 1918D, 476, Ann. Cas. 1914B, 82; Burton *v* Graham, 36 Colo. 199, 84 P. 978.

And is waived by a general appearance.—Where the court denied defendant's application for a change of venue, and if it be conceded that this ruling was erroneous, still when the parties thereafter voluntarily appeared and went to trial without objection, they reinvested the court with jurisdiction. The subject-matter of the action was clearly within its jurisdiction, and the parties voluntarily entered a general appearance. The defendant could waive its privilege to the change, and by subsequently appearing and participating in the trial without objection did so. Phoenix Indemnity Co. *v* Greger, 39 Colo. 193, 195, 88 P. 1066; Kirby *v* Union Pac. Ry. Co., 51 Colo. 509, 119 P. 1042, Ann. Cas. 1913B, 461, cited in notes, 4 A. L. R. 66, 84 A. L. R. 86; Price *v* Lucky Four Gold Min. Co., 56 Colo. 163, 136 P. 1021; O'Rourke *v* O'Rourke, 58 Colo. 300, 144 P. 890, cited in notes, Ann. Cas. 1917A, 940, 76 A. L. R. 990.

Defendant answering and going to trial on the merits waives any error committed in denying his application for a change of the venue. Greeley, etc., Irrigation Co. *v* Farmers Pawnee Ditch Co., 58 Colo. 462, 146 P. 247, cited in note, Ann. Cas. 1916A, 423.

Where a party defendant who was not served with summons voluntarily appeared and applied for a change of venue to another county without limiting his appearance he entered a general appearance to the action and became as completely subject to the jurisdiction of the court as if he had been personally served with summons. Adamson *v* Bergen, 15 Colo. App. 396, 62 P. 629.

Or by failure to appear.—Fletcher *v* Stowell, 17 Colo. 94, 28 P. 326.

Or by failure to make motion to change at proper time.—The right to a change of venue is waived unless the motion is interposed at the earliest possible moment. Such a motion must be made as soon as the moving party acquires knowledge of the facts upon which the motion is based. It is manifest that this knowledge came to the moving party in this case as soon as the complaint was served. We are clearly of the opinion that the motion to change the venue came too late. Kirby *v* Union Pac. Ry. Co., 51 Colo. 509, 541, 119 P. 1042, Ann. Cas. 1913B, 461, cited in notes, 4 A. L. R. 66, 84 A. L. R. 86, citing Denver, South Park, etc., R. Co. *v* Roberts, 6 Colo. 333, cited in note,

14 L. R. A. (N. S.) 860; School District *v* Waters, 20 Colo. App. 106, 77 P. 255, cited in note, Ann. Cas. 1912D, 412; Fletcher *v* Stowell, 17 Colo. 94, 28 P. 326; Board of County Com'rs *v* Board of County Com'rs, 2 Colo. App. 412, 31 P. 183; Wasson *v* Hoffman, 4 Colo. App. 491, 36 P. 445; Denver, etc., R. Co. *v* Cahill, 8 Colo. App. 158, 45 P. 285, cited in note, Ann. Cas. 1913C, 336; Forbes *v* Board of County Com'rs, 23 Colo. 344, 47 P. 388, cited in note, 56 A. L. R. 831; Boyle *v* People, 4 Colo. 176, 34 Am. Rep. 76, cited in notes, 36 Am. Dec. 532, 1 A. L. R. 523, 31 A. L. R. 417; Roberts *v* People, 9 Colo. 458, 13 P. 630, cited in notes, 25 Am. St. Rep. 389, 390, 6 L. R. A. 666, 10 L. R. A. 305, 307, L. R. A. 1916D, 270, Ann. Cas. 1913C, 437, 438; Bean *v* Gregg, 7 Colo. 499, 4 P. 903, cited in notes, 21 A. L. R. 34, 52, 100; Smith *v* Morrill, 12 Colo. App. 233, 55 P. 824, cited in notes, 124 Am. St. Rep. 762, L. R. A. 1918D, 476 Ann. Cas. 1914B, 82; Burton *v* Graham, 36 Colo. 199, 84 P. 978.

The right of a defendant to a change of a place of trial upon the ground of residence, is a personal privilege which may be waived by not applying in apt time. People *v* District Court, 30 Colo. 123, 129, 69 P. 597, cited in notes, 111 Am. St. Rep. 962, Ann. Cas. 1917A, 940. As to what is "apt time," see subdivision (k) of this rule.—Ed. note.

And if the right is waived it is not error for the trial court to refuse to change the place of trial. Burton *v* Graham, 36 Colo. 199, 201, 84 P. 978.

Error in granting change of venue may also be waived.—Where plaintiffs, without objection, went to trial, they invested the court with full jurisdiction to proceed therein, waived the error in granting the change of venue, and cannot now be heard to urge that objection. Raymond *v* Harrison, 27 Colo. App. 484, 486, 150 P. 727, citing O'Rourke *v* O'Rourke, 58 Colo. 300, 144 P. 890, cited in notes, Ann. Cas. 1917A, 940, 76 A. L. R. 990; Greeley, etc., Irrigation Co. *v* Farmers' Pawnee Ditch Co., 58 Colo. 462, 146 P. 247, cited in note, Ann. Cas. 1916A, 423; Fletcher *v* Stowell, 17 Colo. 94, 28 P. 326; Christ *v* Flannagan, 23 Colo. 140, 46 P. 683; Phoenix Indemnity Co. *v* Greger, 39 Colo. 193, 88 P. 1066.

Where a judge in vacation of his own motion ordered a cause transferred to the district court of another county, and the court to which the transfer was made had jurisdiction of the subject-matter, and when the cause was called for trial the plaintiff appeared and consented to proceed with the trial, he waived objection to the order of the court transferring the case. Cheney *v* Crandell, 28 Colo. 383, 65 P. 56, cited in note, Ann. Cas. 1914C, 741.

The duty of changing the place of trial is not devolved upon the court of its own motion. Fletcher *v* Stowell, 17 Colo. 94, 96, 28 P. 326.

The change of venue is required to be made only "on good cause shown." These words plainly imply that a party considering himself aggrieved by the bringing of the action in a wrong county, or considering himself likely to be prejudiced by the trial thereof in the county where the action is pending, must apply to the court and show good cause therefor, in order to have the place of trial changed. *Fletcher v Stowell*, 17 Colo. 94, 97, 28 P. 326.

Such change may be applied for on the ground that the action has not been brought in the proper county, considering the location of the subject of the action, as in the present case; or it may be applied for on the ground that the ends of justice, or the convenience of parties and their witnesses, will be better subserved by the change. *Id.*

2. Effect of Motion on Jurisdiction of Court.

The duty of the court to grant the change is mandatory.—*Ashton v Garretson*, 37 Colo. 90, 85 P. 831.

The right of a defendant to a change of place of trial upon the ground of residence is one which, when the showing is in compliance with the code, the court to which it is addressed must grant without discretion, unless it has been waived. *People v District Court*, 30 Colo. 123, 129, 69 P. 597, cited in notes, 111 Am. St. Rep. 962, Ann. Cas. 1917A, 940, citing *Smith v People*, 2 Colo. App. 99, 29 P. 924, cited in notes, 9 L. R. A. (N. S.) 1226, 16 L. R. A. (N. S.) 1064, 1068; *Pearse v Bordeleau*, 3 Colo. App. 351, 33 P. 140.

And its jurisdiction is divested except for the purpose of making the order of removal.—*Ashton v Garretson*, 37 Colo. 90, 92, 85 P. 831; *Denver, etc., R. Co. v Cahill*, 8 Colo. App. 158, 45 P. 285, cited in note, Ann. Cas. 1913C, 336; *Smith v People*, 2 Colo. App. 99, 29 P. 924, cited in notes, 9 L. R. A. (N. S.) 1226, 16 L. R. A. (N. S.) 1064, 1068; *Pearse v Bordeleau*, 3 Colo. App. 351, 33 P. 140; *Woodworth v Henderson*, 28 Colo. 381, 65 P. 25; *People v District Court*, 30 Colo. 123, 69 P. 597, cited in notes, 111 Am. St. Rep. 962, Ann. Cas. 1917A, 940; *Lamar Alfalfa Milling Co. v Bishop*, 80 Colo. 369, 250 P. 689; *Woods Gold Min. Co. v Royston*, 46 Colo. 191, 103 P. 291; *Denver, etc., Const. Co. v Stout*, 8 Colo. 61, 5 P. 627, cited in notes, 15 L. R. A. 144, 47 L. R. A. (N. S.) 342, 388, 412; *Fletcher v Stowell*, 17 Colo. 94, 28 P. 326; *Brewer v Gordon*, 27 Colo. 111, 59 P. 404, 83 Am. St. Rep. 45; *People v District Court*, 70 Colo. 540, 203 P. 268.

Where an application for a change of place of trial is made by a defendant based upon a ground which entitles him to the change as a matter of right, the court to which it is addressed has no discretion ex-

cept to grant the application. In such cases the court is ousted of jurisdiction to proceed further with the cause than to enter the order of removal. *People v District Court*, 30 Colo. 123, 130, 69 P. 597, cited in notes, 111 Am. St. Rep. 962, Ann. Cas. 1917A, 940, citing *Pearse v Bordeleau*, 3 Colo. App. 351, 33 P. 140.

If an action involving real estate is brought in the wrong county, the court cannot retain jurisdiction after motion in apt time by the defendant to change the place of trial to the county in which it ought to have been commenced. *Smith v People*, 2 Colo. App. 99, 29 P. 924, cited in notes, 9 L. R. A. (N. S.) 1226, 16 L. R. A. (N. S.) 1064, 1068, citing *Veeder v Baker*, 83 N. Y. 156; *Bonnell v Esterly*, 30 Wis. 549; *Woodward v Hanchett*, 52 Wis. 482, 9 N. W. 468; *Meiners v Loeb*, 64 Wis. 343, 25 N. W. 216; *Watts v White*, 13 Cal. 321; *Cook v Pendergast*, 61 Cal. 72; *Heald v Hendy*, 65 Cal. 321, 4 P. 27.

The court's retention of the case after motion for change constitutes reversible error.—*Byram v Piggot*, 38 Colo. 70, 72, 89 P. 809, citing *Brewer v Gordon*, 27 Colo. 111, 59 P. 404, 83 Am. St. Rep. 45; *Woodworth v Henderson*, 28 Colo. 381, 65 P. 25.

An action by the holder of a note secured by deed of trust to cancel a release made by the trustee and to appoint a new trustee to enforce the deed of trust was an action involving the title to real estate. And where such action was brought in a different county from the one in which the land was located, it was reversible error to refuse to change the place of trial to the county where the land was located, upon motion seasonably made by defendant. *Campbell v Equitable Securities Co.*, 12 Colo. App. 544, 56 P. 88.

The county court having lost jurisdiction of the cause by reason of a proper application for a change of place of trial, the authority of the district court, when the cause came to it by appeal, extended no further upon the re-submission of the motion than to order a change of venue to the proper county. Failing to do that, all of its acts in entertaining and determining motions and rendering final judgment are absolutely void. *Pearse v Bordeleau*, 3 Colo. App. 351, 33 P. 140.

Under the provisions of subdivision (c), in an action to recover on a money demand growing out of contract, service upon a defendant in a county other than that in which the action is commenced, does not give the court of the latter county jurisdiction without the acquiescence of the defendant; and when that fact becomes known to the court in the method prescribed by law, it is error to retain the cause and proceed to an adjudication. *Id.*

And the supreme court will issue writ of prohibition to prevent court from proceeding further.—Where a defendant in a divorce suit made application for a change of the place of trial to the county of his residence under circumstances which entitled him to the change as a matter of right, and the application was denied, the supreme court will issue a writ of prohibition to prevent the court denying the change from proceeding further in the cause and directing that all proceedings had in excess of jurisdiction be quashed and that an order be entered removing the cause to the proper county, notwithstanding the erroneous action of the court in denying the change of venue was reviewable on appeal or writ of error. *People v. District Court*, 30 Colo. 123, 69 P. 597, cited in notes, 111 Am. St. Rep. 962, Ann. Cas. 1917A, 940.

3. Sufficiency of Pleading.

Cross references.—As to form of pleading, see Rule 7 (b) c (1). See also, Address no. 14, appx. D.

An application to change the trial of a cause from one county to another, should negative every hypothesis in favor of the county in which the action was commenced. *Adamson v. Bergen*, 15 Colo. App. 396, 399, 62 P. 629.

Thus, motion to change on ground of residence must negative allegation that contract was to be performed where action was brought.—Where a complaint alleges that the contract upon which recovery is sought was to be performed in the county in which the action is brought, a motion to change the place of trial on the ground that defendant resides in another county and was served with summons there, and which fails to negative the allegation of the complaint that the contract was to be performed in the county where the action is brought is insufficient and is properly denied. *Peabody v. Oleson*, 15 Colo. App. 346, 62 P. 234, cited in notes, 43 L. R. A. (N. S.) 542, Ann. Cas. 1918D, 1136.

In an action for the price of apples alleged to have been sold and delivered in the county in which the action was brought, an application for change of place of trial on the ground of the residence of defendant in another county, which fails to negative the allegation that the apples were sold and delivered in the county in which suit was brought was insufficient and was properly denied. *Adamson v. Bergen*, 15 Colo. App. 396, 62 P. 629.

And application must negative the residence of all defendants in county where action is brought.—In an action against two defendants an application to change the venue to another county on the ground that one of the defendants resides in the county to which the change is sought, is insufficient

unless it also negatives the residence of the other defendant in the county in which the action is brought. *Adamson v. Bergen*, 15 Colo. App. 396, 62 P. 629.

In an action against two defendants, an application to change the place of trial which alleged that one of the defendants resided in the county to which the change was sought, and that the other defendant was not within the state was insufficient, as an allegation that one of the defendants was not within the state at the time the application was made did not negative the fact of his residence in the county in which the action was brought, but was entirely consistent with such residence. *Id.*

And it must also show that plaintiff is not a resident of county where action is brought.—An application by defendants for change of venue to another county, on the ground that they are residents of such county; that the action is founded on a contract to be performed therein; and that the summons was there served on them; but which does not show that plaintiff is not a resident of the county where the action is brought when the suit was commenced, is properly refused. *De Wein v. Osborn*, 12 Colo. 407, 21 P. 189.

But application need not negative all exceptions provided in subdivision (c).—Upon motion to change the place of trial of a cause on the ground that defendant resides and was served with summons in the county to which the change was sought, it is not necessary that the application should negative all the exceptions provided in subdivision (c) whereby such change is not required, if the complaint affirmatively shows that the cause does not come within any of the exceptions. *Smith v. Post Printing, etc., Co.*, 17 Colo. App. 238, 239, 68 P. 119.

Application for change will be denied if the supposition of the jurisdiction of the court in which an action is brought is consistent with the statements made in the application. *People v. District Court*, 70 Colo. 540, 203 P. 268.

B. When County Is Improper.

Where the action is not brought in the proper county, the venue will be changed to the county where the cause is triable on application of the defendant. *Coulter v. Bank of Clear Creek County*, 18 Colo. App. 444, 446, 72 P. 602, cited in notes, Ann. Cas. 1912D, 1332, 59 A. L. R. 932, 71 A. L. R. 396, 84 A. L. R. 148.

When an action is brought in a county other than that in which it should be tried, the defendant may avail himself of his right to change the venue to the proper county. *Ashton v. Garretson*, 37 Colo. 90, 91, 85 P. 831, citing *Fletcher v. Stowell*, 17 Colo. 94, 28 P. 326; *Wasson v. Hoffman*, 4 Colo. App. 491, 36 P. 445.

And upon application of the defendant, the duty of the court to make the change is mandatory.—While the action may be brought in any county, at the election of the plaintiff, yet, upon sufficient application by the defendant, made within the proper time, to change the place of trial of the cause, on the ground that the county designated in the complaint is not the proper county, the duty of making the change becomes mandatory upon the court, and its jurisdiction is divested, except for the purpose of making the order of removal to the proper county. *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158, 162, 45 P. 285, cited in note, Ann. Cas. 1913C, 336, citing *Smith v. People*, 2 Colo. App. 99, 29 P. 924, cited in notes, 9 L. R. A. (N. S.) 1226, 16 L. R. A. (N. S.) 1064, 1068; *Pearse v. Bordeleau*, 3 Colo. App. 351, 33 P. 140.

And its refusal to order change is error.—Under this subdivision, providing that the court may, on good cause shown, change the place of trial when the county designated in the complaint is not the proper county where, in an action for the determination of some form of interest in real estate, the county designated in the complaint was not the proper county for trial, and Weld county, where the subject of the action was situated, was the proper county, upon the presentation by Campbell of his motion to change the place of trial, it was the duty of the court to order the change, and its failure to do so was error. *Campbell v. Equitable Securities Co.*, 12 Colo. App. 544, 546, 56 P. 88, citing *Smith v. People*, 2 Colo. App. 99, 29 P. 924, cited in notes, 9 L. R. A. (N. S.) 1226, 16 L. R. A. (N. S.) 1064, 1068; *Pearse v. Bordeleau*, 3 Colo. App. 351, 33 P. 140.

Right of county to change place of trial is controlled by this subdivision.—The right to change the place of trial of an action against a county is not controlled by vol. 2, ch. 46, § 161, as assumed by counsel for defendant in error, but by this subdivision, which necessarily requires the change of the place of trial to the county designated as the place of trial by statute. *Forbes v. Board of County Com'rs*, 23 Colo. 344, 351, 47 P. 388, cited in note, 56 A. L. R. 831.

And where a county fails to apply for a change of venue, the right to have the case tried in the proper county is also waived. *Forbes v. Board of County Com'rs*, 23 Colo. 344, 351, 47 P. 388, cited in note, 56 A. L. R. 831, citing *Fletcher v. Stowell*, 17 Colo. 94, 28 P. 326.

C. When Convenience of Witnesses and Ends of Justice Are Promoted.

A motion to change the place of trial, on these grounds, is addressed to the sound discretion of the court. *Enyart v. Orr*, 78 Colo. 6, 238 P. 29; *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158, 45 P. 285, cited in

note, Ann. Cas. 1913C, 336; *De Wein v. Osborn*, 12 Colo. 407, 21 P. 189; *Lamar Alfalfa Milling Co. v. Bishop*, 80 Colo. 369, 250 P. 689.

An application for a change of venue, in a will contest, for the convenience of witnesses, is within the discretion of the trial court. Its determination will not be disturbed if no abuse of the discretion appears. *Miller v. Weston*, 25 Colo. App. 231, 232, 138 P. 424.

And its decision of the question will be accepted upon review as final.—*Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158, 45 P. 285, cited in note, Ann. Cas. 1913C, 336; *Enyart v. Orr*, 78 Colo. 6, 238 P. 29; *De Wein v. Osborn*, 12 Colo. 407, 21 P. 189; *Great American Ins. Co. v. Scott*, 89 Colo. 99, 299 P. 1051.

Unless an abuse of discretion is apparent.—*Great American Ins. Co. v. Scott*, 89 Colo. 99, 299 P. 1051; *De Wein v. Osborn*, 12 Colo. 407, 21 P. 189; *Enyart v. Orr*, 78 Colo. 6, 238 P. 29; *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158, 45 P. 285, cited in note, Ann. Cas. 1913C, 336.

It is unlike the cases where the ground alleged is one of absolute right, in which it has been said by this court that the filing of the motion deprives the court of jurisdiction, except to order the change. *Enyart v. Orr*, 78 Colo. 6, 11, 238 P. 29.

The court must of necessity rely largely on the good faith of the affidavits or other evidence of what the testimony at the trial will be. *Enyart v. Orr*, 78 Colo. 6, 11, 238 P. 29.

And affidavits in support of motions for change of venue should state facts.—*Enyart v. Orr*, 78 Colo. 6, 11, 238 P. 29.

A motion for change of venue on the ground of convenience of witnesses cannot be considered until the issues are made up. *Lamar Alfalfa Milling Co. v. Bishop*, 80 Colo. 369, 370, 250 P. 689.

A motion to change the place of trial on the grounds that the convenience of witnesses and the ends of justice will be promoted by the change, is in place after the issues of fact are joined so that the court, in passing on the motion, can determine the materiality of the testimony, and it was so filed by the defendant. In this respect it is unlike the grounds mentioned in subdivision (c) of this rule. *Enyard v. Orr*, 78 Colo. 6, 11, 238 P. 29.

Application for change of venue held insufficient.—In *Corson v. Neatheny*, 9 Colo. 212, 214, 11 P. 82, cited in notes, 37 Am. St. Rep. 201, 18 L. R. A. 456, 862, L. R. A. 1918F, 975, 45 A. L. R. 1003, 96 A. L. R. 42, the allegation that "the convenience of witnesses, and the ends of justice, would

be subserved" by the change of venue was not supported. The defendant in his affidavit named eleven witnesses who resided in the county of Ouray, and stated that "he believes he can prove by each of said witnesses that the said Neatheny fairly lost the race and wager on which he put up the money in the complaint mentioned." This was matter which was not and could not become an issue in the case, and evidence of it, if offered, would not have been admissible.

There was no abuse of discretion or error in denying the application for a change of venue demanded upon the ground of the convenience of witnesses where it appeared from the affidavits filed, that the expense and inconvenience to plaintiff, occasioned by the change and consequent delay, would have been great; and where it appeared also, that no sufficient excuse was given for not interposing the motion at an earlier moment. *Bean v. Gregg*, 7 Colo. 499, 4 P. 903, cited in notes, 21 A. L. R. 34, 52, 100.

VII. CHANGE FROM COUNTY.

The granting or refusing a motion for change of venue on the ground of prejudice of the inhabitants is within the sound discretion of the trial court. *Fitzhugh v. Nicholas*, 20 Colo. App. 234, 77 P. 1092; *Nordloh v. Packard*, 45 Colo. 515, 101 P. 787, cited in notes, Ann. Cas. 1913C, 164, Ann. Cas. 1916D, 1286; *Doll v. Stewart*, 30 Colo. 320, 70 P. 326.

This subdivision providing for a change of venue where the inhabitants of the county wherein the action is pending are prejudiced against the applicant is only mandatory upon the court where the party applying has brought himself within its provisions. *Roberts v. People*, 9 Colo. 458, 13 P. 630, cited in notes, 25 Am. St. Rep. 389, 390, 6 L. R. A. 666, 10 L. R. A. 305, 307, L. R. A. 1916D, 270, Ann. Cas. 1913C, 437, 438.

And this is true although no counter affidavits are filed. *Daugherty v. People*, 78 Colo. 43, 239 P. 14.

Where, after motion for change of venue, on the ground of prejudice of the inhabitants, was denied, defendant waived a jury trial, it is held there was no prejudicial error in denying the motion. *Western Wood Products v. Tittle*, 79 Colo. 473, 246 P. 791.

And unless there is a manifest abuse of such discretionary power, the action of the trial court in refusing such application is not reviewable. *Doll v. Stewart*, 30 Colo. 320, 327, 70 P. 326, citing *Power v. People*, 17 Colo. 178, 28 P. 1121; *Michael v. Mills*, 22 Colo. 439, 45 P. 429, cited in notes, 7 L. R. A. (N. S.) 778, 827. See also, *Nordloh v. Packard*, 45 Colo. 515, 519, 101 P. 787, cited in notes, Ann. Cas. 1913C, 154, Ann. Cas. 1916D, 1286, citing *People v. District*

Court, 30 Colo. 488, 71 P. 388, cited in notes, 111 Am. St. Rep. 565, 957, 965, 966, 2 L. R. A. (N. S.) 395, Ann. Cas. 1916D, 1286, 35 A. L. R. 1090.

The fact that the issues between defendants and the landowners are of such magnitude that strong local feeling and bitter prejudices will be engendered is of no consequence, the cause being a chancery cause, triable to the court. If the trial judge should imbibe any of the local feeling, a change of venue could be granted, or the judge of another district called in. *People v. Rogers*, 12 Colo. 278, 279, 20 P. 702, cited in notes, 58 L. R. A. 856, 864.

And the fact is not material that, as the relators and defendants reside in different counties, and part in different judicial districts, a controversy may arise as to the proper county in which to bring the suit. That question can be determined in the district court. *People v. Rogers*, 12 Colo. 278, 279, 20 P. 702, cited in notes, 58 L. R. A. 856, 864.

Illustrative case.—Where an application for a change of venue on the ground of prejudice of the inhabitants of the county was supported by the affidavits of the applicant and six residents of the county, and counter affidavits were filed by ten citizens of the county who stated that they had never heard of the controversy between the parties and denied that the inhabitants of the county were prejudiced, it was not an abuse of discretion of the trial court to deny the application. *Doll v. Stewart*, 30 Colo. 320, 70 P. 326.

Sufficiency of petition.—In a petition for change of venue, in respect to the prejudice of inhabitants of the county, sufficient facts, beyond the bare allegation of prejudice, should be set out by the petitioner, from which the court may be able to judge of the probable truth or falsity of the averments. *De Walt v. Hartzell*, 7 Colo. 601, 4 P. 1201.

Matters not per se contemptuous may be set forth in a petition for a change of venue without subjecting the petitioner to punishment for contempt. *Mullin v. People*, 15 Colo. 437, 24 P. 880, 22 Am. St. Rep. 414, 9 L. R. A. 566, cited in notes, 28 Am. St. Rep. 461, 57 Am. St. Rep. 583, 9 L. R. A. 569, 11 L. R. A. 75, Ann. Cas. 1912B, 1312, 29 A. L. R. 1277, citing *Thomas v. People*, 14 Colo. 254, 23 P. 326, 9 L. R. A. 569, cited in notes, 9 L. R. A. 566, 2 A. L. R. 232.

VIII. TRANSFERS WHERE CONCURRENT JURISDICTION.

Where a cause of which the district court would have had original jurisdiction is brought to it by appeal from the county court, and the parties proceed to trial without objection predicated upon the absence of jurisdiction in the county court, all de-

fects in the jurisdiction of the county court are waived. *Estate of Brown v Stair*, 25 Colo. App. 140, 141, 136 P. 1003, cited in notes, Ann. Cas. 1918D, 245, 74 A. L. R. 373.

IX. PLACE CHANGED IF ALL PARTIES AGREE.

There are no reported cases construing this subdivision due to the fact that the section from which it is taken was so recently enacted.—Ed. note.

X. ALL PARTIES MUST AGREE ON CHANGE.

Note that this subdivision is taken from a statute covering both civil and criminal cases, but this subdivision applies only to civil cases. It applies only when there is more than one plaintiff or defendant. In such event all the plaintiffs or all the defendants must apply for the change. See Address no. 14, appx. D.—Ed. note.

XI. ONLY ONE CHANGE; NO WAIVER.

Motion must be made in "apt time."—In a number of cases it has been said that a defendant to avail himself of the privilege to change the place of trial, should appear and move for it in "apt time," but nowhere has it been held what is apt time. *Smith v Post Printing, etc., Co.*, 17 Colo. App. 238, 242, 68 P. 119. See also, note to subdivision (f) of this rule, analysis line A, 1.

What is considered "apt time" must be determined by the circumstances of each particular case in which the question arises. It would be impossible to formulate a rule which would serve as a guide in all cases. *Burton v Graham*, 36 Colo. 199, 200, 84 P. 978; *People v District Court*, 30 Colo. 123, 129, 69 P. 597, cited in notes, 11 Am. St. Rep. 962, Ann. Cas. 1917A, 940.

Motion may be made at any time before expiration of time to appear and plead.—Without undertaking to fix a definite and specific period of time, we think it sufficient to say that in our opinion a party is not too late who seeks to avail himself of the privilege before the expiration of the time within which he is by the summons required to appear and plead, he not having prior there-

to by pleading to the merits or otherwise, done any act from which an intention to waive the express statutory privilege as to the place of the trial which must subsequently occur, could be reasonably presumed, or which could be held to constitute a waiver in fact. *Smith v Post Printing, etc., Co.*, 17 Colo. App. 238, 242, 68 P. 119.

Motion made after appearance is too late.—The defendant entered a general appearance, indicating no intention whatever to exercise his right to have the place of trial changed. He took no steps to bring that matter to the attention of the court, or advised the plaintiffs in the action that he intended to assert his right, until upwards of eighty days thereafter. This would certainly indicate a purpose on his part to submit the case in all its phases to the court in which the action was brought. Hence, the defendant waived his right to a change of the place of trial, and the court did not err in overruling his motion for such change. *Burton v Graham*, 36 Colo. 199, 201, 84 P. 978, citing *Fletcher v Stowell*, 17 Colo. 94, 28 P. 326; *Smith v Morrill*, 12 Colo. App. 233, 55 P. 824, cited in notes, 124 Am. St. Rep. 762, L. R. A. 1918D, 476, Ann. Cas. 1914B, 82.

And an application for the change of the venue, first interposed after the issues have been made up and the cause is ready for trial, is not in apt time. *Miller v Weston*, 25 Colo. App. 231, 232, 138 P. 424.

Motion held seasonably made.—In a suit for divorce plaintiff applied for temporary alimony and served notice on defendant of the time the application would be heard. The day preceding the one set for hearing the application defendant by his counsel entered a general appearance and procured the postponement of the hearing for three days and on the following day filed a motion to change the place of trial to the county of his residence and in which he was served with summons. The motion to change the place of trial was the first pleading filed by defendant in the case. Held that the motion was in apt time and that defendant had not waived his right to have the place of trial changed to the county of his residence. *People v District Court*, 30 Colo. 123, 69 P. 597, cited in notes, 111 Am. St. Rep. 962, Ann. Cas. 1917A, 940.

Rule 99. Water Rights.

In actions to change the point of diversion of water, it shall be competent to prove abandonment. [From Supreme Court Rule 25.]

For a discussion of this rule, see Address no. 14, appx. D.

CHAPTER XII

ELECTIONS

Rule 100. Contested Elections.

(a) **Statement of Contest; Where Filed.** Any qualified elector wishing to contest the election of any person to the office of presidential elector, supreme, district, or county judge, shall within 30 days after the canvass of the state board of canvassers, in case of a presidential elector, supreme, or district judge, file in the office of the secretary of state a written statement of his intention to contest; and where the contest is for the office of county judge, such statement shall be filed in the office of the county clerk of the proper county within 30 days after the canvass by the county board of canvassers, which statement shall set forth: (1) The name of the contestor; (2) the name of the contestee; (3) the office; (4) the time of the election; (5) the particular cause of contest. The statement shall be verified by the affidavit of the contesting party. [Supplants Supreme Court Rule 85.]

(b) **Trial.** The contestor, or some one in behalf of the person for whose benefit the contest is made, shall, within 30 days after the filing of the statement of contest, file a complaint in the office of the clerk of the supreme court, if the contest relates to a presidential elector or supreme judge, or in the office of the clerk of the district court in the proper county, if the contest relates to a district or county judge. Upon the filing of such complaint the clerk shall issue summons. When the case is at issue, the court shall hear and determine the same in a summary manner, without the intervention of a jury. [Supplants Supreme Court Rules 87 to 90.]

Committee Note.

By 3 C. S. A., Chap. 59, Sub. 12, the court was instructed to prescribe rules for practice and proceedings in election contests triable in the supreme and district courts.

- I. Statement of Contest; Where Filed.
- II. Trial.

Cross References.

For a discussion of this rule, see Address no. 14, appx. D. As to contest of elections, see also, ch. 59, art. 1, subd. 12, vol. 3. As to election contest over office of county judge, see the note to § 262, ch. 59, vol. 3.

I. STATEMENT OF CONTEST; WHERE FILED.

Editor's note.—Since this subdivision is practically the same as Rule 85 of the Supreme Court Rules, case containing that rule has been placed here.

Election contests, for whatever office, necessarily are and must be summary. The

method of procedure to be followed depends upon the office sought to be contested. In such a case the sufficiency of a complaint may be questioned by demurrer or motion. *Gunson v Baldauf*, 88 Colo. 436, 438, 297 P. 516. See also, in this connection § 64, ch. 59, vol. 3.

II. TRIAL.

In *Sparks v Eldred*, 78 Colo. 55, 239 P. 730, the court in construing Rule 87 of the Supreme Court Rules, which is supplanted by this subdivision, said that in an election contest over the office of county judge, the incorporation of the notice of contest in contestor's petition, without further allegation of facts, did not constitute a statement of the grounds of contest as required by that rule and by logical pleading.—Ed. note.

CHAPTER XIII
SEIZURE OF PERSON OR PROPERTY

Rule 101. Arrest and Exemplary Damages.

(a) **Body Execution.** In any civil action where it shall appear from the summons and other papers that the action is founded upon tort, and upon trial a verdict or finding in favor of the plaintiff shall state that the defendant was guilty of either malice, fraud, wilful deceit or negligence consisting of a reckless or wilful disregard of the rights or safety of others, then the plaintiff may have execution against the body of any defendant against whom such verdict or finding was had, provided that in no case shall such execution issue when the defendant shall have been convicted in a criminal prosecution for the same wrong.

(b) **Term of Commitment.** If the verdict or finding described in the foregoing subdivision is made, the court shall fix the term, not in excess of one year for which any defendant may be committed to jail on a writ of execution against the body, and the execution and mittimus shall state the time so fixed; provided that no such execution shall issue if the amount of the judgment shall have been paid, and any person committed to jail by such process shall be immediately released upon payment of the judgment.

(c) **Costs.** All costs, charges and expenses of such imprisonment shall be paid out of the county treasury of the county in which such action is tried and imprisonment had when the plaintiff shall, before such imprisonment takes place, present to the officer having the execution his affidavit that he is a poor person, and not able to pay the costs of such imprisonment: otherwise all such costs shall be paid by the plaintiff, and the said judgment shall not be satisfied in whole or in part by any such imprisonment; but the plaintiff may have execution against the goods and chattels, lands and tenements of the defendant, whether against the body or not, and shall take the body on execution but once in any such action. [From 3 C. S. A., Chap. 93, Secs. 73 to 76, inclusive.]

(d) **Exemplary Damages.** In any civil action based on injury to person or property where the injury complained of shall have been attended by circumstances of fraud, malice or insult, or a wanton or reckless disregard of the injured party's rights and feelings, the jury may in addition to awarding actual damages sustained by such party, include reasonable exemplary damages. [From 2 C. S. A., Chap. 50, Sec. 6.]

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| <p>I. Body Execution.</p> <p style="padding-left: 20px;">A. General Consideration.</p> <p style="padding-left: 20px;">B. Necessity for Finding of Malice, Fraud or Wilful Deceit.</p> <p style="padding-left: 20px;">C. Actions Ex Contractu.</p> <p style="padding-left: 20px;">D. Conviction in Criminal Proceedings.</p> | <p>II. Term of Commitment.</p> <p>III. Costs.</p> <p>IV. Exemplary Damages.</p> <p style="padding-left: 20px;">A. General Consideration.</p> <p style="padding-left: 20px;">B. Against Whom Awarded.</p> <p style="padding-left: 20px;">C. Amount.</p> <p style="padding-left: 20px;">D. Pleading and Practice.</p> |
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Cross Reference.

For a discussion of this rule, see Address no. 15, appx. D.

I. BODY EXECUTION.**A. General Consideration.**

Cross references.—As to execution against body in suits on bonds of county commissioners, see ch. 45, § 73. As to allowances of exemplary damages, see subdivision (d) of this rule.

Editor's note.—Inasmuch as this subdivision is substantially the same as 3 C. S. A., ch. 93, § § 73, 74 of the Code of Civil Procedure from which it was taken the cases construing those sections have been placed here.

This rule is highly penal in its nature, as it contemplates imprisonment for debt. Such statutes are universally held to be penal. *Coryell v. Lawson*, 25 Colo. App. 432, 435, 139 P. 25, cited in note, 33 A. L. R. 652. See also, *Hathaway v. Johnson*, 55 N. Y. 93, 14 Am. Rep. 186.

And is strictly construed.—In *Coryell v. Lawson*, 25 Colo. App. 432, 436, 139 P. 25, cited in note, 33 A. L. R. 652, the verdict merely recited that "defendant was guilty of evil intent," entirely omitting to state that such evil intent was present while the tort was being committed. The court said: "If this statute must be considered penal and strictly construed (of which we think there can be no question) then the order of arrest issued by the district court was void and did not warrant arrest and imprisonment thereunder. We think the legislature only intended to permit imprisonment for tort in a case where the verdict contained a recital of those facts which the act required to be stated therein." See also, *Hathaway v. Johnson*, 55 N. Y. 93, 14 Am. Rep. 186, wherein the court said that statutes authorizing arrest and imprisonment for debt, although remedial in that they are designed to coerce, by means of the imprisonment, the payment of the creditor, are also regarded as penal, and ought not to be extended by construction so as to embrace cases not clearly within them.

In case of a simple money judgment, only the property of the defendant can be taken from him, while in case of a judgment that will support the extraordinary relief of a body execution, he is deprived of his personal liberty. So that a demand for a money judgment only, which will include a demand for an ordinary execution against property, is one thing, while a demand for a judgment that will support an extraordinary execution against the body, under a highly penal statute is another. *Jahl v. Lewis*, 57 Colo. 109, 112, 139 P. 1113.

In many of the states, the warrant of arrest is founded solely upon statutory

affidavits wherein certain matters are required to be specifically stated as a basis for arrest. In such cases the courts seem to invariably rule that a failure to state in the affidavit those matters specifically required by the statute renders the warrant of arrest and imprisonment based thereon absolutely void and affords no justification to the officer acting thereunder. *Coryell v. Lawson*, 25 Colo. App. 432, 438, 139 P. 25, cited in note, 33 A. L. R. 652. See *Spice & Son v. Steinruck*, 14 Ohio St. 213.

The purpose of the body execution is to coerce the payment of the judgment by keeping the defendant in confinement for the prescribed time, unless he pays the judgment before the expiration of that time. *Hershey v. People*, 91 Colo. 113, 116, 12 P. (2d) 345.

A release from prison on parole would defeat, or tend to defeat, that purpose. *Hershey v. People*, 91 Colo. 113, 116, 12 P. (2d) 345.

The body of a defendant debtor can be taken under execution only once, but imprisonment does not discharge the debt. *In re Thompson*, 104 Colo. 171, 89 P. (2d) 538.

When body execution may issue.—Under this and the following subdivision no execution can go against the body unless (1) the jury by their verdict declare that the defendant was guilty of fraud or wilful deceit, nor (2) unless the court has entered upon its docket the term for which the defendant may be committed. *Howard v. Mitchell*, 27 Colo. App. 45, 146 P. 486.

No body execution can be issued in an equity case. *Littlejohn v. Grand International Brotherhood of Locomotive Engineers*, 92 Colo. 275, 20 P. (2d) 311.

To warrant execution against the body of the tortfeasor guilty knowledge on his part must be shown. An instruction that when the acts of a party are voluntary "and necessarily operate to defraud others, he must be deemed to have intended a fraud," was held to warrant a verdict awarding execution against the body, on mere presumption of fraud, which is not permissible. *Barrows v. Case*, 63 Colo. 266, 165 P. 779.

Such execution is not to be awarded upon judgment by default unless expressly demanded in the complaint, even though the complaint states a cause of action entitling plaintiff to the process if it had been prayed. *Jahl v. Lewis*, 57 Colo. 109, 139 P. 1113.

Meaning of action "founded upon tort."—The subdivision speaks of an action "founded upon tort." "Founded upon" means the bottom, or foundation, on which something rests or relies; so that, in speaking of an action founded upon tort, one was meant the basis or foundation of which

was a tort. *Springhetti v Hahnewald*, 54 Colo. 383, 388, 131 P. 266. A body execution may issue in actions "founded upon tort." That does not mean in tort actions only. If an action grows out of a tort it is "founded upon tort." *Wheeler v Wilkin*, 98 Colo. 568, 571, 58 P. (2d) 1223.

Where an agent appropriated money belonging to his principal, an action for conversion was held to be clearly one founded on tort. *Ferguson v Turner*, 69 Colo. 504, 505, 194 P. 1103.

Order for imprisonment is not void because order for body judgment was not made in action.—Where an order was issued by the county court in an estate matter committing a person for refusal to pay a judgment rendered against him in favor of the estate, the contention of defendant that the order for his imprisonment was void, because no order for body judgment was made in the action wherein the judgment was entered, is overruled. *Munson v Luxford*, 95 Colo. 12, 13, 34 P. (2d) 91.

Failure to award judgment does not prevent money judgment.—In an action for conversion, the fact that the court did not feel warranted in awarding a body judgment against defendants, held no reason why a money judgment should not be entered against them. *Scott v Shook*, 80 Colo. 40, 249 P. 259, 47 A. L. R. 1108, cited in notes, 79 A. L. R. 593, 604.

B. Necessity for Finding of Malice, or Wilful Deceit.

This subdivision contemplates an aggravated case—one in which the wrong is premeditated and intentional. A person may obtain the money or property of another by means of statements which are untrue, but of the truth or falsity of which he is without knowledge. In such case he might be held responsible as for a legal fraud, although there was no active intention to commit a wrong. *Converse v Blumrich*, 14 Mich. 108. But while such representations have been held to be false and fraudulent in law, they lack the peculiar feature of guilt implied in the words "malice, fraud or wilful deceit," as used in this section. *Geraghty v Randall*, 18 Colo. App. 194, 200, 70 P. 767.

Hence, to justify execution against the body malice must be distinctly found. *Cohen v Fox*, 26 Colo. App. 55, 141 P. 504, cited in note, 33 A. L. R. 652.

But the word "either" eliminates necessity of finding malice as a condition precedent.—Under this subdivision, providing for a body judgment where defendant is guilty of either malice, fraud or wilful deceit, the use of the word "either" eliminates the necessity of finding malice as a condition precedent to a body judgment. *Clark v Giacomini*,

85 Colo. 530, 531, 277 P. 306, cited in note, 73 A. L. R. 1122.

"Malice" as used in this subdivision is to be taken in its odious and malevolent sense. *Cohen v Fox*, 26 Colo. App. 55, 141 P. 504, cited in note, 33 A. L. R. 652.

The contention that the court should have defined the difference in meaning of the word malice as used in different statutes, overruled, there being no request for such an instruction, and the facts being such that the court would have been justified in instructing the jury to find malice in its odious sense. *Kennedy v Simansky*, 75 Colo. 103, 224 P. 223, cited in note, 33 A. L. R. 652.

So also is "fraud."—From the connection of the word "fraud" with the words "malice" and "wilful deceit" it was intended to be understood in its odious sense. *Geraghty v Randall*, 18 Colo. App. 194, 200, 70 P. 767. See also, *Moody v Sindlinger*, 27 Colo. App. 290, 299, 149 P. 263.

"Evil intent," used in instruction, is not a synonym of malice.—Action for an assault and battery, the complaint alleging malice, and demanding execution against the body. The answer denied malice. The court directed the jury to state in their verdict whether defendant, in committing the tort, was "guilty of either malice or evil intent." Held that the phrase "evil intent" was not intended by the court, or accepted by the jury, as a synonym of malice; and, not being contained in the provision, was error to direct a finding thereon. *Coryell v Lawson*, 25 Colo. App. 432, 139 P. 25, cited in note, 33 A. L. R. 652.

The following instruction was given by the court: "The court instructs the jury that this is an action founded upon tort, and if you in your verdict find for the plaintiff you shall state in your verdict if in committing the tort complained of the defendant was guilty of either malice or evil intent." This instruction was erroneous, as the words, "or evil intent" are not in the provision and the court should not have added them. *Id.*

Verdict finding "fraud and wilful deceit" is sufficient without qualifications.—The verdict was "that in committing the tort complained of, the defendant was guilty of fraud and wilful deceit, consisting of a wilful disregard of the rights of the plaintiff." The quoted words spoil it. Fraud and wilful deceit were enough without more, but fraud and wilful deceit consisting of disregard mean nothing. There was perhaps a misconception of the meaning of the subdivision where the words "consisting of a reckless or wilful disregard, etc.," qualify the word "negligence," and not the words "fraud or wilful deceit." *Clark v Giacomini*, 78 Colo. 551, 554, 243 P. 620, cited in note, 73 A. L. R. 1122.

Hence in an action for deceit, a verdict for plaintiff, declaring that "said defendant is also guilty of fraud and wilful deceit," entitles plaintiff to the award of an execution against the body of defendant. *Mitchell v. Crowl*, 57 Colo. 405, 140 P. 793.

C. Actions Ex Contractu.

An execution against the body is not consistent with an action upon contract. *Thuringer v. Bonner*, 74 Colo. 539, 222 P. 1118.

Whether an action is *ex contractu* or *ex delicto* must be determined from the complaint. *Thuringer v. Bonner*, 74 Colo. 539, 222 P. 1118.

A summons stating that the action is for the recovery of money and interest thereon and attorney fees according to the terms of each held to show that the action is on contract. *Erisman v. McCarty*, 77 Colo. 289, 236 P. 777, cited in notes, 46 A. L. R. 170, 51 A. L. R. 51, 135.

And if it cannot be determined, no body execution can issue.—If an action is *ex contractu* there can be no body judgment, and if it cannot be determined whether it is in tort or on contract, there can be no execution against the body. *Erisman v. McCarty*, 77 Colo. 289, 236 P. 777, cited in notes, 46 A. L. R. 170, 51 A. L. R. 51, 135.

The courts have gone far in holding actions to be in contract, even permitting an averment of fraudulent conversion, if such act amounted to a breach of the alleged contract. *Austin v. Rawdon*, 44 N. Y. 63, 69; *Tugman v. National Steamship Co.*, 76 N. Y. 207; *Thuringer v. Bonner*, 74 Colo. 539, 541, 222 P. 1118.

But body execution may issue where action is grounded on fraudulent misrepresentation.—One who by fraudulent misrepresentation had been induced to enter into a contract may either have his action for the deceit, or rescind the contract and recover what he has paid. Relief in either form of action is grounded upon the allegation of fraud, and, prevailing in an action to rescind, he may, under this subdivision, have execution against the body. The rescission of the contract is no waiver of the fraud. *Springhetti v. Hahnwald*, 54 Colo. 383, 131 P. 266.

Where body execution may issue regardless of the form of action.—Defendant committed a tort when, by false representations, he induced plaintiff to purchase and pay for the stock. That tort gave plaintiff the right to rescind the contract and sue, as she did, in *assumpsit* for the return of the money she paid. In that manner plaintiff's right of action grew out of the tort, or, as this subdivision has it, was founded upon tort. In such case a body execution may issue regardless of the form of the action; that is to say regardless of whether the

action is in tort for damages or in *assumpsit* for money had and received. *Wheeler v. Wilkin*, 98 Colo. 568, 571, 58 P. (2d) 1223.

D. Conviction in Criminal Proceedings.

A body execution is unauthorized in a case where the defendant has been convicted in a criminal prosecution for the same wrong. *Roll v. Davis*, 85 Colo. 594, 277 P. 767.

In an action for assault and battery an order for a *capias* was erroneous under this subdivision, it appearing that the defendant had been fined in a justice court for the same assault. *Kennedy v. Siemansky*, 75 Colo. 103, 224 P. 233, cited in note, 33 A. L. R. 652.

In an action for fraud, where plaintiff asks for a body execution, if defendant claims he has been convicted for the same act as a crime, and is therefore exempt from punishment for tort, he should plead the facts showing such defense. *Clark v. Giacomini*, 78 Colo. 551, 552, 243 P. 620, cited in note, 73 A. L. R. 1122.

II. TERM OF COMMITMENT.

See 3 C. S. A., ch. 93, § 75 and note thereto.

III. COSTS.

This subdivision indicates that the place of imprisonment should be in the county where the action was tried. *Roll v. Davis*, 85 Colo. 594, 277 P. 767, 769.

IV. EXEMPLARY DAMAGES.

A. General Consideration.

Cross references.—As to treble damages for selling exempt property, see ch. 93, § 20. As to liability in treble damages for maliciously killing or injuring animals, see ch. 48, § 391.

Editor's note.—Since this subdivision was taken almost word for word from 3 C. S. A., ch. 50, § 6 the cases construing that section have been placed here.

Exemplary or punitive damages are allowed as a punishment to the wrongdoer and as an example to others. Such damages rest upon the right to punish and not the right of the injured party to compensation for the wrong done. *French v. Deane*, 19 Colo. 504, 511, 36 P. 609, 24 L. R. A. 387, cited in notes, 29 L. R. A. 834, 56 L. R. A. 115, 16 A. L. R. 1320; *Starkey v. Dameron*, 92 Colo. 420, 424, 21 P. (2d) 1112, 22 P. (2d) 640.

They are not recoverable in all tort actions.—The legislature did not intend to enact into a statute the broad principle that exemplary damages might be recovered in all actions of tort for an injury either to the person or to personal or real property.

Ristine v. Blocker, 15 Colo. App. 224, 232, 61 P. 486, cited in note, 48 L. R. A. (N. S.) 42.

And to justify exemplary damages there must be some wrong motive accompanying the wrongful act, or a reckless disregard of plaintiff's rights. French v. Deane, 19 Colo. 504, 509, 36 P. 609, 24 L. R. A. 387, cited in notes, 29 L. R. A. 834, 56 L. R. A. 115, 16 A. L. R. 1320; Republican Pub. Co. v. Conroy, 5 Colo. App. 262, 265, 38 P. 423, cited in notes, Ann. Cas. 1917B, 417, 425, 436, 52 A. L. R. 1438.

To justify a recovery of exemplary damages, the act causing the injuries must be done with an evil intent, and with the purpose of injuring the plaintiff, or with such a wanton and reckless disregard of his rights as evidence a wrongful motive. Gray v. Linton, 38 Colo. 175, 178, 88 P. 749, cited in notes, Ann. Cas. 1912A, 860, 861, 20 A. L. R. 1373, 1407, citing Crymble v. Mulvaney, 21 Colo. 203, 204, 40 P. 499, cited in notes, 68 Am. St. Rep. 272, 278, 52 L. R. A. 53, Ann. Cas. 1915B, 1220, 1222, 9 A. L. R. 1447, 54 A. L. R. 452; Denver Tramway Co. v. Cloud, 6 Colo. App. 445, 40 P. 779, cited in note, 48 L. R. A. (N. S.) 37; Page v. Yool, 28 Colo. 464, 65 P. 636.

To entitle a person to exemplary damages for a wrongful act, under this subdivision there must be an element of fraud or malice or evil intent or oppression entering into and forming part of the act. Moody v. Sindlinger, 27 Colo. App. 290, 297, 149 P. 263; Eisenhart v. Ordean, 3 Colo. App. 162, 170, 32 P. 495, cited in notes, 42 L. R. A. (N. S.) 777, Ann. Cas. 1915C, 397, 62 A. L. R. 1258, 1296, 1309, 1312.

Or wilful misconduct or an entire want of care.—Wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences, is necessary to support a claim for punitive damages. Kansas Pacific Ry. Co. v. Lundin, 3 Colo. 94, 101, cited in notes, 48 Am. Dec. 639, 40 L. R. A. 556, 1 L. R. A. (N. S.) 199, L. R. A. 1918C, 1072, 94 A. L. R. 389.

But an assumption that malice is an essential element in a finding of exemplary damages is incorrect. Clark v. Small, 80 Colo. 227, 229, 250 P. 385.

From the language of this subdivision it will be seen that that part of the verdict assessing exemplary damages could be upheld if malice, fraud or insult, were entirely wanting. It would be sufficient if the jury believed that the injury inflicted on defendant was attended by circumstances showing a wanton and reckless disregard of his rights and feelings. Coryell v. Lawson, 25 Colo. App. 432, 437, 139 P. 25, cited in note, 33 A. L. R. 652.

And one who acts wrongfully without an "innocent or proper motive" acts from a

wrong motive.—If the act is done with malice exemplary damages must be awarded. Such malice need not be admitted, it may be implied. McAllister v. McAllister, 72 Colo. 28, 30, 209 P. 788, cited in notes, 66 A. L. R. 610, 82 A. L. R. 829, 852.

In legal parlance, malice may be actual or implied, and in general it may be implied whenever there is a deliberate intention to do a grievous wrong without legal justification or excuse. Williams v. Williams, 20 Colo. 51, 65, 37 P. 614, cited in notes, 46 Am. St. Rep. 475, 9 L. R. A. (N. S.) 324, 4 A. L. R. 505, 16 A. L. R. 1320, 33 A. L. R. 388, 66 A. L. R. 611, 82 A. L. R. 830, 851.

Malice may be inferred from reckless and wanton acts.—Malice, as used in this subdivision, may be found by the jury or the court from the reckless and wanton acts of the injuring party, such as disclose an utter disregard of consequences, aside from any intentional malice in its odious or malevolent sense. Cohen v. Fox, 26 Colo. App. 55, 57, 141 P. 504, cited in note, 33 A. L. R. 652.

The feelings mentioned in this section may be physical as well as mental, and "wanton" means wilful and intentional. Clark v. Small, 80 Colo. 227, 229, 250 P. 385.

The wrong done need not be a physical injury.—Any one who wrongfully induces a husband to desert and abandon his wife commits an actionable injury against the wife. Such injury is a wrong done to the wife as an individual—as a person. This subdivision does not specify that the wrong shall be a physical or bodily injury. On the contrary, it allows exemplary damages when "the injury complained of shall be attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings." These words clearly import wrongs and injuries other than mere bodily wounds or pecuniary losses. They include as well injuries affecting the mind and sensibilities of the individual which are often more grievous and painful than mere material injuries. The whole language of this subdivision, construed together, forbids that the words wrong done to the person should be restricted to physical or bodily injuries. Williams v. Williams, 20 Colo. 51, 67, 37 P. 614, cited in notes, 46 Am. St. Rep. 475, 9 L. R. A. (N. S.) 324, 4 A. L. R. 505, 16 A. L. R. 1320, 33 A. L. R. 388, 66 A. L. R. 611, 82 A. L. R. 830, 851.

It is sufficient if defendant knew or should have known injury would probably result.—"If, conscious of his conduct and existing conditions, defendant knew, or should have known, that the injury would probably result, the requirements of this subdivision (wanton and reckless disregard) are met." Clark v. Small, 80 Colo. 227, 250 P. 385; Foster v. Redding, 97 Colo. 4, 6, 45 P. (2d) 940.

Money extent of actual damage need not be shown.—If actual damage is shown, even though its amount is not shown, or found, and the other elements entitling the plaintiff to exemplary damages are present, exemplary damages may be awarded; in other words, after actual damage is shown, it is unnecessary to show its money extent to sustain a judgment for exemplary damages. *McConathy v. Deck*, 34 Colo. 461, 463, 83 P. 135, 4 L. R. A. (N. S.) 358, cited in notes, 16 A. L. R. 773, 790, 848, 33 A. L. R. 390, 410, 81 A. L. R. 915.

Refusal of insurer to return stolen automobile.—Where, upon the recovery of a stolen automobile, the insurer against loss by theft refused to deliver it to the owner unless the latter accepted its terms of settlement, it was held that this constituted "a wanton and reckless disregard of the injured party's rights" as those words are used in this subdivision. *Pennsylvania Fire Ins. Co. v. Levy*, 85 Colo. 565, 566, 277 P. 799, 75 A. L. R. 1416.

Action on contract against a bank held not to involve wrong entitling plaintiff to exemplary damages under this subdivision. *Westesen v. Olathe State Bank*, 75 Colo. 340, 225 P. 837, cited in notes, 36 A. L. R. 1413, 1434, 38 A. L. R. 216, 823, 44 A. L. R. 1486, 78 A. L. R. 864, 84 A. L. R. 1346.

B. Against Whom Awarded.

Exemplary damages cannot be awarded against one who has not participated in the offense. *Ristine v. Blocker*, 15 Colo. App. 224, 230, 61 P. 486, cited in note, 48 L. R. A. (N. S.) 42.

Hence, a principal is not liable for such damages because of the acts of his agent.—All the cases discussing the question proceed on the hypothesis that punitive damages are not awarded by way of compensation to the sufferer, but are visited as a punishment on the offender and to serve as a warning to subsequent wrongdoers. Such being the fundamental basis of the doctrine it has always been adjudged and we have been cited to no case, and know of none, wherein a principal has been held liable for exemplary damages because of the wanton and oppressive act or of the malicious intent of his agent. *Ristine v. Blocker*, 15 Colo. App. 224, 230, 61 P. 486, cited in note, 48 L. R. A. (N. S.) 42.

Unless such acts are authorized or ratified.—The legislature did not intend to enact that in all civil actions for wrongs done to the person or to property, exemplary damages might be assessed, but only in those cases where the circumstances show fraud, malice, insult or a wanton reckless disregard of the injured party's rights or feelings. On well settled principles, this can only occur where the suit is brought directly against the wrongdoer who alone

can exhibit the intent, and to whom alone can be imputed, and against whom only can be proved the fraud, the malice, the insult or the wantonness which is a condition precedent to the assessment of such damages. This subdivision therefore, does not extend to actions brought against a principal for wrongs committed by his servant unless the record exhibits a mandate from which the authority to thus act can be deduced or the principal afterwards confirms what has been done. *Ristine v. Blocker*, 15 Colo. App. 224, 233, 61 P. 486, cited in note, 48 L. R. A. (N. S.) 42.

The words "fraud, malice, insult, wanton or reckless disregard of the injured party's rights," are commonly used only in reference to an individual who commits a wrong, or who is in some way an actor in the wrong either by direct performance or by what would make him equally responsible, as where the agent may have been authorized to act under a mandate which either directly or by implication warrants him to act in the manner in which he has performed or that which is equally available where the principal afterwards confirms what has been done by the representative. It is clearly settled that there can be no wanton and reckless disregard of an injured party's rights except by the one who exhibits it in the commission of the wrong which is the subject matter of the action. It is for this reason and this only that the courts have always held that the principal is not liable for such damages where the act has been done by his agent without authority directly or impliedly given, or he has not subsequently adopted the act. Such damages are justifiable only in an action against the wrongdoer and not in actions against those who are only consequentially liable because of their relation to the offender. *Id.*

And this rule applies to actions against railroads.—This subdivision neither directs nor permits the assessment of exemplary damages against a principal for the wrong done by his agent, and it follows the same rule should be applied, the same principle invoked, and the same results reached in an action brought against a railroad company when the basis for the assessment of exemplary damages is to be found only in circumstances showing fraud, malice, insult or reckless disregard of consequences by the agent in which the employer, the railroad company, could not participate. Admitting always the exception unless there be some order, direction or affirmance which is a prerequisite in the case against an individual principal, the rule must be the same in both cases. *Ristine v. Blocker*, 15 Colo. App. 224, 235, 61 P. 486, cited in note, 48 L. R. A. (N. S.) 42.

C. Amount.

Exemplary damages cannot be accurately measured and are usually discretionary with

the jury.—Ordinarily they should bear some relation to the compensatory damages awarded and the evil intent or wantonness exhibited toward the particular person injured. *Starkey v. Dameron*, 92 Colo. 420, 423, 21 P. (2d) 1112, 22 P. (2d) 640.

And in fixing the amount of exemplary damages, the jury may take into consideration the defendant's financial condition, since the allowance of a given sum may be less punishment to one man than to another. *Starkey v. Dameron*, 92 Colo. 420, 424, 21 P. (2d) 1112, 22 P. (2d) 640, concurring opinion of Butler, J.

But unreasonable exemplary damages will not be sustained, because the punishment "is not commensurate with the injury done." *Starkey v. Dameron*, 92 Colo. 420, 423, 21 P. (2d) 1112, 22 P. (2d) 640, wherein plaintiff's demand was for exemplary damages in the sum of two-fifths his demand for compensatory damages, but the jury found him actually damaged in the sum of \$100 and awarded him exemplary damages in twenty times that amount.

In the above case it was held that under the circumstances, the exemplary damages should not exceed the actual damages.

Award of five hundred dollars exemplary damages sustained.—Where finding of the court and the undisputed evidence showed that appellee sustained actual damage, although the money extent thereof was not found and a finding further was, that such damage was inflicted under circumstances justifying the award of exemplary damages, and exemplary damages were awarded the judgment awarding \$500 as exemplary damages was sustained. *McConathy v. Deck*, 34 Colo. 461, 465, 83 P. 135, 4 L. R. A. (N. S.) 358, 7 Ann. Cas. 896, cited in notes, 16 A. L. R. 773, 790, 848, 33 A. L. R. 390, 410, 81 A. L. R. 915.

D. Pleading and Practice.

Common law practice may be followed.—Under this section, the damages claimed being essentially unliquidated, and there being no definite limit to the exemplary damages allowable, except that they be reasonable, the common law practice may be followed in declaring for and awarding such damages. *Williams v. Williams*, 20 Colo. 51, 53, 37 P. 614, cited in notes, 46 Am. St. Rep. 475, 9 L. R. A. (N. S.) 324, 4 A. L. R. 505, 16 A. L. R. 1320, 33 A. L. R. 388, 66 A. L. R. 611, 82 A. L. R. 830, 851.

Punitive damages can only be obtained in action for wrongful death upon proper averment and proof under this subdivision. *Hayes v. Williams*, 17 Colo. 465, 468, 30 P. 352, cited in notes, L. R. A. 1916E, 136, Ann. Cas. 1913B, 351, 355, Ann. Cas. 1916E, 652.

Allegations of complaint held to state a cause of action to entitle plaintiff to exemplary damages under this subdivision. *Sager v. Sisters of Mercy*, 81 Colo. 498, 256 P. 8, 56 A. L. R. 655.

Where an action for damages is tried to the court without a jury by consent of the parties, the court may in proper case, award exemplary damages under this subdivision. *Calvat v. Franklin*, 90 Colo. 444, 9 P. (2d) 1061.

Admissibility of evidence in libel action to mitigate exemplary damages.—Where the plaintiff in a libel action seeks exemplary damages, he can recover such damages only upon proof of actual malice upon the part of the defendant, or a reckless disregard by him of the plaintiff's rights and feelings and in such case, the defendant, not as a justification, but for the sole purpose of mitigating exemplary damages, may introduce evidence to the contrary. *Bearman v. People*, 91 Colo. 486, 488, 16 P. (2d) 425.

Questions of law and fact.—"Whether there is any evidence to justify the finding of exemplary damages, is a question for the court. If there is none, it is error to submit the question to the jury." *Eisenhart v. Ordean*, 3 Colo. App. 162, 170, 32 P. 495, cited in notes, 42 L. R. A. (N. S.) 777, Ann. Cas. 1915C, 397, 62 A. L. R. 1258, 1296, 1309, 1312; *Moody v. Sindlinger*, 27 Colo. App. 290, 297, 149 P. 263; *Reyher v. Mayne*, 90 Colo. 586, 590, 10 P. (2d) 1109.

"It is error to submit the question of punitive damages to the determination of the jury in the absence of any requisite element for the application of the rule." *Reyher v. Mayne*, 90 Colo. 586, 590, 10 P. (2d) 1109.

In *Eisenhart v. Ordean*, 3 Colo. App. 162, 169, 32 P. 495, cited in notes, 42 L. R. A. (N. S.) 777, Ann. Cas. 1915C, 397, 62 A. L. R. 1258, 1296, 1309, 1312, it was held that there was no evidence whatever in the case bringing it within the provisions of this subdivision nothing upon which the jury could act; hence, to submit to the jury in the instructions the question, and allow it arbitrarily to evolve or assume wrongful acts and award exemplary damage was error.

Instructions approved.—The following instruction: "Malice may be implied when there is a deliberate intention to do a grievous wrong without legal justification or excuse," was approved in *McAllister v. McAllister*, 72 Colo. 28, 209 P. 788, cited in notes, 66 A. L. R. 610, 82 A. L. R. 829, 852.

In *Gray v. Linton*, 38 Colo. 175, 178, 88 P. 749, cited in notes, Ann. Cas. 1912A, 860, 861, 20 A. L. R. 1373, 1407, the following instruction was approved: "The court further instructs the jury that, if you find

from the evidence that the plaintiff had a lease on said premises expiring May 14, 1901, and the defendant disturbed plaintiff in the peaceable and quiet enjoyment of said premises, and that the plaintiff suffered substantial damages therefrom, and that the injuries complained of were attended by a wanton and reckless disregard of the plaintiff's rights and feelings, the jury may, in addition to the actual damages sustained by the plaintiff, award her reasonable exemplary damages."

Erroneous instruction.—An instruction that "in law a wrongful act done intentionally, without a legal justification, as done maliciously," is erroneous. To justify exemplary damages there must be some wrong motive accompanying the wrongful act, or a reckless disregard of plaintiff's

rights. *French v Deane*, 19 Colo. 504, 509, 36 P. 609, 24 L. R. A. 387, cited in notes, 29 L. R. A. 834, 56 L. R. A. 115, 16 A. L. R. 1320.

Harmless error.—When there might have been more evidence of malice than appeared in the written record, the appellate court would not hold that there was error in instructing the jury that they might find malice, wantonness, or recklessness, upon which to base exemplary damages, and even if a general verdict of only \$600 included some necessarily small sum of money that might have been allowed by the jury as exemplary damages, in addition to compensatory damages, the appellate court would not disturb it. *Cohen v Fox*, 26 Colo. App. 55, 58, 141 P. 504, cited in note, 33 A. L. R. 652.

Rule 102. Attachments.

(a) **Any Time before Judgment; Security in Lieu of.** The plaintiff, at the time of issuing the summons or filing the complaint in an action on contract, express or implied, or in an action to recover damages for any tort committed by a non-resident of this state, against the person or property of a resident of this state, or at any time afterward before judgment, may have the property of the defendant, not exempt from execution, attached as security for any judgment that may be recovered in such action, in the manner prescribed in this rule, unless the defendant shall give good and sufficient security to secure the payment of such judgment. [Supplants Code Secs. 97 and 109.]

(b) **Affidavit; Causes.** No writ of attachment shall issue unless the plaintiff, his agent or attorney, or some credible person for him, shall file in the office of the clerk of the court in which the action is brought, an affidavit setting forth that the defendant is indebted to plaintiff, or that the defendant is liable in damages to plaintiff for a tort committed by a non-resident of this state against the person or property of a resident of this state, stating the nature and amount of such indebtedness or claim for damages as near as may be, and alleging any one or more of the following causes for attachment, viz.:

- (1) That defendant is not a resident of this state.
- (2) That the defendant is a foreign corporation.
- (3) That the defendant is a corporation whose chief office or place of business is out of the state.
- (4) That the defendant conceals himself, or stands in defiance of an officer, so that process of law cannot be served upon him or that the defendant has

for more than four months been absent from the state, or that for such length of time his whereabouts have been unknown, and that the indebtedness or the claim for damages mentioned in the affidavit has been due or has existed during all the said period.

(5) That the defendant is about to remove his property or effects, or a material part thereof, out of this state, with intent to defraud or hinder or delay his creditors, or some one or more of them, or to render process of execution unavailable when judgment is obtained.

(6) That the defendant has fraudulently conveyed or transferred or assigned his property or effects, so as to hinder or delay his creditors, or some one or more of them, or to render process of execution unavailable when judgment is obtained.

(7) That the defendant has fraudulently concealed or removed or disposed of his property or effects, so as to hinder or delay his creditors, or some one or more of them, or to render process of execution unavailable when judgment is obtained.

(8) That the defendant is about to fraudulently convey or transfer or assign his property or effects so as to hinder or delay his creditors, or some one or more of them, or to render process of execution unavailable when judgment is obtained.

(9) That the defendant is about to fraudulently conceal or remove or dispose of his property or effects so as to hinder or delay his creditors, or to render process of execution unavailable when judgment is obtained; or that such debtor has departed, or is about to depart from this state, with the intention of having his effects removed from the state.

(10) That the defendant has failed or refused to pay the price or value of any article or thing delivered to him which he should have paid for upon delivery thereof.

(11) That the defendant has failed or refused to pay the price or value of any work or labor done or performed, or for any services rendered by the plaintiff at the instance of the defendant, and which should have been paid at the completion of such work or when services were fully rendered.

(12) That the defendant fraudulently contracted the debt, or fraudulently incurred the liability respecting which the suit is brought, or by false representation or false pretenses or by any fraudulent conduct, procured money or property of the plaintiff. [Code Sec. 98 except "First" etc., changed to "(1)" etc.]

(c) **Plaintiff to Give Bond.** Before issuing the writ of attachment the clerk shall require the plaintiff to furnish for his approval, a written undertaking, by a corporate surety company or by two or more sufficient sureties, in a sum not less than double the amount claimed by the plaintiff, to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all

costs that may be awarded to the defendant, and all damages he may sustain by reason of the wrongful suing out of the attachment, not exceeding the sum specified in the undertaking. The defendant may require the sureties to satisfy the clerk that each, for himself, is worth the amount for which he has become surety over and above his just debts and liabilities, in property not by law exempt from execution in this state. [From Code Sec. 106.]

(d) **Clerk Issues Writ of Attachment.** Where an affidavit shall be made and filed, as aforesaid, the clerk shall issue a writ of attachment, directed to the sheriff of any county, returnable like other writs or process in this rule, commanding him to attach the lands, tenements, goods, chattels, rights, credits, moneys and effects of said debtor, of every kind, or so much thereof as will be sufficient to satisfy the claim sworn to, with interest and costs, in whose hands or possession the same may be found. [From Code Sec. 104.]

(e) **Contents of Writ.** The writ shall be directed to the sheriff of any county in which the property of such defendant may be, and require him to serve a copy of the writ on the defendant if found in such county, and to attach and safely keep all the property of such defendant within such county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the affidavit. If the defendant deposit the amount of money claimed by the plaintiff or give and furnish security by an undertaking approved by the sheriff of a corporate surety company or of at least two sureties in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been, or is about to be, attached, the sheriff shall take such money or undertaking in lieu of the property. Several writs may be issued at the same time, or alias writs may issue at any time to the sheriffs of different counties. [From Code Sec. 108.]

(f) **Service; How Made.** The writ of attachment shall be served in like manner and under the same conditions as are provided in these rules for the service of process, except that if personal service be made in the state of Colorado, it shall be made by the sheriff. Service shall be deemed completed upon the expiration of the same period as is provided for service of process. [New.]

(g) **Execution of Writ.** The sheriff to whom the writ is directed and delivered, shall execute the same without delay, as follows:

(1) Real property standing upon the records of the county in the name of the defendant, shall be attached by filing a copy of the writ, together with a description of the property attached, with the recorder of the county.

(2) Real property, or any interest therein belonging to the defendant, and held by any person, or standing upon the records of the county in the name of any other person (but belonging to the defendant), shall be attached by leaving with such person or his agent, if either be found in the county, a copy of the writ and a notice that such real property (giving a description thereof), and any interest therein belonging to the defendant, are attached pursuant to

such writ, and filing a copy of such writ and notice with the recorder of the county.

(3) Personal property capable of manual delivery shall be attached by taking it into custody. [From Code Sec. 115.]

(h) **Return of Writ.** The sheriff shall return the writ of attachment within 20 days after its receipt, with a certificate of his proceedings endorsed thereon, or attached thereto, making a full inventory of the property attached as a part of his return upon the writ. [Code Sec. 125.]

(i) **Execution of Writ on Sunday or Legal Holiday.** If an affidavit is filed with the clerk stating that it is necessary to execute the writ of attachment on Sunday or on a legal holiday, to secure property sufficient to satisfy the judgment to be obtained, the clerk shall endorse on the writ an order to the officer directing the writ to be executed on such day. [From Code Sec. 127 and paragraph "Fourth" and the first sentence of paragraph "Fifth" of Code Sec. 453.]

(j) **No Final Judgment Until 30 Days After Levy.**

(1) **Creditors.** No final judgment shall be rendered in a cause wherein an attachment writ has been issued and a levy made thereunder, until the expiration of 30 days after such levy has been made; and any creditor of the defendant making and filing within said 30 day period an affidavit and undertaking, as hereinbefore required of the plaintiff, together with his complaint setting forth his claim against the defendant, shall be made a party plaintiff and have like remedies against the defendant to secure his claim, as the law gives to the original plaintiff. [From Code Sec. 99.]

(2) **Judgment Creditors.** Any creditor whose claim has been reduced to judgment in this state, may upon motion filed within said 30 days be made a party and have like remedies against the attached property. Such judgment creditor shall not be required to make or file an affidavit, undertaking, complaint, or have summons issue, provided, that any such judgment creditor may be required to prove to the satisfaction of the court that his judgment is bona fide and not in fraud of the rights of other creditors. [New.]

Committee Note.

This subdivision is added to protect judgment creditors so that new pleadings will not be required from them.

(k) **Dismissal by one Creditor does not Affect Others.** After any additional creditor has been made a party to the action, as hereinbefore provided, a dismissal by the first or any subsequent attaching creditor of his cause of action, or proceedings in attachment, shall not operate as a dismissal of the attachment proceedings, as to any other attaching creditor; but the remaining creditors may proceed to final judgment therein the same as though no such dismissal had been made. [From Code Sec. 100.]

(l) **Final Judgment Prorated; When Creditors Preferred.** The final judgment in said action shall be a several judgment, wherein each creditor named as plaintiff shall have and recover of the defendant the amount of his claim

or demand, as found by the court to be due, together with his costs; and the money realized from the attachment proceedings, after paying all costs taxed in the attachment action, shall be paid to the participating creditors in proportion to the amounts of their several judgments; and any surplus of such moneys, if any, shall be paid to the defendant by order of the court, upon proof thereof. Provided, when the property is attached while the defendant is removing the same or after the same has been removed from the county, and the same is overtaken and returned, or while same is secreted by the defendant, or put out of his hands, for the purpose of defrauding his creditors, the court may allow the creditor or creditors through whose diligence the same shall have been secured a priority over other attachments or judgment creditors. [Supplants Code Sec. 101 and part of Sec. 103.]

(m) **Insolvent Defendant; Creditors Prorate.** Whenever it shall satisfactorily appear to the court, that levies of writs of attachment have been made upon the property of the defendant sufficient to render the defendant in such suit insolvent, the court shall upon application, order that writs of attachment may issue in suits upon contracts, express or implied, not yet due, in order that such attaching creditors may prorate upon the attached property and the proceeds thereof under this rule; provided, that any judgment obtained under the provisions of this subdivision shall be with a rebate of the interest, if any, from the time such judgment is rendered until the time at which said debt or liability would become due. [From Code Secs. 102 and 105.]

(n) **When Suit Transferred to District Court:**

(1) **Indivisible Property Over \$2,000.00.** Whenever in any attachment proceeding in the county court it is determined by the court that the ownership of indivisible property of the value of more than \$2,000.00 is in issue, the county court shall suspend all proceedings in the entire action and certify the same, including a transcript of any judgment which may have been rendered, and transmit all papers therein to the district court of the same county, and the entire action shall thereupon proceed as if originally instituted in the said district court, and any judgment so certified shall be entered in the judgment docket of the district court, and when so entered shall have the same force and effect as if rendered originally by such district court; provided, however, that whenever a judgment of the county court is so certified, either party may have a new trial in the district court on the same terms and within the same time that an appeal from the said judgment might have been taken if there had been no certification of the cause; provided, further, that nothing herein contained shall be construed to abridge the constitutional right of either party to a review of the judgment of the county court by writ of error issued out of the supreme court. [New.]

(2) **Intervener or Attachment Creditor.** Whenever the original suit in which a writ of attachment shall be issued and served, shall be begun in the county court of any county in this state, and the claim of any intervener or attaching creditor therein, as hereinbefore provided, shall exceed the sum of

\$2,000.00, exclusive of costs, it shall be the duty of such court to forthwith certify such case and transmit all papers issued or filed therein, to the district court of such county, and thereafter the case shall proceed in the same manner as if it had been originally begun in such district court. [From Code Sec. 103.]

Committee Note.

The balance of Code Sec. 103 is covered by Rules 42 (b) and 102 (l).

(o) **Attachment Upon Debts Not Due.** Actions may be commenced and writs of attachment issued as prescribed in this rule upon debts or liabilities not yet due, if the affidavit states any of the causes mentioned, except subdivision (b) (1), (2), (3); provided that any judgment obtained under the provisions of this subdivision shall be with a rebatement of the interest, if any, from the time such judgment is rendered until the time at which said debt or liability would become due. [From Code Sec. 105.]

(p) **Traverse of Affidavit.** The defendant, within 20 days after the service of the writ of attachment upon him, may, by affidavit, traverse and put in issue the matters alleged in the affidavit upon which the attachment is based; and if the plaintiff shall substantiate any one of the causes alleged in his affidavit, the said attachment shall be sustained, otherwise the same shall be dissolved. If the debt for which the action is brought is not due and the attachment is not sustained, the action shall be dismissed; but if the debt is due, the action may proceed to judgment after the attachment is dissolved, as in other actions where no attachment is issued. If the defendant fails to traverse the plaintiff's affidavit within said 20 days, the attachment shall be deemed sustained, but it shall not be necessary to have an actual return of the writ before resorting to service by publication or to personal service out of the state, provided the other requisites of constructive service are complied with. [From Code Sec. 107.]

(q) **Amendment of Affidavit.** If on the trial of issues formed by a traverse of an affidavit for attachment it shall appear that the evidence introduced does not prove the cause or causes alleged in the affidavit, but the evidence does tend to prove another cause of attachment, then on motion the affidavit may be amended to conform to proof the same as pleadings are allowed to be amended in cases of variance. [From Code Sec. 128.]

Committee Note.

Code Sec. 109 was considered sufficiently covered by paragraph (a), which refers to property in general; Secs. 110 to 114 were repealed by 1927 Session Laws; Sec. 116 was considered entirely statutory and improper in the rules.

(r) **Intervention. Damages.** Any third person claiming any of the property attached, or any lien thereon or interest therein, may intervene under the provisions of Rule 24, and in case of a judgment in his favor may also recover such damages as he may have suffered by reason of the attachment of the property. [From Code Sec. 117.]

(s) **Perishable Property May be Sold.** Where property taken under execution, attachment, garnishment or replevin, or seized under order of court,

be in danger of serious and immediate decay or waste, or likely to depreciate rapidly in value pending the determination of the issues, or, where the keeping of it will be attended with great expense, any party to the action may apply to the court, upon due notice for a sale thereof, and, thereupon the court may, in its discretion, order the property sold in the manner provided for in said order and the proceeds of said sale shall, thereupon, be deposited with the clerk to abide the further order of the court. [From Code Sec. 118.]

(t) **Application of Proceeds. Satisfaction of Judgment.** If judgment be recovered by the plaintiff or any intervener, on order of court, all funds previously deposited with the clerk, or in the hands of the sheriff, shall be first applied thereto. If any balance remain due, execution shall issue and be delivered to the sheriff who shall sell so much of the attached property as may be sufficient to satisfy the judgment. Sales shall be conducted as in cases of sales on execution. If there is a personal judgment and after such sale the same is not satisfied in full, the sheriff shall thereupon collect the balance as upon an execution in other cases. [From Code Sec. 119.]

(u) **Balance Due. Surplus.** Whenever the judgment shall have been paid, the sheriff, upon demand, shall deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment. [From Code Sec. 120.]

(v) **Procedure When Judgment is for Defendant.** If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales, all money collected by the sheriff, and all the property attached remaining in the sheriff's hands, shall be delivered to the defendant, the writ of attachment shall be discharged and the property released therefrom. [From Code Sec. 121.]

(w) **Defendant May Release Property. Bond.** The defendant may at any time before judgment have released to him any money in the hands of the clerk or any property in the hands of the sheriff, by virtue of any writ of attachment, by executing the undertaking provided for in subdivision (x). All the proceeds of sales, all money collected by the sheriff, and all the property attached remaining in the sheriff's hands shall thereupon be released from the attachment and delivered to the defendant upon the delivery and approval of the undertaking. [From Code Sec. 122.]

(x) **Conditions of Bond. Liability of Sheriff.** Before releasing such attached property to the defendant, the sheriff shall require an undertaking executed by the defendant to the plaintiff approved by the sheriff either of a corporate surety company or with at least two sureties in such sum as may be fixed by the sheriff in not less than the value of the property, to the effect that in case the plaintiff recover judgment in the action, and the attachment is not dissolved, defendant will, on demand, re-deliver such attached property so released, to the proper officer, to be applied to the payment of the judgment, and that in default thereof the defendant and sureties will pay to the plaintiff the full value of the property so released. If a sheriff shall release any

property held by him under any writ of attachment without taking sufficient bond, he and his sureties shall be liable to the plaintiff for the damages sustained thereby. [From Code Sec. 123.]

(y) **Application to Discharge Attachment.** The defendant may also, at any time before the time for answer expires, move that the attachment be discharged on the ground that the writ was improperly issued for any reason appearing upon the face of the papers and proceedings in the action. If on such application it shall satisfactorily appear that the writ of attachment was improperly issued, it shall be discharged. [From Code Sec. 124.]

(z) **New Bond, When Ordered: Failure to Furnish.** If at any time where an attachment has been issued it shall appear to the court that the undertaking is insufficient, said court shall order another undertaking, and if the plaintiff shall fail to comply with such order within 20 days after the same shall be made, all or any writs of attachment issued therein shall be quashed. The additional undertaking shall be executed in the same manner as the original, and the sureties therein shall be jointly and severally liable with those in the original undertaking. [From Code Sec. 126.]

(aa) **New Trial; Appeal and Writs of Error.** Motions for new trial may be made in the same time and manner, and shall be allowed in attachment and garnishment proceedings as in other actions. Appeals from the county court to the district court and writs of error may be taken and prosecuted from any final judgment or order in such proceedings as in other civil cases. Any order by which an attachment or garnishment is released or sustained is a final judgment. [From Code Sec. 158.]

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| I. Any Time before Judgment: Security in Lieu of. | X. Dismissal by One Creditor Does Not Affect Others. |
| II. Affidavit: Causes. | XI. Final Judgment Prorated—Creditors Preferred: When. |
| A. General Consideration. | XII. Insolvent Defendant: Creditors Prorate. |
| B. The Affidavit. | XIII. Attachment upon Debts Not Due. |
| C. Subdivisions (b) (1), (b) (3). | XIV. Traverse of Affidavit. |
| D. Subdivision (b) (6). | XV. Intervention: Damages. |
| E. Subdivision (b) (10), (b) (11), (b) (12). | XVI. Perishable Property May Be Sold. |
| III. Plaintiff to Give Bond. | XVII. Balance Due: Surplus. |
| IV. Clerk Issues Writ of Attachment. | XVIII. Procedure when Judgment is for Defendant. |
| V. Contents of Writ. | XIX. Defendant May Release Property Bond. |
| VI. Service: How Made. | XX. Conditions of Bond: Liability of Sheriff. |
| VII. Execution of Writ. | XXI. Application to Discharge Attachment. |
| A. General Consideration. | XXII. New Trial; Appeal and Writs of Error. |
| B. Service of Writ. | |
| C. Jurisdiction by Attachment. | |
| VIII. Return of Writ. | |
| IX. No Final Judgment until Thirty Days after Levy. | |
| A. Creditors. | |
| B. Judgment Creditors. | |

Cross References.

For a discussion of this rule, see Address no. 15, appx. D. As to attachment of shares of corporate stock, see vol. 2, ch. 41, § 99. As to grounds for attachment and attachment proceedings before justices of the peace, see vol. 3, ch. 96, § 61 et seq. As to garnishment proceedings before justices of the peace and constables, see vol. 3, ch. 96, § 89 et seq.

I. ANY TIME BEFORE JUDGMENT; SECURITY IN LIEU OF.

Editor's note.—Inasmuch as this subdivision makes no changes from § 97 of the Code of Civil Procedure from which it was taken the cases construing that section have been placed here.

The following properties and funds are exempt from attachment: benefits received from accident association, vol. 3, ch. 87, § 92; benefits received from fraternal benefit societies, vol. 3, ch. 87, § 189; firemen's pension fund, vol. 4, ch. 163, § 480; policemen's pension fund, vol. 4, ch. 163, § 512; workmen's compensation insurance, vol. 3, ch. 97, § 365; wearing apparel, vol. 3, ch. 93, § 13; certain articles owned by the head of a family, vol. 3, ch. 93, § 14; bicycle and sewing machine, vol. 3, ch. 93, § 15; wages, vol. 3, ch. 93, § 16; money received as a pension, vol. 3, ch. 93, § 17; homestead, vol. 3, ch. 93, § 23; funds belonging to the Colorado state relief committee, vol. 4, ch. 141, § 12.

The remedy by attachment is a special remedy at law, except in some states where it is authorized in chancery. *Dygert v. Clem*, 26 Colo. App. 286, 287, 143 P. 823.

Right to sue out writ upon an implied contract upheld.—The right to sue out a writ of attachment upon an implied contract, under statutes similar to ours, is sustained at page 442, 4th Cyc., many authorities being cited in support thereof. *Reyer v. Blaisdell*, 26 Colo. App. 387, 411, 143 P. 385, cited in notes, Ann. Cas. 1916A, 1211, 1216, 4 A. L. R. 832.

The words, "in an action," used in this subdivision are not used to denote an action pending, but rather as introductory to the words describing the kind of action, to-wit, "an action on contract, express or implied," in which the plaintiff may have the property of the defendant attached. So the words, "at the time of issuing the summons," in this subdivision, meant precisely what they said as to the time when the writ of attachment might issue. When we consider that the chief utility of an attachment consists in the writ being served in time to prevent a delinquent debtor from placing his property beyond the reach of the creditor, it would be unfortunate, indeed, if the writ could not issue until the debtor

should have notice of the proceedings by the service of the summons. *Schuster v. Rader*, 13 Colo. 329, 333, 22 P. 505, cited in notes, 17 Am. St. Rep. 281, 22 Am. St. Rep. 615, 23 Am. St. Rep. 868, 43 Am. St. Rep. 379, 111 Am. St. Rep. 101, 7 L. R. A. 582, 20 L. R. A. 446, 28 L. R. A. 622, 30 L. R. A. 237, 238, citing *Raynolds v. Ray*, 12 Colo. 108, 20 P. 4, cited in note, 21 L. R. A. 860.

Bail bond to prevent levy.—Under this subdivision whenever a suit is begun and a writ of attachment issues in aid of it, the defendant may give a bail bond to prevent the levy of the writ and the property never becomes subject to the lien. This is generally called a bail bond, and under all the authorities whenever such a bond is given the *jus disponendi* remains with the attachment defendant. When he has given this bond he may mortgage, sell or dispose of the property as though the writ had never issued because the property has never passed into the custody of the law, the plaintiff has never acquired a lien and the bond stands in place of the property. *Nichols v. Chittenden*, 14 Colo. App. 49, 73, 59 P. 954, dissenting opinion.

For cases discharging the garnishee because the action was in tort, see *Donald Co. v. Dubinsky*, 74 Colo. 128, 129, 219 P. 209, cited in note, 93 A. L. R. 1089; *Thuringer v. Bonner*, 74 Colo. 539, 222 P. 1118; *Dygert v. Clem*, 26 Colo. App. 286, 287, 143 P. 823.

II. AFFIDAVIT; CAUSES.**A. General Consideration.**

Cross reference.—See note to the preceding subdivision.

Editor's note.—Since this subdivision is essentially the same as § 98 of the Code of Civil Procedure (see Address no. 15, appx. D) from whence it came the cases construing that section have been placed in this note. Formerly one of the causes of attachment was upon an over-due promissory note or upon an over-due book account. See *Sess. Laws 1887*, p. 121, § 92. See also, *Fitch v. Hammer*, 17 Colo. 591, 31 P. 336, cited in notes, 38 Am. St. Rep. 820, 99 Am. St. Rep. 511, 68 L. R. A. 514, 515, 518, 562; *Gurley v. Tomkins*, 17 Colo. 437, 30 P. 344, cited in notes, L. R. A. 1915D, 14, 59, 65; *Stuyvesant v. Western Mtg., etc., Co.*, 22 Colo. 28, 43 P. 144, cited in note, 21 A. L. R. 480; *Day v. Madden*, 9 Colo. App. 464, 48 P. 1053; *Mulnix v. Spratlin*, 10 Colo. App. 390, 50 P. 1078; *National Bank v. Riethmann*, 79 F. 582, 583.

The remedy by attachment owes its existence entirely to this subdivision. *Rocky Mountain Oil Co. v. Central Nat. Bank*, 29 Colo. 129, 133, 67 P. 153.

And unless a case clearly comes within its provisions, it cannot be maintained. *Rocky Mountain Oil Co. v. Central Nat.*

Bank, 29 Colo. 129, 133, 67 P. 153, citing Great West. Min. Co. v Woodmas of Alston Min. Co., 12 Colo. 46, 20 P. 771, 13 Am. St. Rep. 204, cited in notes, 13 Am. St. Rep. 493, 15 Am. St. Rep. 142, 16 Am. St. Rep. 511, 17 Am. St. Rep. 143, 19 Am. St. Rep. 218, 345, 20 Am. St. Rep. 779, 21 Am. St. Rep. 358, 23 Am. St. Rep. 21, 27 Am. St. Rep. 733, 28 Am. St. Rep. 293, 29 Am. St. Rep. 157, 459, 30 Am. St. Rep. 545, 33 Am. St. Rep. 662, 35 Am. St. Rep. 588, 38 Am. St. Rep. 412, 43 Am. St. Rep. 532, 44 Am. St. Rep. 716, 48 Am. St. Rep. 352, 50 Am. St. Rep. 256, 52 Am. St. Rep. 269, 54 Am. St. Rep. 223, 247, 57 Am. St. Rep. 675, 950, 58 Am. St. Rep. 139, 750, 60 Am. St. Rep. 648, 61 Am. St. Rep. 491, 577, 644, 70 Am. St. Rep. 416, 82 Am. St. Rep. 501, 84 Am. St. Rep. 746, 114 Am. St. Rep. 803, 126 Am. St. Rep. 42, 137 Am. St. Rep. 59, 7 L. R. A. 829, 21 L. R. A. 43, 848, 851, 852, 853, 856, 857, 859, 860, 14 L. R. A. (N. S.) 215, 39 A. L. R. 419, 88 A. L. R. 15, 31, 34, 61, 73.

Thus the attachment will be discharged where there is a failure to establish the ground by proof. *Miller v Godfrey*, 1 Colo. App. 177, 182, 27 P. 1016.

In *Mentzer v Ellison*, 7 Colo. App. 315, 43 P. 464, cited in notes, 31 L. R. A. 428, 35 L. R. A. 772, the plaintiff sued out an attachment. His affidavit stated that the defendant is indebted to the plaintiff in a given sum, but omitted to state any cause for attachment. The court of appeals held the attachment void, saying: An affidavit is an essential prerequisite to the issuance of a writ of attachment. This provision is probitory in its terms. It provides that no writ shall issue except upon affidavit filed. The jurisdiction of the court in attachment proceedings depends upon the affidavit, and if none is filed the attachment writ and all proceedings under it are void. * * * *Axelson v Columbine Laundry Co.*, 81 Colo. 254, 258, 254 P. 990, cited in notes, 52 A. L. R. 1367, 67 A. L. R. 1006.

Jurisdiction of person acquired by service of process or by appearance and of the property by attachment.—If, when property is attached, there is no service of summons upon the defendant and no appearance by him to the action, the proceeding is purely in rem. The jurisdiction of the court is confined to the property attached, and, if the attachment fails, there is nothing for the court to adjudicate. It can render no judgment of any kind. If the defendant is served with summons, or appears to the action, the proceeding is both in personam and in rem. The court has jurisdiction of the person by virtue of service of its process, or of appearance; and of the property by virtue of the attachment. But the court acquires no jurisdiction of the property merely by virtue of its jurisdiction of the person. *Mentzer v Ellison*, 7 Colo. App. 315, 318, 43

P. 464, cited in notes, 31 L. R. A. 428, 35 L. R. A. 772.

B. The Affidavit.

The affidavit must state the grounds for attachment positively. *Colorado Vanadium Corp. v Western Colorado Power Co.*, 73 Colo. 24, 28, 213 P. 122, citing 2 R. C. L., § 38, p. 830.

An affidavit for attachment which alleges that the defendant is indebted for "goods, wares and merchandise sold by the plaintiff to the defendant," states the nature of the action sufficiently. *Plummer v Struby-Estabrooke Mercantile Co.*, 23 Colo. 190, 47 P. 294, cited in notes, 52 L. R. A. 577, 580, Ann. Cas. 1914C, 1251.

And this requirement is not satisfied by allegations on information and belief merely. *Colorado Vanadium Corp. v Western Colorado Power Co.*, 73 Colo. 24, 28, 213 P. 122, citing 2 R. C. L., § 38, p. 830.

An affidavit which fails to state definitely the nature of the demand, is defective. *Leppel v Beck*, 2 Colo. App. 390, 31 P. 185, cited in notes, 31 L. R. A. 428, 35 L. R. A. 777, 849.

But not so defective as to render the proceedings absolutely void because of subdivision (q) of this rule permitting amendment. *Leppel v Beck*, 2 Colo. App. 390, 31 P. 185, cited in notes, 31 L. R. A. 428, 35 L. R. A. 777, 849.

Affidavit must contain an allegation of indebtedness and also one or more grounds of attachment. In *Mentzer v Ellison*, 7 Colo. App. 315, 43 P. 464, cited in notes, 31 L. R. A. 428, 35 L. R. A. 772, our court of appeals held that it is indispensable that the affidavit for attachment contain an allegation of indebtedness from the defendant, and also some one or more of the grounds upon which the statute authorizes an attachment. If either allegation is absent from the affidavit, there is no power to issue the writ. The decision of the court of appeals on this ground was afterwards approved by the supreme court in *Stephens v Wheeler*, 60 Colo. 351, 153 P. 444. *Gibson v Gagnon*, 82 Colo. 108, 111, 257 P. 348; *Axelson v Columbine Laundry Co.*, 81 Colo. 254, 258, 254 P. 990, cited in notes, 52 A. L. R. 1367, 67 A. L. R. 1006.

It cannot be attacked by a third person in a collateral proceeding.—The affidavit in this suit was not attacked by the defendant in the attachment proceedings, nor does the record disclose that he contemplated interposing any defense whatever to the proceedings. This therefore brings us to the consideration of the question: Can the affidavit be attacked by a third party in a collateral proceeding? This question has received the consideration of this court in

the case of *Elliott v. First Nat. Bank*, 2 Colo. App. 164, 30 P. 53, cited in notes, 35 L. R. A. 768, 778, 23 L. R. A. (N. S.) 1085, wherein it is determined that questions of the nature here presented must be raised between the parties to the suit, that they cannot be raised collaterally by a third party. *Leppel v. Beck*, 2 Colo. App. 390, 393, 31 P. 185, cited in notes, 31 L. R. A. 428, 35 L. R. A. 777, 849.

Or for the first time in an appellate court. *Rice v. Hauptman*, 2 Colo. App. 565, 31 P. 862, cited in note, 72 A. L. R. 120.

The burden is upon plaintiff to prove by a preponderance of the evidence the allegations in the affidavit. *First Nat. Bank v. Poor*, 94 Colo. 314, 29 P. (2d) 713.

The affidavit stands as a pleading, not alone in cases commenced originally by attachment, but where sued out in aid of an action the affidavit answers to the complaint in that proceeding, and hence is so far a pleading that it is properly brought up by the record without being included in the statement required by the code. *Goss v. Board of Com'rs*, 4 Colo. 468, 473, cited in notes, 79 Am. Dec. 166, 76 Am. St. Rep. 801, 4 A. L. R. 838.

And a material allegation therein must be taken to be true unless denied. *Wehle v. Kerbs*, 6 Colo. 167, cited in notes, 123 Am. St. Rep. 1044, Ann. Cas. 1918A, 516.

C. Subdivisions (b) (1), (b) (3).

Subdivision (b) (1).—A finding of the trial court that a defendant in an attachment suit was a resident of the state so as to defeat an attachment based on the ground of non-residence is supported by evidence which shows that defendant had been a resident of the state for a number of years, that he had gone out of the state and was absent from the state when the attachment was sued out, and where defendant and his wife testified that he had only temporarily left the state to accept a three months' job of work, leaving his household goods in the state. *Newlon-Hart Grocer Co. v. Peet*, 18 Colo. App. 147, 70 P. 446.

Subdivision (b) (3) applies to domestic corporations.—Counsel concede that this subdivision applies to domestic corporations. This certainly must have been the purpose, for express provision is made as to foreign corporations. Its evident object was to keep corporations organized under the laws of this state within the jurisdiction of our courts, and subject to the visitorial powers of the state, and at the same time protect creditors by requiring an office or place of business to be maintained within the state, which would be under the direction of an officer or agent upon whom service of process might be had, which would be binding upon the corporation. *Rocky*

Mountain Oil Co. v. Central Nat. Bank, 29 Colo. 129, 132, 67 P. 153.

And it must be construed in connection with the laws of the state governing the creation of domestic corporations. *Rocky Mountain Oil Co. v. Central Nat. Bank*, 29 Colo. 129, 133, 67 P. 153, petition for rehearing.

It does not apply to a corporation whose principal place of business is within the state although its chief office may be without the state. *Rocky Mountain Oil Co. v. Central Nat. Bank*, 29 Colo. 129, 67 P. 153.

It is obvious that to carry out the intent of the legislature and at the same time harmonize this subdivision with the law governing the creation of domestic corporations, the word "and" must be substituted for "or," and the subdivision given the construction stated in the main opinion. *Rocky Mountain Oil Co. v. Central Nat. Bank*, 29 Colo. 129, 135, 67 P. 153, petition for rehearing.

The expressions, "chief office" or "place of business," while not strictly synonymous, must be regarded as equivalent. The essential characteristics of each might be very different. The former would ordinarily be the place where the officials charged with the general management of its affairs might meet and direct them; while the latter might be the same or the place where its business operations were carried on under the direction and supervision of an authorized agent. The two designations are mentioned in the disjunctive, but it is clear that one must be considered the equivalent of the other, although each may be maintained at a separate place. *Rocky Mountain Oil Co. v. Central Nat. Bank*, 29 Colo. 129, 131, 67 P. 153.

If the expressions, in this subdivision, "chief office" and, "place of business" mean the same thing, then useless words have been employed. On the other hand, if "chief office" means the place from whence the general affairs of a corporation are managed and directed and the "place of business" that point where its actual business operations are carried on, then full effect is given to every word employed. If the maintenance of either a place of business or chief office (as the latter is ordinarily defined in law) out of the state renders a domestic corporation subject to attachment, it is a penalty which follows a domestic corporation strictly complying with the law. It will not be presumed that the legislature intended any such results. *Rocky Mountain Oil Co. v. Central Nat. Bank*, 29 Colo. 129, 134, 67 P. 153, petition for rehearing.

D. Subdivision (b) (6).

Intent of a debtor to hinder and delay a creditor in the collection of a debt may be

proved by circumstances as well as by direct evidence. *First Nat. Bank v. Poor*, 94 Colo. 314, 29 P. (2d) 713.

The giving of a mortgage was not sufficient of itself to prove an intent on the part of the defendants to hinder or delay the plaintiff in the collection of its debt. Such intent must be apparent from all the facts and circumstances in evidence before an attachment can be sustained on the ground alleged. If a mortgage is given with such intent, the property of the mortgagor is subject to attachment, even though the mortgagor had no purpose eventually to defeat the creditor in the collection of his demand, and even though the debt secured by the mortgage is a valid and subsisting liability. *First Nat. Bank v. Poor*, 94 Colo. 314, 316, 29 P. (2d) 713, citing *Hafelfinger v. Perry*, 52 Colo. 444, 121 P. 1021; *Asiatic Tunnel Min., etc., Co. v. Stephenson*, 63 Colo. 301, 165 P. 773.

Such question is for the jury to determine.—*First Nat. Bank v. Poor*, 94 Colo. 314, 316, 29 P. (2d) 713.

But where the transaction results in the hindering or delaying of creditors it is for the court to say whether it was fraudulent or not.—It is true that in actions at law, questions of fact must be passed upon by the jury. They are the exclusive judges of the credibility of witnesses, and of the weight to which testimony is entitled. But in order that there may be a question of fact for them to decide, some fact must be in controversy. Where the intent to delay creditors is conceded by the party against whom it is charged, it is not to be considered as a question of fact. The intent is not in question at all. Also, where the nature of the transaction was such that its necessary result was to hinder and delay creditors, it is for the court to say whether it was fraudulent or not. *Curran v. Rothschild*, 14 Colo. App. 497, 503, 60 P. 1111, cited in note, 85 A. L. R. 135.

In *Burr v. Clement*, 9 Colo. 1, 9 P. 633, the court approved and adopted the opinion of the chancellor, in *Cunningham v. Freeborn*, 3 Paige ch. 557, that when a party has intentionally executed an assignment or conveyance of his property, which must hinder or defraud his creditors of their just demands, the question whether the conveyance is fraudulent or not, necessarily becomes a question of law, and not of fact. *Id.*

It is not necessary to show that transfer was made with a dishonest motive.—To justify an attachment on the ground that the debtor has transferred his property so as to hinder or delay his creditors, it is not necessary to show that the transfer was made with a dishonest motive or with a purpose to cheat creditors and deprive them of the power ever to realize on their claims.

If a debtor assigns or transfers his property for the purpose of hindering or delaying his creditors in the collection of their claims, his act is fraudulent within the meaning of the law and will justify an attachment although he may intend that eventually the proceeds of the property shall be applied to the payment of their claims, and honestly believes that by preventing them from sacrificing his property they will ultimately realize more money. *Curran v. Rothschild*, 14 Colo. App. 497, 60 P. 1111, cited in note, 85 A. L. R. 135; *Kalberer v. Wilmore*, 65 Colo. 411, 177 P. 147.

Where intent is doubtful it is proper to receive testimony of person making the conveyance.—Where the fraudulent intent is not a conclusive legal presumption from the facts, the party who made the conveyance is a competent witness as to what his purpose actually was. If, from the evidence, the intent is doubtful, as he is the only person who could know with certainty, what, in fact, it was, it is proper to interrogate him in relation to it, and a refusal to permit him to answer the question, would be error. *Curran v. Rothschild*, 14 Colo. App. 497, 501, 60 P. 1111, cited in note, 85 A. L. R. 135.

In *Love v. Tomlinson*, 1 Colo. App. 510, 29 P. 666, cited in notes, 23 L. R. A. (N. S.) 395, 402, there was nothing on the face of the transaction to stamp it as fraudulent, and the circumstances were not in themselves conclusive; and it was held that an inquiry of the party as to his intent in making the transfer was proper. And again, in *Brown v. Potter*, 13 Colo. App. 512, 58 P. 785, cited in notes, 41 L. R. A. (N. S.) 20, 64 A. L. R. 799, 83 A. L. R. 1468, a case of a sale by a debtor of his property to one of his creditors, in the facts and circumstances of which, separately considered, there was nothing indicative of an unlawful purpose, we held that the ruling of the court admitting the testimony of the parties as to their intentions in the transaction, was correct. But this court has not decided, as counsel seems to suppose it has, that such testimony would be admissible without regard to the character impressed upon the face of the transaction itself, or that with which the attendant circumstances invested it. *Id.*

But this is not true where the intent appears upon the face of the transaction.—Where the intent of the party appears upon the face of the transaction, or where the undisputed facts are irreconcilable with a lawful purpose, his testimony as to what his motives really were, would be without effect, and should not be received. *Curran v. Rothschild*, 14 Colo. App. 497, 501, 60 P. 1111, cited in note, 85 A. L. R. 135.

An honest transfer of property by a husband to his wife in satisfaction of a prior

obligation cannot be made the basis of a proceeding in attachment. *Loveland v. Kearney*, 14 Colo. App. 463, 464, 60 P. 584.

E. Subdivisions (b) (10), (b) (11),
(b) (12).

Subdivision (b) (10).—This ground was intended to cover cases where possession of goods was fraudulently obtained under promise to pay for same on delivery. *Miller v. Godfrey & Co.*, 1 Colo. App. 177, 27 P. 1016.

In *Wade on Attach.*, § 100, it is said: "When the cause of attachment is that the action is for the price or value of an article or thing sold and delivered, which, according to the contract of sale, was to be paid for on delivery, there must be a concurrence of three facts in addition to that of indebtedness: (1) The thing must have been delivered. (2) There must have been no credit given. (3) And the contract to pay on delivery must be unconditional. If there has been a credit of ever so short a time beyond the delivery; or if the payment depends upon any condition whatever, as a demand, the contract does not come within the operation of the statute." *Id.*

Subdivision (b) (11).—An attachment under this subdivision cannot be sustained when it appears that a credit, however short, was given for the payment of the work or labor. *Morris v. Everly*, 19 Colo. 529, 36 P. 150.

Where, by contract, one is employed by another to do work by the day or month, and nothing is said as to the time of payment for the services to be rendered, his wages are due and may be demanded at the close of each day or month, as the case may be. Such services are comprehended within the meaning of this subdivision, and after demand for the amount due the laborer may maintain attachment. *De Lappe v. Sullivan*, 7 Colo. 182, 2 P. 926, cited in note, 2 A. L. R. 528.

Subdivision (b) (12).—Plaintiff's action, being in the nature of *indebitatus assumpsit* for money obtained by fraud, and the complaint being sustained by sufficient evidence, a dissolution of the attachment is reversible error. *Reyer v. Blaisdell*, 26 Colo. App. 387, 388, 143 P. 385, cited in notes, *Ann. Cas.* 1916A, 1211, 1216, 4 A. L. R. 832.

III. PLAINTIFF TO GIVE BOND.

It has been held in this state that the giving of a forthcoming bond does not release the attachment, but that the property still remains subject to the writ and the lien until the judgment is paid and satisfied. *Day v. Madden*, 9 Colo. App. 464, 475, 48 P. 1053.

IV. CLERK ISSUES WRIT OF ATTACHMENT.

Section 104 of the Code of Civil Procedure from which this subdivision was taken was printed as subdivision (13) in *Sess. Laws 1881*, § 92. In speaking of this the court in *Simmons v. California Powder Works*, 7 Colo. 285, 288, 3 P. 420, said, "It will be observed that the paragraph numbered 'thirteen,' of § 92, contains no cause for attachment, but set forth the mode of procedure after the filing of the affidavit provided for in the first paragraph of the section, and the numbering of this latter paragraph of the section is simply a blunder or oversight in preparing, copying or printing the act.—Ed. note.

V. CONTENTS OF WRIT.

Editor's note.—In § 108 of the Code of Civil Procedure from which this section was taken there was no requirement that the sheriff approve the sureties. Since the cases in the following note are constructions of that section they should be read with this difference in mind.

Where possible personal service must be made before the court acquires jurisdiction.—This provision and § 115 (now Rule 102 (g)) have been construed by this court in the case of *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 20 P. 771, 13 Am. St. Rep. 204, cited in notes, 13 Am. St. Rep. 493, 15 Am. St. Rep. 142, 16 Am. St. Rep. 511, 17 Am. St. Rep. 143, 19 Am. St. Rep. 218, 345, 20 Am. St. Rep. 779, 21 Am. St. Rep. 358, 23 Am. St. Rep. 21, 27 Am. St. Rep. 733, 28 Am. St. Rep. 293, 29 Am. St. Rep. 157, 459, 30 Am. St. Rep. 545, 33 Am. St. Rep. 662, 35 Am. St. Rep. 588, 38 Am. St. Rep. 412, 43 Am. St. Rep. 532, 44 Am. St. Rep. 716, 48 Am. St. Rep. 352, 50 Am. St. Rep. 256, 52 Am. St. Rep. 269, 54 Am. St. Rep. 223, 247, 57 Am. St. Rep. 675, 950, 58 Am. St. Rep. 139, 750, 60 Am. St. Rep. 648, 61 Am. St. Rep. 491, 577, 644, 70 Am. St. Rep. 416, 82 Am. St. Rep. 501, 84 Am. St. Rep. 746, 114 Am. St. Rep. 803, 126 Am. St. Rep. 42, 137 Am. St. Rep. 59, 7 L. R. A. 829, 21 L. R. A. 43, 848, 851, 852, 853, 856, 857, 859, 860, 14 L. R. A. (N. S.) 215, 39 A. L. R. 419, 88 A. L. R. 15, 31, 34, 61, 73, where, among other things, it is said: "The mere levy of an attachment did not give the court jurisdiction to determine the question of indebtedness and condemn the attached property to pay the same. * * * Where a defendant resides in this state, and there is no question but that he can be personally served, the service is complete when a copy of the writ is served upon him, and the property levied upon. Then, and not until then, does the court acquire jurisdiction to finally hear and determine the same." *Thompson v. White*, 25 Colo. 226, 230, 54 P. 718, cited in note, 21 A. L. R. 279.

A failure to pursue the statutory requirements is almost universally held fatal to a levy. *Graham v. Reno*, 5 Colo. App. 330, 334, 38 P. 835, cited in note, Ann. Cas. 1916D, 317.

Service of writ is required to enable the debtor to deposit the money sued for and prevent the lien.—A fair construction of this provision and § 115 (now Rule 102 (g)) would seem to justify the conclusion that the service of the attachment writ is required for the purpose of enabling the debtor to deposit the money sued for, and thus prevent the lien from taking effect; or, if the lien already exists, thus to secure its dissolution; and also to enable him, in case he shall see fit so to do, to traverse and put in issue the matters stated in the affidavit of attachment. In a majority of cases, the levy of the writ will either precede or be made simultaneously with the service thereof. In some cases, the officer may serve the writ before he makes the levy, and in such cases the subdivision provides that, if the amount of the claim be deposited, the levy shall not be made. *Raynolds v. Ray*, 12 Colo. 108, 115, 20 P. 4, cited in note, 21 L. R. A. 860.

Where lien is preserved and continued in force.—Where a writ of attachment was levied on real estate of a debtor and judgment entered without service of either the attachment writ or summons, but afterwards, on discovering the error, the judgment was set aside and a new judgment entered, after personal service of an alias summons and of a copy of the attachment writ, it is held that the lien acquired at the commencement of the action by the levy of the writ was preserved and continued in force. *Raynolds v. Ray*, 12 Colo. 108, 20 P. 4, cited in note, 21 L. R. A. 860.

A writ directed to the sheriff of a county cannot be executed by the sheriff of any other county, and cannot be executed by the sheriff to whom it is issued outside of his own county. *McArthur v. Boynton*, 19 Colo. App. 234, 74 P. 540.

In so far as relates to the execution of process, the power possessed by the sheriff is conferred by the statutes; and no power exists in him except such as is expressly so conferred, or may be fairly implied. *Id.*

Under this provision and § 115 (now Rule 102 (g)), a valid levy of a writ of attachment may be made on real estate and a valid lien acquired by indorsing thereon a description of the property attached and filing a copy of such writ, so indorsed, in the recorder's office of the county wherein the real estate is situated. The levy of the writ creates a provisional lien; but before a valid judgment can be rendered which will preserve and make the lien effective, there must be service of the writ and summons

on the defendant. *Raynolds v. Ray*, 12 Colo. 108, 20 P. 4, cited in note, 21 L. R. A. 860.

This subdivision applies to real as well as personal property, and gives the person whose property is about to be seized or has been seized on such writ an opportunity to prevent the levy of the writ, or, if the levy has been made, to obtain an immediate release of the property by securing the payment of the plaintiff's claim. This is an important right, the full benefit of which cannot, in many cases, be enjoyed unless notice of the issuing of the attachment writ be given as provided by the subdivision, viz., by its service on the defendant. *Raynolds v. Ray*, 12 Colo. 108, 118, 20 P. 4, cited in note, 21 L. R. A. 860, dissenting opinion of Mr. Chief Justice Beck.

Bond not required to be executed under seal.—A bond executed under this subdivision to release attached property, is not required to be executed under seal, and if so executed the liability of the obligors is in no manner affected thereby. To authorize an agent to sign his principal's name to such bond, it is not necessary that such authority be under seal. Parol evidence is sufficient to establish such authority, or to establish a ratification of an unauthorized signing. *Lynch v. Smyth*, 25 Colo. 103, 54 P. 634, cited in notes, L. R. A. 1918C, 222, Ann. Cas. 1912B, 151, 31 A. L. R. 1091, 1101.

VI. SERVICE; HOW MADE.

For a discussion of this subdivision, see Address no. 15, appx. D.

VII. EXECUTION OF WRIT.

A. General Consideration.

Cross references.—See notes to subdivision (e) of this rule. As to group life insurance policy exempt from attachment, see vol. 3, ch. 87, § 167. As to fraternal benefit societies exempt from attachment, see vol. 3, ch. 87, § 189. As to when levy of attachment is subordinate to certain liens, see vol. 3, ch. 101, § 20.

Editor's note.—Since this subdivision is almost identical with § 115 of the Code of Civil Procedure from which it was taken the cases construing that section have been placed here.

Personal property capable of manual delivery can be attached only by being taken into custody by the officer. An attempted levy of an attachment upon personal property, capable of manual delivery, where the property was left in the custody of the defendant, and was not separated from defendant's other property, was not such levy as would give the attaching creditor or the officer any right in the property. *Gottlieb v. Barton*, 13 Colo. App. 147, 57 P. 754, cited in notes, Ann. Cas. 1916B, 984, 986.

See *Nichols v. Chittenden*, 14 Colo. App. 49, 64, 59 P. 954.

An attachment remains a continuing security for any judgment that may be obtained. It is an incumbrance from the time of its levy, and a subsequent judgment relates back to that levy. *Shuck v. Quackenbush*, 75 Colo. 592, 227 P. 1041, 38 A. L. R. 259.

Where failure to sue out writ is excusable.—We must presume for our present purpose, as the fact undoubtedly is, that this property belonged to the defendant debtor. On the records it stood in the name of C, his wife. Both were non-residents, absconders, and he was a fugitive from justice. Neither had an agent in Colorado on whom service or execution of the writ of attachment could be made. Had a writ of attachment been sued out by the creditor, it was impossible to execute it as required by this subdivision because all the statutory steps essential to a valid levy must be taken or no valid seizure can be made. *Graham v. Reno*, 5 Colo. App. 330, 38 P. 835, cited in note, Ann. Cas. 1916D, 317. Failure, therefore, of plaintiff to sue out a writ of attachment was excusable. No seizure or levy upon this property by or under an attachment was possible in this state, and the only remedy, if any, left to the creditor was that invoked by him, a creditor's suit, by which, in this state, as generally, an equitable lien may be procured, or an equitable levy made. *Shuck v. Quackenbush*, 75 Colo. 592, 603, 227 P. 1041, 38 A. L. R. 259.

When sheriff's duties are terminated.—This subdivision provides that real estate "shall be attached by filing a copy of the writ, together with a description of the property attached with the recorder of the county." The sheriff's duties are terminated when those acts are performed and he can exercise no further agency or control. "The lien created by the attachment, whatever may be its character, is in the attaching creditor, and he only can release or discharge it." *Drake*, Att. (4th Ed.) § 240. *Barton v. Continental Oil Co.*, 5 Colo. App. 341, 346, 38 P. 432.

Wherever the wrongful levy of a writ is the gravamen of a suit, the burden must of necessity be with the plaintiff to show that in fact a levy was made, unless it concerns personalty, and there be some circumstances of dispossession or disturbance of the owner's rights which will sustain a suit. *Graham v. Reno*, 5 Colo. App. 330, 333, 38 P. 835, cited in note, Ann. Cas. 1916D, 317.

An attack by a third person upon a void levy is not an attack upon the judgment.—An insufficient and void levy of an attachment upon lands is made and the plaintiff in the action recovers judgment. One

not a party to that action institutes a suit in equity to set aside, as a cloud upon his title, such void and insufficient levy. The latter action is not an attack upon the judgment in the former. *Weiss v. Ahrens*, 24 Colo. App. 531, 135 P. 987.

B. Service of Writ.

The lien does not become effective until the writ is properly and completely served.—In *Raynolds v. Ray*, 12 Colo. 108, 20 P. 4, cited in note, 21 L. R. A. 860, the court says: "We are of opinion that by filing a copy of the writ of attachment, together with a description of the property to be attached, with the recorder of the county, a valid levy was made, and that a valid lien upon the property was thereby created. * * * By the levy under a writ of attachment before the service thereof, the plaintiff acquires a provisional lien upon the property levied on; but, before a valid judgment can be rendered by which the attachment lien is preserved and made effective, there must be proper service of the summons and the writ of attachment." *Thompson v. White*, 25 Colo. 226, 231, 54 P. 718, cited in note, 21 A. L. R. 279.

In harmony with the view expressed in *Raynolds v. Ray*, 12 Colo. 108, 20 P. 4, cited in note, 21 L. R. A. 860, is the case of *Graham v. Reno*, 5 Colo. App. 330, 38 P. 835, cited in note, Ann. Cas. 1916D, 317, where the court held that an action for the wrongful levy of a writ of attachment would not lie unless, among other things, a service of the writ was had upon the attachment debtor. The effect of these decisions is that, in the absence of a general appearance by defendant, an attachment lien does not become valid and effective and enforceable until the attachment writ is properly and completely served. *Thompson v. White*, 25 Colo. 226, 232, 54 P. 718, cited in note, 21 A. L. R. 279. See *Emery v. Yount*, 7 Colo. 107, 1 P. 686, cited in note, 23 L. R. A. (N. S.) 46; *Brown v. Tucker*, 7 Colo. 30, 1 P. 221.

And proper service includes delivery of a copy of the writ to defendant and filing a copy with the recorder; and no judgment establishing the lien, or ordering a sale of the property, is valid without such service, or without a general appearance, if that does away with the necessity for service. *Thompson v. White*, 25 Colo. 226, 54 P. 718, cited in note, 21 A. L. R. 279.

"The remedy by attachment is purely statutory. It has no existence without the statute. It has an individuality entirely foreign to the common law, and, being in derogation of common right, must be strictly construed. An attachment of real estate and notice thereof is made by filing a copy of the writ, together with a description of the property, with the recorder of the county and by serving a copy of the

writ on the defendant." *Weiss v. Ahrens*, 24 Colo. App. 531, 535, 135 P. 987, citing *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 55, 20 P. 771, 13 Am. St. Rep. 204, cited in notes, 13 Am. St. Rep. 493, 15 Am. St. Rep. 142, 16 Am. St. Rep. 511, 17 Am. St. Rep. 143, 19 Am. St. Rep. 218, 345, 20 Am. St. Rep. 779, 21 Am. St. Rep. 358, 23 Am. St. Rep. 21, 27 Am. St. Rep. 733, 28 Am. St. Rep. 293, 29 Am. St. Rep. 157, 459, 30 Am. St. Rep. 545, 33 Am. St. Rep. 662, 35 Am. St. Rep. 588, 38 Am. St. Rep. 412, 43 Am. St. Rep. 532, 44 Am. St. Rep. 716, 48 Am. St. Rep. 352, 50 Am. St. Rep. 256, 52 Am. St. Rep. 269, 54 Am. St. Rep. 223, 247, 57 Am. St. Rep. 675, 950, 58 Am. St. Rep. 139, 750, 60 Am. St. Rep. 648, 61 Am. St. Rep. 491, 577, 644, 70 Am. St. Rep. 416, 82 Am. St. Rep. 501, 84 Am. St. Rep. 746, 114 Am. St. Rep. 803, 126 Am. St. Rep. 42, 137 Am. St. Rep. 59, 7 L. R. A. 829, 21 L. R. A. 43, 848, 851, 852, 853, 856, 857, 859, 860, 14 L. R. A. (N. S.) 215, 39 A. L. R. 419, 88 A. L. R. 15, 31, 34, 61, 73.

Both steps are precedent to a valid levy of a writ of attachment on property thus circumstanced as to its title. A failure to pursue the statutory requirements is almost universally held fatal to a levy. *Graham v. Reno*, 5 Colo. App. 330, 334, 38 P. 835, cited in note, Ann. Cas. 1916D, 317.

Mere filing of certificate is ineffective as to subsequent purchasers.—Under this subdivision a writ of attachment is not effectually levied upon lands unless a copy of the writ, with a description of the lands taken, is filed with a recorder in the county. The mere filing of a certificate of the levy is without effect as to subsequent purchasers. *Weiss v. Ahrens*, 24 Colo. App. 531, 135 P. 987.

Where defendant dies before copy of writ delivered to him.—In an action against a resident defendant where an attachment had been levied upon real estate by filing a copy of the writ together with a description of the property with the recorder, but the defendant died before a copy of the writ was delivered to him, the attachment lien could not be perfected by service upon the executrix of the deceased defendant, nor by her general appearance in the action. *Thompson v. White*, 25 Colo. 226, 54 P. 718, cited in note, 21 A. L. R. 279.

C. Jurisdiction by Attachment.

Seizure of property of non-resident as a condition precedent to jurisdiction is a judicial requirement.—The rule requiring the seizure of property within the state belonging to a non-resident defendant, as a condition precedent to the exercise of jurisdiction, is a judicial, and not a statutory requirement. *Bank of Colfax v. Richardson*, 34 Ore. 518, 54 P. 359. As *Bean, J.*, who delivered the opinion in that case, in speak-

ing of this rule, says, "Its requirements are satisfied, and the court acquires sufficient jurisdiction of the rem to protect its proceeding from collateral attack, when the property of the defendant has been actually brought within the power and control of the court by a seizure under a lawful writ of attachment issued in the action, although there may be irregularities, even errors, in the attachment proceedings." *Van Wagenen v. Carpenter*, 27 Colo. 444, 454, 61 P. 698, cited in note, 4 L. R. A. (N. S.) 1127.

Such jurisdiction is aided by the same presumptions as in cases of personal service.—The jurisdiction of a court of general jurisdiction in attachment proceedings is general, and its actions therein are aided by the same presumptions as in cases of personal service. Here jurisdiction was obtained in a case by attachment of the property of a non-resident, a judgment rendered therein and the property sold under a special execution, and a sheriff's deed thereunder is sufficient to establish ownership in the purchaser. *Van Wagenen v. Carpenter*, 27 Colo. 444, 61 P. 698, cited in note, 4 L. R. A. (N. S.) 1127.

In *Stewart v. Anderson*, 70 Tex. 588, 8 S. W. 295, *Stayton, C. J.*, uses the following language: "There has been much difference of opinion in courts for whose decisions we have the highest respect, as to whether the same presumptions will be indulged in favor of jurisdiction when reliance is placed on citation by publication and seizure of property, as will be when personal service made within the territory over which the court has jurisdiction is relied upon. * * * Whether the jurisdiction of a court be general or special, it cannot be made to depend upon the character of the process through which it acquires power over the person or thing to be affected by its final adjudication. The constitution confers jurisdiction, but the legislature prescribes the process through which persons and things may be brought within its reach and made subject to its exercise." We think the rule announced in this case is supported by the better reason; and that when action of a court of general jurisdiction is invoked in attachment proceedings, although its power to so act is conferred by a special statute, it nevertheless, in exercising such special powers, acts judicially and is none the less a court of general jurisdiction because it proceeds according to rules and practice prescribed by the statute. *Id.*

Thus upon a collateral attack it will be conclusively presumed that everything necessary to be done was done, unless the contrary appears from the record. *Van Wagenen v. Carpenter*, 27 Colo. 444, 61 P. 698, cited in note, 4 L. R. A. (N. S.) 1127.

Our conclusion does not militate against the rule announced in *Thompson v. White*, 25 Colo. 226, 54 P. 718, cited in note, 21 A.

L. R. 279, and other decisions of this court in regard to the strictness with which the requirements of the attachment act must be observed; but only recognizes, as applicable to judgments in this class of cases, the same presumption of jurisdiction upon collateral attack that obtains in other cases, to-wit, that everything necessary to be done was done, unless the contrary appears from the record. *Id.*

And a sheriff's deed thereunder is sufficient to establish ownership in the purchaser. *Van Wagenen v. Carpenter*, 27 Colo. 444, 61 P. 698, cited in note, 4 L. R. A. (N. S.) 1127.

VIII. RETURN OF WRIT.

Editor's note.—This subdivision is identical with § 125 of the Civil Procedure Code so the cases construing that section have been placed here.

The return of the officer upon a writ of attachment is the record of the levy, and is the legal evidence of the fact that the levy was made. It cannot be proved by parol evidence. *Gottlieb v. Barton*, 13 Colo. App. 147, 57 P. 754, cited in notes, *Ann. Cas.* 1916B, 984, 986.

Sheriff is not entitled to costs for making out the inventory.—The making of an inventory of attached property is not a matter necessarily involving the expenditure of money out of pocket, and the sheriff is not entitled to costs therefor in addition to the statutory fees prescribed by statute for serving and otherwise executing attachment writs. *Cramer v. Oppenstein*, 16 Colo. 495, 27 P. 713.

IX. NO FINAL JUDGMENT UNTIL THIRTY DAYS AFTER LEVY.

A. Creditors.

Editor's note.—Inasmuch as this subdivision is practically the same as § 99 of the Code of Civil Procedure from which it was taken the cases construing that section have been placed here.

The last part of this subdivision following the semicolon is the codification of the holding in *Hartner v. Davis*, 100 Colo. 464, 68 P. (2d) 456, construing § 99 of the Code of Civil Procedure. See Address no. 15, appx. D.

Purpose of provision.—The plain purpose of this and the following subdivision is to permit creditors to pro-rate the proceeds of attached property, not to permit them to establish rights in a strange and unusual way. The provision simply makes it possible for all creditors to put themselves in a position of equality, in respect to the satisfaction, out of the property attached, of claims properly asserted and regularly adjudicated; and it is a matter of administra-

tive policy and convenience that all creditors intervening are, upon application, named as plaintiffs in one general proceeding for the purpose of determining and adjudicating their respective rights. *Trinidad Nat. Bank v. Jamieson House Furnishing Co.*, 60 Colo. 356, 360, 153 P. 441.

The "like remedies" secured to an intervening attachment creditor by this subdivision are no more or less than such means as were available to the original plaintiff to establish and secure his claim, that is to say, upon the filing of affidavit, undertaking and complaint, with application to be made a party plaintiff in the original proceeding, the intervening creditor merely places his claim, in point of time of action, and for the purpose of pro-rata, upon an equal basis with that of the original plaintiff, and should enforce his rights by the same legal modes as were available to the one first to act. It certainly was not intended thereby to put an intervening creditor in a better position than he who first attached, and the section grants no privilege which obviates taking the steps ordinarily requisite to jurisdiction in order to recover a valid judgment upon a claim properly established. The claim of the defendant company was a separate cause of action. To hold that "like remedies" comprehends that the attachment debtor has constructive notice, by the original proceeding, of any and all causes of action which might be subsequently asserted against him upon his contractual obligations, would be to declare that which is plainly not within the purview of the section, much less within its express terms. *Trinidad Nat. Bank v. Jamieson House Furnishing Co.*, 60 Colo. 356, 361, 153 P. 441.

Creditors making themselves co-plaintiffs cannot assert any right superior to that of their co-plaintiff.—Where in an attachment suit other creditors come in and make themselves co-plaintiffs with the original plaintiff in the attachment suit for the purpose of pro rata distribution of the attached fund as provided in this subdivision, such creditors thereby preclude themselves from asserting any right in the case superior to that of their co-plaintiff. *Rouse v. Wallace*, 10 Colo. App. 93, 50 P. 366, cited in notes, *Ann. Cas.* 1913C, 285, 287, 75 A. L. R. 1005.

Where petition comes too late.—Petition for intervention comes too late where, before it was presented, judgment had been entered, execution issued, and levy and sale had thereunder. *Hartner v. Davis*, 100 Colo. 464, 68 P. (2d) 456, 458.

B. Judgment Creditors.

For a discussion of this part of the subdivision, see Address no. 15, appx. D.

X. DISMISSAL BY ONE CREDITOR DOES NOT AFFECT OTHERS.

See notes to the preceding subdivision.

XI. FINAL JUDGMENT PRORATED—CREDITORS PREFERRED; WHEN.

For a discussion of this subdivision, see Address no. 15, appx. D.

XII. INSOLVENT DEFENDANT; CREDITORS PRORATE.

This and subdivisions (d) and (o) of this rule indicate that the legislature intended that a writ should be not only issued, but levied by the original plaintiff, and as well by each intervening creditor who sets up a new and independent cause of action. The issuance of a writ, without levy thereof, would be useless. *Trinidad Nat. Bank v. Jamieson House Furnishing Co.*, 60 Colo. 356, 362, 153 P. 441.

XIII. ATTACHMENT UPON DEBTS NOT DUE.

Cross reference.—See note to subdivision (m) of this rule. See also, the note to subdivision (b) of this rule.

Editor's note.—Since this subdivision is identical with § 105 of the Code of Civil Procedure from which it was taken the cases construing that section have been placed here.

General consideration.—It is a well settled rule of construction of statutes to so construe them, if possible, as to give each part some meaning and effect, and allow the whole to stand. This is easily done in this case. There are several grounds of attachment stated, notably fourth to ninth, both inclusive, and the twelfth, where the attachment could be rightfully maintained when the money is not yet due. The eleventh is not excepted in this subdivision, and can no more be brought under the operation of the section than can the tenth ground. It provides for attachment where—"the defendant has failed or refused to pay the price or value of any work or labor done * * * which should have been paid at the completion of such work." The necessity of excepting those two clauses, probably, never occurred to the legislature. *Miller v. Godfrey & Co.*, 1 Colo. App. 177, 183, 27 P. 1016.

There must be a finding of the facts alleged as the basis of the attachment, and a formal entry declaring them to exist, in order to entitle the plaintiff to judgment for a debt not due. *Woods v. Tanquary*, 3 Colo. App. 515, 34 P. 737, cited in notes, 123 Am. St. Rep. 1031, 1059, 32 A. L. R. 866.

To recover debt not yet due plaintiff should state such purpose in affidavit or complaint.—It is urged that under this subdivision appellee might recover for the August business, for the reason that he had commenced his suit by attachment, and

had alleged causes of attachment entitling him to recover upon debts or liabilities not yet due. The referee held that inasmuch as neither the complaint nor the affidavit of attachment stated that the suit was brought for a debt or liability not yet due, appellee's recovery should be restricted to such claims as were due. This was not an unreasonable construction of the pleadings. Perhaps by amendment appellee might have been permitted to include the August transactions in his recovery; but the pleadings were not amended in this respect. *Kimball v. Lyon*, 19 Colo. 266, 269, 35 P. 44.

XIV. TRAVERSE OF AFFIDAVIT.

Editor's note.—Since this subdivision is essentially the same as § 107 of the Code of Civil Procedure (see Address no. 15, appx. D), from which it was taken, the cases construing that section have been placed here.

When the grounds of an attachment have been traversed and there is no evidence to sustain any one of them, the attachment should be dissolved. *Mt. Lincoln Coal Co. v. Lane*, 23 Colo. 121, 46 P. 632.

A traverse of an affidavit which does not deny the allegations as of the time stated in the affidavit, is not good. *Colorado Vanadium Corp. v. Western Colorado Power Co.*, 73 Colo. 24, 213 P. 122.

The court thinks the plaintiffs are right in their contention that this provision was not complied with. The traverse is in the present tense. It does not deny the existence of any fact set forth in the affidavit for attachment. No issue is created. It says that the grounds of attachment herein alleged are false; it relates to the present, not to the past. It was made fifteen days after the affidavit in attachment was made. *Id.*

In *Wehle v. Kerbs*, 6 Colo. 167, cited in notes, 123 Am. St. Rep. 1044, Ann. Cas. 1918A, 516, the traverse was in the following language: "It is not true that defendant * * * is about to fraudulently conceal or remove or dispose of his property, so as to hinder or delay his creditors." The court said of this traverse: "This affidavit does not deny that the defendant was about to perpetrate this fraud six days before, when the attachment was sued out." *Id.*

In *Midland Fuel Co. v. Schuessler*, 18 Colo. App. 386, 71 P. 894, the affidavit in attachment, in part is: "That defendant is about to fraudulently transfer its property to hinder its creditors." The traverse of defendant was: "Denies that it is about to fraudulently transfer its property or any part thereof so as to hinder or delay its creditors or any one or more of them." At page 389 the court of appeals said: "The affidavit alleged that on December 8, the defendant was about to fraudulently

transfer its property with the intent to hinder creditors. The traverse made on December 19, denied that the defendant upon December 19, was about to fraudulently transfer its property with intent to hinder creditors. This was not a denial of the allegation in the affidavit, to-wit, that defendant was about on December 8, to fraudulently transfer its property with intent to hinder creditors, and it is so ruled in *Wehle v. Kerbs*, 6 Colo. 167, cited in notes, 123 Am. St. Rep. 1044, Ann. Cas. 1918A, 516." *Id.*

In the absence of a traverse the court is not required to investigate the truth of the affidavit.—In the absence of a traverse, or of any application to quash the writ or to discharge the attachment, this subdivision does not require an investigation of the truth of the allegations of the affidavit, or that the court shall make any finding or order concerning either the attachment or the property attached. These matters are merely incidental to the action, and there being no issue as to them, the court does not appear to have any duty appertaining there-to to perform. *Brown v. Tucker*, 7 Colo. 30, 38, 1 P. 221.

Presumption as to filing of traverse.—Both parties having stipulated that the evidence should be taken upon the traverse issue at the time of the hearing upon the main case, we will presume the traverse was filed. Assuming then that the traverse was filed, we must also assume that this ground of attachment was therein denied. Therefore, having hereinbefore reached the conclusion that this is an action at law as for money had and received upon an implied contract to recover money in the possession of defendant which rightfully belongs to plaintiffs, and having also decided that the money sued for was obtained from plaintiffs by and through false representations, false pretenses, and fraudulent conduct, of the defendant, it follows that the lower court committed reversible error in finding the issues upon the traverse in favor of defendant. *Reyer v. Blaisdell*, 26 Colo. App. 387, 410, 143 P. 385, cited in notes, Ann. Cas. 1916A, 1211, 1216, 4 A. L. R. 832.

Waiver of order dissolving attachment.—Defendant having obtained an order dissolving an attachment afterwards stipulated that the issues in the main cause, as well as those framed upon the traverse of the affidavit in attachment should be tried at the same time. Held, that he thereby waived the order dissolving the attachment, and all rights thereunder. *Reyer v. Blaisdell*, 26 Colo. App. 387, 143 P. 385, cited in notes, Ann. Cas. 1916A, 1211, 1216, 4 A. L. R. 832.

Traverse should be positive, clear and explicit.—In 2 R. C. L., § 38, page 830, it is said: "The prevailing view is that an affidavit for attachment which is expressed

to be made on information and belief is not sufficient. The affidavit, it is held, must state the grounds for attachment positively, and this requirement is not satisfied by allegations on information and belief merely." See also *Wade on Attachment*, § 279, where it is said: "The denial of the grounds of attachment, * * * should be positive, clear and explicit." The same principle applies to the charging and traversing affidavits. *Colorado Vanadium Corp. v. Western Colorado Power Co.*, 73 Colo. 24, 28, 213 P. 122.

The separate traversing affidavit is not a pleading in the sense in which that word is used in our code, so as to permit a traverse, by an officer of a corporation, upon information and belief. An officer or an attorney of a corporation, who undertakes to traverse an affidavit in attachment, is presumed to know what his corporation did and must make his affidavit positively. *Colorado Vanadium Corp. v. Western Colorado Power Co.*, 73 Colo. 24, 28, 213 P. 122, citing *Mastin v. Bartholomew*, 41 Colo. 328, 92 P. 682, cited in note, 72 A. L. R. 730.

If the prescribed procedure for release of attached property be not invoked, the levy remains in force. *Collins v. Burns*, 16 Colo. 7, 26 P. 145.

Lien becomes absolute if the ground of it be not successfully traversed.—Under our statutes an attachment plaintiff is in reality, and for many purposes, an incumbrancer. It is quite true the lien which he acquires is contingent rather than inchoate, and dependent not only upon a compliance with the statute which provides for its issue, but also upon the subsequent recovery of a judgment and proof of a cause of action on which he had a right to sue when he commenced his action. In this sense, it is contingent; in another, it is absolute, or becomes absolute, if the ground of it be not successfully traversed and the plaintiff ultimately succeeds. *Day v. Madden*, 9 Colo. App. 464, 475, 48 P. 1053.

Where the statements of the affidavit are regularly traversed by the defendant without the court's attention being called to its supposed defects, and the issues are found against him upon the trial; or if the amount of actual damage proved by the plaintiff be less than the amount averred in the affidavit, the judgment will not be reversed on such grounds. *De Stafford v. Gartley*, 15 Colo. 32, 24 P. 580, cited in notes, 107 Am. St. Rep. 895, 72 A. L. R. 120.

XV. INTERVENTION. DAMAGES.

The court in construing § 117 of the Code of Civil Procedure from which this subdivision was taken said that jurisdiction does not in an intervention depend upon the record of the permission to intervene. Permission is presumed where nothing to

the contrary appears and the court has assumed jurisdiction. *Grove v. Foutch*, 6 Colo. App. 357, 40 P. 852, cited in note, 123 Am. St. Rep. 286.—Ed. note.

XVI. PERISHABLE PROPERTY MAY BE SOLD.

For a discussion of this subdivision, see Address no. 15, appx. D.

XVII. BALANCE DUE. SURPLUS.

This subdivision is identical with the last clause of § 120 of the Code of Civil Procedure. In construing that clause the court said that it unmistakably provides for a disposition of the balance of any fund remaining in the hands of the sheriff, and distinctly commands the payment of such balance, after satisfaction of the judgment, to the defendant. *Cramer v. Brasher*, 15 Colo. 216, 218, 25 P. 180.—Ed. note.

XVIII. PROCEDURE WHEN JUDGMENT IS FOR DEFENDANT.

Judgment against the attaching creditor releases the property, restores proceeds, if any, and dissolves the writ. *Vigil v. Pacheco*, 95 Colo. 405, 408, 36 P. (2d) 766.

XIX. DEFENDANT MAY RELEASE PROPERTY. BOND.

Editor's note.—Section 122 of the Code of Civil Procedure from which this section was taken provided that defendant might release the attached property at any time by the execution of a bond.

Bond releases property from officers' custody but does not dissolve the attachment lien.—*Chittenden v. Nichols*, 31 Colo. 202, 72 P. 53, reversing *Nichols v. Chittenden*, 14 Colo. App. 49, 59 P. 954.

Enforceable undertaking.—An undertaking given by the defendant with sureties for the purpose of releasing money in the hands of a garnishee is enforceable where, by reason of its execution, the money was in fact paid over by the garnishee to the defendant. *Schradsky v. Dunklee*, 9 Colo. App. 394, 48 P. 666, citing *Abbott v. Williams*, 15 Colo. 512, 25 P. 450.

Where person is estopped from controverting validity of undertaking.—When a person signs an incomplete undertaking and delivers the same to another for a particular purpose and with ostensible authority to fill in any needed matter to make it effective, and it is accepted in its completed form by the obligee, he is estopped from controverting its validity to the prejudice of the obligee. *Palacios v. Brasher*, 18 Colo. 593, 34 P. 251, 36 Am. St. Rep. 305.

Property in the hands of the sheriff.—The sheriff has no authority to accept an

undertaking for the release of money garnished, nor to execute a release for money in the hands of a garnishee, such property not being "in the hands of the sheriff." Nevertheless, where parties, through the instrumentality of an undertaking executed by them, procure money from the garnishee, they having thus received the benefit of the undertaking, cannot be heard to deny its binding obligation upon themselves upon the happening of the contingencies therein provided for. *Abbott v. Williams*, 15 Colo. 512, 25 P. 450.

The decision in the case of *Henry v. Gold Park Min. Co.*, 10 F. 11, seems to have been based upon an application to the court to discharge the garnishee upon giving the undertaking provided by this provision. While the court refused to order the money in the hands of the garnishee to be released, it does not by any means follow that, if the money had been so released, the parties executing the undertaking could have avoided their obligation on the ground that the court was without authority to make the order. *Id.*

XX. CONDITIONS OF BOND. LIABILITY OF SHERIFF.

Cross reference.—See the note under the preceding subdivision.

Editor's note.—Even though this subdivision is somewhat different from § 123 of the Code of Civil Procedure some of the cases construing that section still seem applicable and have been placed hereunder.

Defective complaint.—In a suit against the sureties on a re-delivery bond given by defendant to plaintiff in an attachment suit to release the property attached, a complaint which fails to allege that demand was made on the defendant in the attachment suit for the return of the property released is fatally defective. It is not sufficient to allege that demand was made on the sureties in the bond. *Murray v. Ginsberg*, 10 Colo. App. 63, 48 P. 968.

Return of property in damaged condition constitutes a breach of the bond.—Where property, released from an attachment under a forthcoming bond is damaged from use by the defendant after the execution of the bond, its return to the officer in such damaged condition is not a return of substantially the same property and constitutes a breach of the bond. *Creswell v. Woodside*, 15 Colo. App. 468, 63 P. 330.

Measure of damages in such a case.—In an action by an attachment plaintiff upon a redelivery bond where the property had been returned to the officer in a damaged condition resulting from use by the attachment defendant, the measure of plaintiff's damage was the diminution in value of the goods between the date of their release and

the date of their return to the attaching officer, not to exceed the unpaid residue of the judgment. *Creswell v. Woodside*, 15 Colo. App. 468, 63 P. 330.

Where attached property has been released on a re-delivery bond and after judgment sustaining the attachment the property is returned to the officer and the property is regularly and fairly sold as provided by statute and the proceeds applied on the judgment, as between the parties, the selling price is conclusive of the value thereof, and in an action by an attachment plaintiff upon a re-delivery bond for damage to the property from use by the defendant after the execution of the bond, an instruction that undertakes to charge plaintiff with the value of the property returned regardless of the amount it brought at the sale is erroneous, and the fact that the plaintiff was the purchaser at the sale is of no significance. *Id.*

XXI. APPLICATION TO DISCHARGE ATTACHMENT.

Editor's note.—Section 124 of the Code of Civil Procedure from which this section was taken provided that defendant should give plaintiff reasonable notice before he could move to have the attachment discharged.

Where improperly issued.—Looking to the affidavit and complaint, the court must

say that there is no express or implied contract between the appellant and appellee; and it follows that the attachment was improperly issued and should have been discharged under the motion. *Goss v. Board of Com'rs*, 4 Colo. 468, 473, cited in notes, 79 Am. Dec. 166, 76 Am. St. Rep. 801, 4 A. L. R. 838.

Neither officer nor plaintiff can refuse to accept property on account of damage.—Where attached property has been released on a re-delivery bond and the identical property is returned to the sheriff, it is the right of the bondsmen to have the property sold and the proceeds applied on the judgment and neither the officer nor the plaintiff can refuse to accept the return of the property on account of damage or diminution in value, nor is the plaintiff estopped by such acceptance to sue upon the bond for damage to the property resulting from use by the defendant after it has been released to him under the bond. *Creswell v. Woodside*, 15 Colo. App. 468, 63 P. 330.

XXII. NEW TRIAL; APPEAL AND WRITS OF ERROR.

For a discussion of this subdivision, see Address no. 15, appx. D. For provisions as to garnishments in courts of record after judgment and execution issued, see vol. 3, ch. 96 § 88 et seq.

Rule 103. Garnishment.

(a) **When Writ Issues.** Any time after the issuance of a writ of attachment the plaintiff may have a writ of garnishment issue and, whether they are due at the time of the service of the writ or are to become due thereafter, attach the credits, effects, debts, choses in action, money, and other personal property of the defendant in the possession or in the control of any third person, as garnishee for the security of any judgment the plaintiff may recover in such action against the defendant; provided that no garnishment shall issue for any sum less than the amount fixed by statute. [From Code Sec. 129.]

Committee Note.

This amount is now \$20.00.

(b) **Garnishee Summoned, When.** Whenever in any action a writ of attachment has been issued and delivered to the proper officer, the officer shall, upon the request of plaintiff, summon such person as the plaintiff may direct to answer as garnishee. [From Code Sec. 130.]

(c) **Garnishment of Public Official.** Garnishee summons directed against any public body, including the state, against whom garnishment is authorized, shall be served upon the officer of such body whose duty it is to issue warrants, checks or money to the defendant in the action. Service of the summons on such officer shall be made by leaving a copy thereof with him personally, or in the event of his absence from the office, then by leaving a copy thereof in his office with the chief clerk, deputy or other employee of the office then in charge thereof. Such officer shall answer such summons in the manner provided for answer of garnishee summons by private corporations; provided, however, he need not include as money due the amount of any warrant or check drawn and signed prior to the time of service of the summons. [From Code Secs. 132 A to 132 E, incl.]

Committee Note.

Code Secs. 132 A to 132 E [§§ 4 to 8, appx. B] are largely statutory, conferring the power to garnish, and are left in the statutes. Subdivision (c), *supra*, places the procedure portions in the rules.

(d) **Writ Issued by Officer. Alias and Pluries Writs.** The writ of garnishment shall be issued by the sheriff to whom the writ of attachment is delivered. The names of as many individuals, corporations or other persons as are sought to be charged as garnishees, may be inserted in the same or different writs of garnishment; and the writ shall be served and returned by the officer issuing the same, in the same manner as a summons in the action; and, in like manner alias and pluries writs may be issued, served and returned. [From Code Secs. 133 and 134. See form No. 23.]

(e) **When Jurisdiction Acquired.** Service of the writ of garnishment shall give the court jurisdiction of the garnishee. [From Code Sec. 135.]

(f) **Interrogatories Answered Under Oath. Failure to Answer.** The garnishee shall answer the interrogatories in writing upon oath or affirmation; and upon the request of the garnishee the officer serving the writ of garnishment shall administer such oath or affirmation and take and return such answer with the writ or the garnishee may file his sworn answer with the court within the time required by the writ or he shall be deemed in default. [From Code Sec. 136. See form No. 23.]

(g) **Garnishee Need Not Plead Exemption.** A garnishee shall not be required to set up or plead any exemption for or in behalf of the defendant. [From Code Sec. 137.]

(h) **Garnishee not Required to Defend Claims of Third Persons.** A garnishee who has notice of the claim of a third person to any goods, chattels, choses in action, credits, money or effects of the defendant in his possession or control shall not be required to defend on account of such claim, but he shall state in his answer that he is informed that such goods, chattels, choses in action, credits, money or effects are claimed by such person. When such an answer has been filed the court shall issue a summons to the alleged claimant, which shall be served as provided in Rule 4, requiring him to appear within the time specified in Rule 12 for answer and set up and defend his claim

or be thereafter barred. The garnishee may, at the time of filing his answer or at any time thereafter, surrender to the court the goods, chattels, choses in action, credits, money or effects so claimed, and, upon service of the summons upon the alleged claimant, as hereinbefore provided, he shall thereupon be released and discharged from all liability to any person on account thereof. [From Code Sec. 138.]

(i) **Garnishee to Deliver Property; Sale; Judgment.** If the answer of the garnishee shows that he has personal property of any kind in his possession, or under his control, belonging to the defendant, the court shall enter judgment that the garnishee deliver the same to the sheriff; and if the plaintiff recover judgment against the defendant in the action, such property, or so much thereof as may be necessary, shall be sold as upon execution, and the proceeds applied towards the satisfaction of such judgment, together with the costs of the action and proceedings; and if there be a surplus of such property, or of the proceeds thereof, it shall be restored to the defendant. If the answer shows that the garnishee is indebted to the defendant, then, if the plaintiff recover judgment against the defendant in the action, the court shall also enter judgment in favor of the defendant for the use of the plaintiff against the garnishee for the amount of the indebtedness admitted in the answer; provided, the judgment against the garnishee shall not be for a greater sum than is necessary to satisfy the judgment of the plaintiff against the defendant, together with costs as aforesaid; and in no case shall the garnishee be chargeable with costs unless his answer shall be successfully controverted, as hereinafter provided. [Code Sec. 141.]

(j) **Garnishee Released Upon Delivery of Property.** In all cases the garnishee, upon making answer, may deliver to the officer serving the writ, the property belonging to the defendant, together with the money due to the defendant, as shown by the answer, and the officer shall make return of such property and money with the writ to the court, to be dealt with as provided in the foregoing subdivision; and thereupon the garnishee shall be relieved from further liability in the proceedings, unless his answer shall be successfully controverted, as hereinafter provided. [Code Sec. 142.]

(k) **Refusal of Garnishee to Answer. Default. Judgment.** If the garnishee, having been duly served with the writ of garnishment and interrogatories, refuse or fail to answer the interrogatories within the time required, the plaintiff may enter a default against him and proceed before the court to prove the liability of the garnishee, (and in such case the garnishee may be compelled to give testimony as a witness as in other cases) and upon a finding in that behalf, the plaintiff may have judgment entered the same as if the garnishee had answered according to such finding; and if the finding charge the garnishee with any liability, the plaintiff may recover the costs of the proceedings against him, otherwise the garnishee shall be discharged without costs. [From Code Sec. 143.]

(l) **Traverse of Answer.** If the garnishee answer, the plaintiff may within 10 days after the expiration of the time allowed for the filing of such answer,

reply traversing the same; and may allege any matters which would charge the garnishee with liability. If the plaintiff fail to reply within the time aforesaid, he shall be deemed to have accepted the answer of the garnishee as true, and judgment shall be entered accordingly. [From Code Sec. 144.]

(m) **Trial of Traverse Issue; Judgment.** New matter in the reply shall be taken as denied or avoided and judgment shall be entered upon the finding thereon; provided, if the finding be as favorable to the garnishee as his answer he shall recover costs of the proceeding against the plaintiff, otherwise the plaintiff may recover costs against the garnishee. [From Code Sec. 145.]

(n) **Intervention by Motion.** Any person other than the garnishee or the parties to the action, who claims any credits, effects, debts, choses in action, or other personal property or any interest therein with which any garnishee is sought to be charged, may at any time before the garnishment proceedings are determined, intervene as provided in Rule 24. [From Code Sec. 146.]

(o) **Garnishee May Claim Set-off.** Every garnishee shall be allowed to retain or deduct out of the property, effects or credits of the defendant in his hands, all demands against the plaintiff and all demands against the defendant of which he could have availed himself if he had not been summoned as garnishee, whether the same are at the time due or not, and whether, by way of set-off on a trial, or by the set-off of judgments or executions between himself and the plaintiff and defendant, severally, and he shall be liable for the balance, only after all mutual demands between himself and plaintiff and defendant are adjusted, not including unliquidated damages for wrongs and injuries; provided, that the finding shall show in all cases against which party, and the amount thereof, any set-off shall be allowed, if any shall be allowed. [From Code Sec. 147.]

(p) **Garnishee Not Liable on Instruments Not Due.** No garnishee shall be liable by reason of having drawn, accepted, made or endorsed any negotiable instrument, when the same is not due at the time of service of the writ of garnishment. [From Code Sec. 148.]

(q) **Effect of Judgment Against Garnishee.** The judgment against a garnishee shall acquit him from all demands by the defendant for all goods, effects and credits paid, delivered or accounted for by the garnishee by force of such judgment. [Code Sec. 149.]

(r) **Discharge of Garnishee no Bar to Action by Defendant.** If the garnishee is discharged, the judgment shall be no bar to an action brought against him by the defendant for the same demand. [From Code Sec. 150.]

(s) **Liability of Garnishee on Debt Not Due.** When judgment is rendered against any garnishee, and it shall appear that the debt from him to the defendant is not yet due, execution shall not issue until the debt shall have become due. [From Code Sec. 151.]

(t) **Plaintiff May Pay Lien and be Subrogated.** When any personal property, choses in action, or effects of the defendant in the hands of a garnishee are mortgaged or pledged, or in any way liable for the payment of a debt to him, the plaintiff may, under an order of the court for that purpose, pay or tender the amount due to the garnishee, and thereupon the garnishee shall deliver the personal property, choses in action, and effects to the sheriff, as in other cases. [Code Sec. 152.]

(u) **Subrogation; Where Pledge Held Under Condition.** If the personal property, choses in action, or effects are held by the garnishee for any purpose other than to secure the payment of money, and if the contract, condition or other thing to be done or performed, is such as can be performed by the plaintiff, without damage to the other parties, the court may make an order for the performance thereof by him, and upon such performance, or a tender of performance, the garnishee shall deliver the personal property and effects to the sheriff, as in other cases. [From Code Sec. 153.]

(v) **Disposition of Delivered Property; Redemption Money; Indemnity.** All personal property, choses in action, and effects received by the sheriff under either of the two preceding subdivisions, shall be disposed of in the same manner as if they had been delivered by the garnishee without condition, except that the plaintiff shall, out of the proceeds thereof, be first repaid the amount paid by him to the garnishee for the redemption of the same, or shall be indemnified for any other act or thing by him done or performed, pursuant to the order of the court for the redemption of the same. [Code Sec. 154.]

(w) **Refusal to Deliver Property.** If any garnishee refuses or neglects to deliver any personal property, choses in action, or effects in his hands, when thereto lawfully required by the court, he may be adjudged in contempt. [From Code Sec. 155.]

(x) **Taxation of Costs; Fees of Garnishee.** The court may order the costs of the proceedings in any garnishment be paid by the plaintiff, or out of the effects or credits garnished, or by the garnishee, or may apportion the same as shall appear to be just and equitable. The garnishee shall be entitled to fees and mileage as a witness where he does not improperly resist or make costs. [From Code Sec. 156.]

(y) **Remedies of Judgment Creditors.** The rights, remedy and proceedings of garnishment given by these rules to plaintiffs in attachment shall be available to judgment creditors in aid of execution. [From Code Sec. 157.]

(z) **Release Upon Bond.** The provisions of subdivisions (w) and (x) of Rule 102 shall apply to proceedings under this Rule and the sheriff shall release any garnishment in accordance therewith. [New.]

Committee Note to Rule 103.

For the sale of perishable property under garnishment, see Rule 102 (s).

I. Subdivision (a)

III. Subdivision (c).

II. Subdivision (b).

IV. Subdivision (d).

- V. Subdivision (e).
- VI. Subdivision (f).
- VII. Subdivision (g).
- VIII. Subdivision (h).
- IX. Subdivision (i).
- X. Subdivision (l).
- XI. Subdivision (m).
- XII. Subdivision (n).
- XIII. Subdivision (o).
- XIV. Subdivision (q).
- XV. Subdivision (t).

Cross References.

For a discussion of this rule, see Address no. 15, appx. D. As to new trials, see Rule 102 (aa). For form of writ, see Form 23, appx. A.

I. SUBDIVISION (a).

A proceeding by garnishment, though an independent suit, is auxiliary to the main suit, and the judgment hypothetical when taken in advance of a judgment in the main suit. It is dependent upon a judgment subsequently obtained, and when the principal judgment has been obtained the validity of the judgment against the garnishee depends upon the validity of the judgment against the defendant. In the language of this subdivision, the judgment against the garnishee is only "security of any judgment the plaintiff may recover in such action against the defendant." *McPhee v. Gomer*, 6 Colo. App. 461, 463, 41 P. 836, cited in note, 49 A. L. R. 1412.

A garnishment can reach only such property as belongs to the debtor. *Denver Joint Stock Land Bank v. Moore*, 93 Colo. 151, 25 P. (2d) 180.

It cannot be extended to cases not within the letter and spirit of the statute.—In *Troy Laundry, etc., Co. v. Denver*, 11 Colo. App. 368, 371, 53 P. 256, cited in notes, 96 Am. St. Rep. 451, 54 L. R. A. 570, 59 L. R. A. 354, 56 A. L. R. 602, our court of appeals said: "Garnishment is a strictly statutory remedy, and it cannot be extended by construction to cases which are not within both its letter and spirit. It is true that the garnishment statutes of Colorado specifically require that they shall be liberally construed so as to promote their objects. * * * This applies, however, only to the enforcement of the remedy after jurisdiction has attached. It does not permit courts to enlarge or extend by implication the scope of the statutes, so as to bring within their jurisdiction any cases except those to which the statutes manifestly and clearly apply. As to this, the rule of strict construction prevails, the statutes being in

derogation of the common law." *Black v. Plumb*, 94 Colo. 318, 323, 29 P. (2d) 708, 91 A. L. R. 1334, cited in note, 93 A. L. R. 1089.

Garnishment laws are statutory in origin, and such proceedings cannot be sustained if they go beyond the statute. *Colorado v. Elkins*, 84 Colo. 409, 270 P. 875.

Thus, it applies only to contracts and not to tort actions.—In 12 R. C. L. p. 797, § 26, the author discusses the question of liability arising out of tort and says: "The controlling characteristic of the remedy by garnishment is, that the liability of the garnishee must originate in, and be dependent on, contract. * * * A right of action for a tort, is not, therefore the subject of garnishment in most jurisdictions. A claim in tort, not reduced to judgment, is not a debt within the meaning of the statutes in reference to garnishment. * * * The rule is the same where as between the tortfeasor and the person to whom the wrong was done the latter might at his option either hold the tortfeasor to his liability in tort, or, waiving the tort, treat him as his debtor, since the creditor of the wronged person is not at liberty to exercise this option in his place, and so evade the general rule as to garnishment of claims in tort, substituting therefor a liquidated claim quasi ex contractu." *Black v. Plumb*, 94 Colo. 318, 323, 29 P. (2d) 708, 91 A. L. R. 1334, cited in note, 93 A. L. R. 1089.

In *Donald Co. v. Dubinsky*, 74 Colo. 128, 219 P. 209, cited in note, 93 A. L. R. 1089, this court in the opinion by Mr. Justice Denison, which case was for the recovery of damages for deceit, said the discharge of the garnishee was right because the action was in tort and the statute permits attachment only in aid upon contract. Applying the doctrine of the *Dubinsky* case, it appears clearly that the cause of action here was in tort and the trial court instead of submitting the questions to the jury upon an instruction as to the facts, should have dismissed the action when it appeared beyond question by the testimony of the plaintiff himself that the action sounded in tort. *Id.*

An indebtedness only can be made the subject of garnishment, and, in order that a liability may be an indebtedness within the meaning of the law, it must arise out of contract. *Lewis v. Denver*, 9 Colo. App. 328, 48 P. 317, cited in notes, 96 Am. St. Rep. 451, 56 A. L. R. 602.

But a widow's allowance is subject to garnishment.—In *Isbell-Kent-Oakes Dry Goods Co. v. Larimer County Bank, etc., Co.*, 75 Colo. 451, 453, 226 P. 293, cited in notes, 59 A. L. R. 777, 778, it is held that a widow's allowance is subject to garnishment.

Sheriff is not required to make diligent search for other property of defendant before writ may issue.—*Du Pont De Nemours & Co. v. Lednum*, 82 Colo. 472, 260 P. 1017.

This subdivision shows an intent that every sort of interest of the debtor might be garnished. *Bank of Grand Junction v. Bank of Vernal*, 81 Colo. 483, 486, 256 P. 660.

Creditor accepting provisions of assignment cannot reach funds derived by garnishment proceedings.—If a creditor accepts, and acts under, the provisions of an assignment for the benefit of creditors, he may not thereafter repudiate his acceptance and claim property in the hands of the trustee for the satisfaction of his debt or reach funds derived from the sale thereof by proceedings in garnishment. *McMullin v. Keogh-Doyle Meat Co.*, 96 Colo. 298, 299, 42 P. (2d) 463.

Without jurisdiction of the defendant and a judgment against him, a judgment against the garnishee is void and its payment will not protect the garnishee. *McPhee v. Gomer*, 6 Colo. App. 461, 41 P. 836, cited in note, 49 A. L. R. 1412.

"As the whole object of garnishment is to reach effects or credits in the garnishee's hands, so as to subject them to the payment of such judgment as the plaintiff may recover against the defendant, it results necessarily that there can be no judgment against the garnishee until judgment against the defendant shall have been recovered." *Drake on Attach.*, § 460; *Washburn v. New York, etc., Min. Co.*, 41 Vt. 50; *Withers v. Fuller*, 30 Gratt. (Va.) 547. *Railroad v. Todd*, 58 Tenn. (11 Heisk.) 549. *Id.*

Garnishee cannot be placed in a worse position than if defendant enforced his own claim.—In the absence of fraud between defendant and a garnishee, the latter cannot be placed, through garnishment proceedings, in a worse position than if defendant's claim were enforced by defendant himself. And, in the absence of statute, if the assessment or demand has not been previously made in accordance with law, the garnishee is not liable. *Universal Fire Ins. Co. v. Tabor*, 16 Colo. 531, 27 P. 890, cited in notes, 31 Am. St. Rep. 950, 46 L. R. A. (N. S.) 440.

Plaintiff in garnishment does not stand in the position of a purchaser in good faith and for value, but is in no better position than a purchaser or assignee with notice. *Collins v. Thuringer*, 92 Colo. 433, 434, 21 P. (2d) 709.

And therefore a garnishment proceeding cannot displace prior valid and bona fide existing right and claims against the debt or property involved. *Collins v. Thuringer*, 92 Colo. 433, 434, 21 P. (2d) 709.

An attorney's lien is prior and superior to any right acquired by a plaintiff in such proceedings. *Collins v. Thuringer*, 92 Colo. 433, 434, 21 P. (2d) 709.

Priority of liens.—Garnishment under execution held properly subordinated to garnishment under writs of attachment theretofore served on the same creditor, although the latter were, as a precautionary measure, again served on the same date as that issued under the writ of execution. *Larimer County Bank, etc., Co. v. Colorado Rubber Co.*, 79 Colo. 4, 243, P. 622.

II. SUBDIVISION (b).

Where an order for a widow's allowance and service of garnishment summons affecting the same, are made on the same day, they are presumptively at the same time. *Isbell-Kent-Oakes Dry Goods Co. v. Larimer County Bank, etc., Co.*, 75 Colo. 451, 226 P. 293, cited in notes, 59 A. L. R. 777, 778.

The state in which services were rendered and in which the employer and employee reside is the situs of a chose in action for wages, and a creditor of the employee, who would reach the fund by garnishment, must proceed in that state. The fact that the employer is a railroad company operating a line through different states does not change the rule. *Atchison, etc., R. Co. v. Maggard*, 6 Colo. App. 85, 86, 39 P. 985, cited in notes, 67 L. R. A. 219, 222, 223, 1 L. R. A. (N. S.) 195, 3 L. R. A. (N. S.) 611, 27 A. L. R. 1404.

III. SUBDIVISION (c).

As to general provisions concerning service of process, see Rule 4 (e). As to statutory power to garnish, see §§ 4 to 8, appx. B.

IV. SUBDIVISION (d).

This subdivision combines former code §§ 133 and 134. The form appearing in § 133 is now found as Form 23, appx. A. The only change is that the time for answer is now twenty days, whether served in county where action was brought or elsewhere. (See Address no. 15, appx. D.)—Ed. note.

V. SUBDIVISION (e).

It is claimed that the court did not have jurisdiction, but there was a judgment and execution in the main cause, regularly obtained, and the return of the writ of garnishment, showing due service, gave the court jurisdiction over the garnishee. This subdivision and other subdivisions of this rule are made applicable and available to a judgment creditor, the same as for a plaintiff in attachment, by subdivision (y). *Du Pont De Nemours & Co. v. Lednum*, 82 Colo. 472, 473, 260 P. 1017.

VI. SUBDIVISION (f).

As to answer of garnishee showing assignment of future wages being void unless plaintiff has notice or assignment is recorded, see vol. 3, ch. 97, § 234.

VII. SUBDIVISION (g).

As to fraternal benefit societies being exempt from garnishment, see vol. 3, ch. 87, § 189. As to group life insurance policy being exempt from garnishment, see vol. 3, ch. 87, § 167.

VIII. SUBDIVISION (h).

Editor's note.—This subdivision incorporates the provisions of Code §§ 138, 139 and hence cases construing both those sections are included in this note.

This subdivision refers to answers in good faith. If a garnishee knows the truth he must tell it; if he tells a falsehood, at least if he tells it for a fraudulent purpose, he must pay damages. *International State Bank v. Trinidad Bean, etc., Co.*, 79 Colo. 286, 288, 245 P. 489.

It is not essential that notice of an assignment be given in advance to a garnishee, although in the absence of knowledge or notice the latter would be protected against double payment. *Denver Joint Stock Land Bank v. Moore*, 93 Colo. 151, 25 P. (2d) 180.

If, during the pendency of garnishment proceedings, it is established that an assignment of the subject-matter antedating the garnishment was actually executed, the absence of previous notice to the garnishee would be immaterial, and a judgment creditor would not be entitled to notice as such. *Id.*

Duty of court.—When a garnishee in his answer states that a third party claims property in his possession belonging to the debtor, it is the duty of the court to issue a citation or summons to said party, requiring him to appear and set up his claim. *Burnett v. Jeffers*, 88 Colo. 613, 299 P. 18.

IX. SUBDIVISION (i).

This subdivision refers to garnishment upon attachment, but garnishment upon execution is allowed by subdivision (y), and all rights, remedies and proceedings under this rule are made available to the parties. *Hahnwald v. Schlapfer*, 82 Colo. 313, 316, 260 P. 105.

The answer of a garnishee is given in response to interrogatories. The law provides for no other answer. It is made with reference to the facts existing at the time of the service of the writ of garnishment. If, at that time, the garnishee owes the defendant a debt, or has personal property of the defendant in his possession, or under his

control, he must so answer, and abide the judgment of the court. But if, at that time, he is not indebted to the defendant, or has not in his possession, or under his control, any property of the defendant, he is entitled to a discharge. He is not answerable for effects of the defendant coming into his hands, or indebtedness accruing from him to the defendant, after the garnishment. *Bragdon v. Bradt*, 16 Colo. App. 65, 68, 64 P. 248, cited in note, 83 A. L. R. 1384.

Only where answer shows garnishee is indebted to defendant is judgment against him lawful.—It is only in case the answer of the garnishee shows that he is indebted to the defendant, or has personal property in his possession, or under his control, belonging to the defendant, or, in case his answer denying indebtedness to the defendant, or possession of his property, is successfully controverted, that a judgment against him is lawful. In order to charge him upon his answer, it must contain a clear admission of a debt due to, or the possession of attachable property of, the defendant; and where his answer is a substantial denial of indebtedness, or possession of attachable property belonging to the defendant, he is entitled to a judgment of discharge, unless the force of the denial is overcome by other statements in the answer, or unless the answer is shown to be untrue. *Bragdon v. Bradt*, 16 Colo. App. 65, 67, 64 P. 248, cited in note, 83 A. L. R. 1384.

Paper held not to be an answer.—About three months after the garnishee made his answer, he deposited a paper in court, setting forth that his debt had been paid, and his interest in the property extinguished; and asking an order that he deliver the property to the sheriff or some other custodian. He styled the paper a "supplemental answer." His answer had been filed, and his right to answer exhausted, a considerable time before the presentation of this paper. The paper was not a "supplemental answer." It was not an answer at all. And the order it prayed was one which, in the then condition of the case, the court had no authority to grant. A delivery by the garnishee to the sheriff can be ordered only where the answer admits possession in the garnishee of property belonging to the defendant, or where, upon a trial of issue joined upon the answer, such possession is found. *Bragdon v. Bradt*, 16 Colo. App. 65, 69, 64 P. 248, cited in note, 83 A. L. R. 1384.

The paper was not a pleading, and for any purpose connected with the record, it was totally ineffective. But a copy was sent to plaintiff's attorneys, and they were thus notified that the garnishee no longer had title, and that he was then in possession of property belonging to the defendant. Such property was not affected by the garnishment, because it became the defend-

ant's after the service of the writ. But the garnishee voluntarily gave the plaintiff information which, if the latter had acted upon it, might have been of value to him. No duty rested upon the garnishee to impart the information; and to call the paper an answer, and to use it for the purpose of compelling the garnishee to pay the indebtedness of the defendant, could hardly be regarded as a generous return for a kindness. *Id.*

Payment to attorneys of creditor is payment to creditor.—Where money is deposited in court by the garnishee in garnishment proceedings, payment of the fund to attorneys for the garnisheeing creditor is payment to the creditor, and an order to repay part of the fund is proper. *Hahnwald v. Schlapfer*, 82 Colo. 313, 260, P. 105.

Where note properly turned over to sheriff.—Where a note in the hands of a garnishee is held pending the result of litigation on final determination of which the note inured to the benefit of the judgment creditor, it was properly turned over to the sheriff with the order that he make disposition of it in the manner required by law. *Union Deposit Co. v. Driscoll*, 95 Colo. 140, 33 P. (2d) 251.

In a suit by a creditor to recover for goods sold and delivered to defendant it was held that plaintiff, under attachment proceedings, was entitled to a fund owing defendant by his employer as against the claims of another creditor of which he had no notice the claims of which said other creditor were not based on a contract sufficient to bind the fund. This being determined, then the only further action within the jurisdiction of the trial court was, on application, to order a judgment against the employer in favor of the defendant for the use of the plaintiff pursuant to the terms of this subdivision. *Meyer v. Delta Market*, 98 Colo. 421, 424, 57 P. (2d) 3.

X. SUBDIVISION (l).

Editor's note.—In case of *Steele v. Revell*, 102 Colo. 271, 78 P. (2d) 980, it was held that an order denying a motion to discharge a garnishee for failure of plaintiff to traverse answer of garnishee within required period was not appealable as a "final judgment, decree or order," where no final judgment was entered and garnishee specifically saved right to further challenge court's jurisdiction and nothing in record indicated that court had passed on garnishee's answer. This was possible under § 144 which stated the court "may" enter judgment. But the instant subdivision states that "judgment shall be entered," which would appear to be mandatory.

Traverse stating only conclusions of law is insufficient.—A traverse filed to the answer of the garnishee stating only conclu-

sions of law and not facts, is insufficient. *Day v. Bank of Del Norte*, 76 Colo. 223, 230 P. 785.

Garnishee cannot take advantage of his own neglect.—The garnishee, by its own delay, having made it impossible for the plaintiff to file the traverse within the time allowed by this subdivision, is in no position to complain. It cannot take advantage of a situation brought about by its own neglect. *Stollins v. Shideler*, 91 Colo. 40, 42, 11 P. (2d) 562.

XI. SUBDIVISION (m).

Garnishee, without further pleading, may avail himself of any defense he has as to new matter.—The garnishee had no opportunity to plead to this reply, but without further pleading he could avail himself of any defense he might have to the new matter set up in the affidavit. *Jones v. Langhorne*, 19 Colo. 206, 210, 34 P. 997, cited in notes, 55 L. R. A. 322, 25 A. L. R. 58.

Thus, a partner may set up non-joinder of co-partner as a defense.—Where a partner is sued individually for a firm debt he is usually required to plead the nonjoinder of his co-partners, in order that he may avail himself of this defense, but this general rule has no application to garnishment proceedings under this rule. *Jones v. Langhorne*, 19 Colo. 206, 210, 34 P. 997, cited in notes, 55 L. R. A. 322, 25 A. L. R. 58.

XII. SUBDIVISION (n).

Denial of right of intervention constitutes reversible error.—Where, in a garnishment proceeding, a third party files a petition in intervention claiming the property involved, he is entitled to have his claim tried and determined, and a denial of that right constitutes reversible error. *Burnett v. Jeffers*, 88 Colo. 613, 299 P. 18.

Intervention in due time.—The intervention in the present case was before the judgment against the garnishee, and it cannot be said that the garnishment proceedings had then been determined. The intervention therefore was in due time. *Hahnwald v. Schlapfer*, 82 Colo. 313, 316, 260 P. 105.

Priority as to assignment and garnishment lien.—The allegations of the petition in intervention are sufficient to make out a prima facie case for the intervening assignee. They set forth among other things that prior to the garnishment the landlord assigned all his right, title and interest in and to the beet crops of both tenants, and authorized payment of the proceeds thereof, to the intervener. The latter gave a good and valuable consideration therefor. The evidence tends to prove that one, if not both, of the assignments was made long before the garnishment took place. Unless the

failure to record or the lack of notice to the garnishee or the judgment creditor invalidates the assignee's claim as against the garnishment, such an assignment takes precedence over the garnishment lien. *Denver Joint Stock Land Bank v. Moore*, 93 Colo. 151, 153, 25 P. (2d) 180.

XIII. SUBDIVISION (o).

The rights and liabilities of a garnishee are to be determined as of the date of the garnishment, and not upon a state of facts that existed theretofore or thereafter. *Day v. Bank of Del Norte*, 76 Colo. 223, 230 P. 785.

A garnishee cannot be placed in a worse condition by operation of the proceedings against him, than he would be if the defendant were attempting to enforce his claim. *Day v. Bank of Del Norte*, 76 Colo. 223, 230 P. 785.

By this subdivision the garnishee is allowed to retain or deduct out of the property or credits of the defendant in his hands all demands against the defendant of which he could have availed himself had he not been summoned as garnishee, and this court has ruled that the garnishee may plead as a defense or set-off whatever he might have pleaded were the suit directly against him by his own creditor. *Sauer v. Nevadaville*, 14 Colo. 54, 23 P. 87, cited in notes, 51 Am. St. Rep. 115, 117. In the opinion in that case was cited with approval § 462 of *Drake on Attachments*, where the learned author says that under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in any worse condition than he would be if the defendant's claim against him were enforced by the defendant himself. *Tabor v. Bank of Leadville*, 35 Colo. 1, 9, 83 P. 1060, cited in notes, 51 L. R. A. (N. S.) 597, 34 A. L. R. 1356, 68 A. L. R. 884.

The assertion by a garnishee of a jurisdictional defense to a judgment for which he is sought to be held is not a collateral but a direct attack upon the judgment. *Tabor v. Bank of Leadville*, 35 Colo. 1, 83 P. 1060, cited in notes, 51 L. R. A. (N. S.) 597, 34 A. L. R. 1356, 68 A. L. R. 884.

Bank may apply amount of deposit to a note not due.—Under this subdivision a garnisheed bank may apply the amount on deposit to the credit of the debtor, to the payment of his note to it, although not due. *Day v. Bank of Del Norte*, 76 Colo. 223, 230 P. 785.

Bank receiver entitled to set-off compensation due him.—Where at the request of a bank a receiver was appointed for its assets and under such appointment and with the consent and approval of the bank said receiver took possession of and administered the assets of the bank such receiver was

entitled to compensation for his services from the bank, although the order appointing the receiver was void and the court was not authorized to make an allowance to such receiver for compensation, and in a garnishment proceeding against said receiver to hold him liable for a judgment against the bank such receiver was entitled to plead as a defense or set-off the compensation due him by the bank. *Tabor v. Bank of Leadville*, 35 Colo. 1, 83 P. 1060, cited in notes, 51 L. R. A. (N. S.) 597, 34 A. L. R. 1356, 68 A. L. R. 884.

Void agreement.—An agreement by a garnishee to apply upon or deduct from credits of the defendant in his possession, a loan made by him to the defendant after service of the writ would be void and could not be enforced by any party thereto. *Day v. Bank of Del Norte*, 76 Colo. 223, 225, 230 P. 785.

XIV. SUBDIVISION (q).

This subdivision taken in connection with subdivision (a) can only be construed as an acquaintance to the garnishee when the judgment against him is valid. *McPhee v. Gomer*, 6 Colo. App. 461, 463, 41 P. 836, cited in note, 49 A. L. R. 1412.

XV. SUBDIVISION (t).

By this subdivision, the title of a mortgagee of personalty, in possession, is recognized and protected; and, for the very reason that while the mortgage remains unsatisfied the property does not belong to the defendant, it extends to the attachment plaintiff the privilege of extinguishing the mortgagee's title, in order that, the ownership being thus revested in the defendant, the chattels may be subjected to the garnishment. No other method is provided whereby mortgaged goods, in the possession of the mortgagee, can be reached by such process while the debt secured remains unpaid; and, in a case like the one before us, if the attachment plaintiff, resorting to garnishment in aid of his proceeding, does not avail himself of the provisions of that subdivision, he is without remedy against the mortgaged property, so long as the mortgagee's title remains unextinguished; and when the property reverts to the defendant, it can be reached only by new process. *Bragdon v. Bradt*, 16 Colo. App. 65, 69, 64 P. 248, cited in note, 83 A. L. R. 1384.

But garnishee has no right where mortgage found to be in fraud of creditors.—The garnishee insists that before the attaching creditors could have lawfully seized or obtained any right in the mortgaged property, or the proceeds thereof, they must first have paid or tendered to the mortgagee the amount of his debt for which the property was pledged, as is provided in this and the following subdivision. This would be

true, but for the important fact that the court had properly found the mortgage to be in fraud of creditors, and hence absolutely void. This being the case, the garnishee had no right to any part of the mortgaged property or of the proceeds thereof received by him as against the bona fide creditors. *Livingston v. Swofford Bros. Dry Goods Co.*, 12 Colo. App. 331, 334, 56 P. 355, cited in note, 79 A. L. R. 133.

A garnishee is liable who turns over balance of proceeds to mortgagor.—Where a mortgagee, after being garnished by an attaching creditor of the mortgagor, sells the mortgaged property, satisfies his lien out of the proceeds and turns over a balance to the mortgagor, he is liable to the garnisheeing creditor for the amount of such balance. *Bank of Grand Junction v. Bank of Vernal*, 81 Colo. 483, 256 P. 660.

Subdivision may be waived by garnishee.—A plaintiff may pay a lien and be subrogated to the rights of a garnishee by complying with this subdivision. The provisions of this subdivision may be waived by the garnishee, however, and if he agrees to forego payment of his lien by plaintiff, whereby the latter is lulled into a false

sense of security and loses his right of subrogation, the garnishee is estopped to claim that plaintiff did not observe the subdivision. *Kortz v. Hoffman*, 80 Colo. 153, 249 P. 650.

Right of plaintiff creditor.—In a garnishment proceeding, where the garnishee claims a lien on property of the debtor held by him, the plaintiff creditor may traverse the garnishee's answer and in the alternative pray for leave to pay the lien and take over the property under this subdivision. *Bank of Grand Junction v. Bank of Vernal*, 81 Colo. 483, 256 P. 660.

Defendants in error cite *Metzler v. James*, 12 Colo. 322, 19 P. 885, cited in notes, 17 Am. St. Rep. 865, 109 Am. St. Rep. 449, 59 L. R. A. 371, 83 A. L. R. 1384, and *Bragdon v. Bradt*, 16 Colo. App. 65, 64 P. 248, cited in note, 83 A. L. R. 1384. The first of these cases merely holds that a judgment creditor cannot levy by seizure and sale on his debtor's property in the hands of a mortgagee; the second that he can reach such property only by proceeding under this subdivision, which is what plaintiff in error was doing. Neither holds that he might not do so after traverse, nor that he might not do so with traverse. *Id.*

Rule 104. Replevin.

(a) **Personal Property.** The plaintiff in an action to recover possession of personal property, may, at any time before judgment, claim the delivery of such property to him as provided in this rule. [From Code Sec. 85.]

(b) **Causes; Affidavit.** Where a delivery is claimed, an affidavit shall be filed, showing:

(1) That the plaintiff is the owner of the property claimed, particularly describing it; or is lawfully entitled to the possession thereof;

(2) That the property is wrongfully detained by the defendant;

(3) That the same has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff; or if seized, that it is by the statute exempt from such seizure; and,

(4) The value of the property. [From Code Sec. 86.]

(c) **Bond; Writ.** The plaintiff shall file a written undertaking executed by two or more sufficient sureties or a corporate surety company, approved by the clerk, to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the

action without delay, and with effect, and for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff. The clerk shall thereupon issue a writ requiring the sheriff to forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody until delivery as hereinafter provided. The sheriff shall also, without delay, serve on the defendant a copy of the writ, by delivering to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual abode of the defendant with some member of his family over the age of 18 years; or, if he has no place of abode by putting said copy in the nearest postoffice, directed to the defendant. [From Code Sec. 87.]

(d) **Exception to Sureties. Liability of Clerk.** The defendant may, within 5 days after the service of a copy of a writ, give notice to the clerk, that he excepts to the sufficiency of the sureties on plaintiff's undertaking. If he fails to do so within 5 days after such service, he shall be deemed to have waived all objections to them. When the defendant excepts, the sureties shall justify, on notice, before the clerk within 5 days after such notice, and if they fail to justify in said time, the property shall be returned by the sheriff to the defendant. The clerk shall be responsible for the sufficiency of the sureties until the objection to them is waived, as above provided, or until they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in this Rule. [From Code Sec. 88.]

(e) **When Returned to Defendant. Bond.** At any time, within 48 hours from the time of the taking of the property and the service of the writ, the defendant may, if he do not except to the sureties of the plaintiff, require the return of the property, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, or a corporate surety company, who shall justify before such undertaking shall be accepted or approved, to the effect that they are bound to the plaintiff in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property be not so required in such time, it shall be delivered to the plaintiff, except as provided in this rule. [From Code Sec. 89.]

(f) **Qualification of Sureties. New Bond.** The qualification of sureties and their justification shall be such as are prescribed for sureties on attachment bonds or undertakings. If, at any time, on notice, it shall appear to the court that any undertaking given is insufficient or that any surety therein has died or has removed from this state, or is or has been or is likely to become insolvent, said court shall order another and satisfactory undertaking to be given within such time as the court shall direct. If any person to whom such order shall be directed shall fail to comply with the terms thereof the court shall order the return of the property to the adverse party pending the trial. [From Code Sec. 90.]

(g) **Amended or Additional Bonds.** The court shall allow upon such terms, and within such time as may be just, the giving of amended or additional undertakings or affidavits in place of defective or insufficient ones. [Code Sec. 91.]

(h) **Sheriff May Break Buildings, When.** If the property, or any part thereof, be concealed in a building or inclosure, the sheriff shall publicly demand its delivery; if it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and if necessary he may call to his aid the power of his county. [Code Sec. 92.]

(i) **Duty of Sheriff in Holding Goods.** When the sheriff shall have taken property, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same. [Code Sec. 93.]

(j) **Claim by Third Person. Indemnity to Sheriff.** If the property taken be claimed by any other person than the defendant, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand, indemnify the sheriff against such claim by an undertaking of a corporate surety company, or with two sufficient sureties, each one qualifying as worth double the value of the property as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution; and no claim to such property by any other person than the defendant shall be valid against the sheriff unless so made. [From Code Sec. 94.]

(k) **Custodian of Property. Bond.** If the property taken be of extraordinary kind, or of uncertain value, any claimant thereof may apply to the court upon due notice and thereupon the court, after a hearing upon affidavits or otherwise, may direct in whose custody the property shall be kept pending the litigation, and may require the custodian to give bond with sufficient surety for the forthcoming of the property to abide the further order of the court. [From Code Sec. 95.]

(l) **When Sheriff Files Papers.** The sheriff shall file the notice and all undertakings and affidavits with his proceedings thereon, with the clerk within 20 days after taking the property mentioned therein. [From Code Sec. 96.]

(m) **Judgment.** In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and

withholding the same. The provisions of Rule 13 shall apply to replevin actions. [Supplants Code Sec. 247.]

Committee Note.

Mason vs. Machinery Co., 91 Colo. 69 and Mosco vs. Forsythe, 102 Colo. 115, deny counterclaim in replevin actions. These rules now permit this.

Committee Note to Rule 104.

For the sale of perishable property seized by replevin, see Rule 102 (s).

- I. Personal Property.
 - A. General Consideration.
 - B. Demand.
 - C. Pleading.
 1. In General.
 2. Complaint.
- II. Causes; Affidavit.
- III. Bond; Writ.
- IV. Exception to Sureties. Liability of Clerk.
- V. When Returned to Defendant. Bond.
- VI. Qualification of Sureties. New Bond.
- VII. Judgment.

Cross References.

As to judgment in replevin, see subdivision (m) of this rule. As to jurisdiction of justices of the peace in actions of replevin, see vol. 3, ch. 96, §§ 10 and 113. As to procedure in actions of replevin before justices of the peace, see vol. 3, ch. 96, § 114 et seq. As to statute of limitations in actions of replevin, see vol. 3, ch. 102, § 1.

For a discussion of this rule, see Address no. 14, appx. D.

I. PERSONAL PROPERTY.

A. General Consideration.

At common law replevin lay where there was an unlawful taking, and detinue where there was an unlawful detention. *Denver Onyx, etc., Mfg. Co. v. Reynolds*, 72 F. 464, 466.

This subdivision supersedes the common-law action.—The remedy provided by this subdivision “to recover possession of personal property” supersedes the common-law action of replevin, whether in the cepit or in the detinet, and all the ancient learning relating to these distinctions became obsolete upon the adoption of the subdivision. *Denver Onyx, etc., Mfg. Co. v. Reynolds*, 72 F. 464, 466.

There are no provisions that specially apply to the action anterior to filing the affidavit. *Benesch v. Waggner*, 12 Colo. 534, 21 P. 706, 13 Am. St. Rep. 254, cited in notes, 13 Am. St. Rep. 590, 16 Am. St. Rep. 333, 835, 21 Am. St. Rep. 818, 30 Am. St. Rep. 330, 53 Am. St. Rep. 531, 82 Am. St. Rep. 29, 22 L. R. A. (N. S.) 657, citing *Baker v. Cordwell*, 6 Colo. 199, 200.

Replevin is possessory action, and in a replevin suit involving livestock, plaintiff being entitled to possession of the cattle, judgment in his favor is affirmed. *Wyman v. McCarthy*, 93 Colo. 340, 26 P. (2d) 245.

To maintain action, plaintiff's right to the possession of the property must be exclusive. *Hoeffer v. Agee*, 9 Colo. App. 189, 47 P. 973, cited in notes, 37 L. R. A. (N. S.) 267, L. R. A. 1917C, 1115, 26 A. L. R. 1015.

And replevin for an undivided interest in property cannot be maintained. *Hoeffer v. Agee*, 9 Colo. App. 189, 47 P. 973, cited in notes, 37 L. R. A. (N. S.) 267, L. R. A. 1917C, 1115, 26 A. L. R. 1015.

Issuance of writ is optional with the plaintiff.—The issuance of the writ of replevin provided for in this subdivision, is an ancillary remedy and is optional with the plaintiff. The failure of the plaintiff to allege and prove the execution of the writ of replevin does not deny him the right to have his case determined. *Shinn on Replevin*, p. 281, § 323; 34 Cyc. 1451, C. p. 1457, 4; 23 R. C. L. 920, § 87. *Colburn v. Riley*, 11 Colo. App. 184, 52 P. 684; *Hart v. Moulton*, 104 Wis. 349, 352, 80 N. W. 599; *Simpson Brick-Press Co. v. Marshall*, 5 S. D. 528, 59 N. W. 728; *Eads v. Stephens*, 63 Mo. 90; *Varner v. Bowling*, 54 Kan. 380, 38 P. 481; *Hodson v. Warner*, 60 Ind. 214. *Blackmer v. Blackmer*, 87 Colo. 483, 484, 289 P. 366, affirmed in 92 Colo. 414, 21 P. (2d) 180.

Plaintiff may recover damages for taking of property or judgment for its value.—Under this subdivision the action for the recovery of personal property lies, by one entitled to the possession, against one wrongfully holding the possession, whether the possession was acquired in good or bad faith. In the action, the plaintiff may, if he maintains his suit, recover damages for the taking or detention of the property, and, if the property cannot be returned, judgment for its value. The remedy is plain and complete. *Burrage v. Melson*, 48 Miss. 237. *Denver Onyx, etc., Mfg. Co. v. Reynolds*, 72 F. 464, 467.

And in the absence of an objection there is no error in permitting jury to award interest where no damages or interest were asked.—In an action in replevin, the contention of defendant that the court erred in permitting the jury to award interest when no

damages or interest were asked, overruled, no objection on this ground having been interposed to either the instructions, verdict or judgment. *Thomas v. First Nat. Bank*, 97 Colo. 474, 475, 51 P. (2d) 589.

B. Demand.

Where the seizure was wrongful demand prior to the commencement of suit is unnecessary. *Smith v. Jensen*, 13 Colo. 213, 22 P. 434, cited in notes, 10 Am. St. Rep. 633, 80 Am. St. Rep. 755, 9 L. R. A. 417, 31 L. R. A. 610, 647, 21 A. L. R. 337, 83 A. L. R. 1456; *Bartels v. Arms*, 3 Colo. 72. See also, *Farncomb v. Stern*, 18 Colo. 279, 32 P. 612, cited in notes, 121 Am. St. Rep. 379, 402, 8 L. R. A. (N. S.) 429, 45 A. L. R. 323.

And it is only required when it is necessary to terminate the defendants' right of possession. *Lamping v. Keenan*, 9 Colo. 390, 12 P. 434.

Or to confer that right on the plaintiff. *Lamping v. Keenan*, 9 Colo. 390, 12 P. 434.

The only reason why demand is necessary in any case, is to give the defendant an opportunity to surrender without being put to costs; and while this is eminently proper, the object of the rule is fully accomplished, and the plaintiff sufficiently punished for his neglect by judgment against him for costs, without being compelled to surrender his goods. *Denver Live Stock Comm. Co. v. Parks*, 41 Colo. 164, 167, 91 P. 1110.

Thus, no proof of demand is necessary where the defendant claims ownership and right of possession. *Denver Live Stock Comm. Co. v. Parks*, 41 Colo. 164, 91 P. 1110; *Hennessey v. Barnett*, 12 Colo. App. 254, 55 P. 197, cited in note, L. R. A. 1915E, 194; *Scott v. Bohe*, 81 Colo. 454, 457, 256 P. 315.

Or where it is clear that it would have been unavailing. *Scott v. Bohe*, 81 Colo. 454, 457, 256 P. 315, citing *Lamping v. Keenan*, 9 Colo. 390, 12 P. 434.

A demand made after the beginning of the action but prior to the execution of the writ is sufficient. *Denver Live Stock Comm. Co. v. Parks*, 41 Colo. 164, 91 P. 1110.

C. Pleading.

1. In General.

In replevin, fraud need not be specially pleaded. *Sopris v. Truax*, 1 Colo. 89. But see Rule 9 (b).

Upon a general denial a defendant may show absolute title in himself or a third party. *Mason Tire Sales Co. v. Mason Tire, etc., Co.*, 73 Colo. 42, 213 P. 117.

But not a special property. *Mason Tire Sales Co. v. Mason Tire, etc., Co.*, 73 Colo. 42, 213 P. 117.

This must be pleaded, if relied on. *Mason Tire Sales Co. v. Mason Tire, etc., Co.*, 73 Colo. 42, 213 P. 117.

2. Complaint.

Cross reference.—See the following subdivision, and note thereto.

The complaint must allege ownership.—In an action to recover possession of personal property, the complaint must allege ownership, either general or special, otherwise the complaint will be bad on demurrer. *Baker v. Cordwell*, 6 Colo. 199.

No writ of replevin may be issued under this and the following subdivision until an action in claim and delivery is commenced by the filing of a complaint which alleges the right of the plaintiff to the possession of personal property, and claims the delivery thereof. *Gentry v. United States*, 101 F. 51, 53.

The complaint need not, however, allege everything required to be stated in the affidavit under the following subdivision; and in the absence of legislation requiring it, the court sees no necessity for greater detail in the allegations of the complaint than under the former practice. *Benesch v. Waggner*, 12 Colo. 534, 536, 21 P. 706, 13 Am. St. Rep. 254, cited in notes, 13 Am. St. Rep. 590, 16 Am. St. Rep. 333, 835, 21 Am. St. Rep. 818, 30 Am. St. Rep. 330, 53 Am. St. Rep. 531, 82 Am. St. Rep. 29, 22 L. R. A. (N. S.) 657.

Complaint stating a cause of action.—In an action to recover possession of stock certificates, complaint held to state a cause of action where it alleged plaintiff's ownership, right of possession, and unlawful detention by defendant. *Blackmer v. Blackmer*, 87 Colo. 483, 289 P. 366, affirmed in 92 Colo. 414, 21 P. (2d) 180.

A complaint which alleges that plaintiff is the owner, sufficiently answers the requirement that plaintiff be entitled to possession. *Illinois Sewing Machine Co. v. Harrison*, 43 Colo. 362, citing *Shipton v. Norrid*, 1 Colo. 404.

Complaint not stating a cause of action.—In an action to recover possession of stock certificates, a complaint which states only that B. president of the corporation, counseled and advised the wrongful withholding of the certificates by the defendant corporation, held to state no cause of action against B. *Blackmer v. Blackmer*, 87 Colo. 483, 289 P. 366, affirmed in 92 Colo. 414, 21 P. (2d) 180.

A complaint which does not allege ownership in plaintiff, but alleges that plaintiff is entitled to possession of the property by virtue of a certain chattel mortgage, but fails to allege by whom or to whom the chattel mortgage was executed, fails to allege a

special ownership in plaintiff and is insufficient to state a cause of action. *Elliott v. First Nat. Bank*, 30 Colo. 279, 70 P. 421.

Complaint may be amended to conform to proof concerning ownership of property.—In an action in replevin, in the disclosed circumstances, it is held that there was no abuse of discretion on the part of the trial court in permitting the plaintiff to amend its complaint to conform to the proof concerning ownership of certain of the property involved. *Thomas v. First Nat. Bank*, 97 Colo. 474, 475, 51 P. (2d) 589.

II. CAUSES; AFFIDAVIT.

Cross reference.—See the note under analysis line C, 2.

Allegations of value are binding on plaintiff.—In a replevin action, allegations of the value of the property in the affidavit and sworn complaint are binding on plaintiffs. *Startzell v. Bowers*, 88 Colo. 135, 136, 292 P. 601, cited in note, 85 A. L. R. 675, citing *Dodge v. Chambers*, 43 Colo. 366, 96 P. 178.

Defective affidavit.—In *Conly v. Friedman*, 6 Colo. App. 160, 40 P. 348, the court held that if the affidavit was defective the appellant was not in a condition to avail himself of any defects.

III. BOND; WRIT.

Editor's note.—Under Code § 87 the sheriff could serve copy of writ at abode of defendant with some member of his family over age of fifteen years. The age requirement has been raised to eighteen years by the instant subdivision.

Issuance of writ in advance of judgment can only be invoked in the manner provided by this rule.—The issuance of a writ of replevin in advance of a judgment settling the rights of the parties in an action for the claim and delivery of personal property is a provisional remedy, which can only be invoked in the manner provided by this rule. *Greig v. Ware*, 25 Colo. 184, 186, 55 P. 163.

Before such writ can be issued, a bond must be filed.—Under such writ the party at whose instance it is issued is entitled to the possession of the property, taken under the writ, pending the trial of the cause upon its merits, unless defendant chooses to give what is termed a "re-delivery bond." *Greig v. Ware*, 25 Colo. 184, 186, 55 P. 163.

The object of the bond is for the protection of the defendant in the action. *Greig v. Ware*, 25 Colo. 184, 186, 55 P. 163; *Imel v. Van Deren*, 8 Colo. 90, 5 P. 803.

And to indemnify the officer who executes the writ. *Imel v. Van Deren*, 8 Colo. 90, 5 P. 803.

It is duty of plaintiff to retain possession of property until final determination of the action.—In *Western Finance, etc., Co. v. Fisher*, 72 Colo. 121, 210 P. 66, the court held that by the terms of the bond it is the duty of the plaintiff in replevin, to whom the property has been delivered, to retain possession until final determination of the action, so that the property may be turned over to the one adjudged to be entitled to the possession; and that if he voluntarily parts with the possession before that, he violates his bond. Upon its delivery by the sheriff to the plaintiff in replevin, the property does not cease to be in custody of the law. *Grattan v. Wilson*, 82 Colo. 239, 243, 259 P. 6.

In delaying the sale, and in holding the property to await the outcome of the replevin action, plaintiff was performing his legal duty. *Id.*

Burden of proof in action on bond.—In an action upon a replevin bond the burden is upon the plaintiff to allege and prove the facts showing the failure of the principal in the bond to perform the judgment of the court. *Gallup v. Wortmann*, 11 Colo. App. 308, 53 P. 247.

Where plaintiff gives no bond case is tried on theory of conversion.—Although this subdivision provides that in an action for possession of property the plaintiff shall at the commencement of the action "file a written undertaking" if given possession of the property, where no bond is given and possession remains with the defendant, the case is tried on the theory of conversions by defendant and not on theory that plaintiff is entitled to possession of property. *Melnick v. Bowman*, 102 Colo. 384, 79 P. (2d) 368.

IV. EXCEPTION TO SURETIES. LIABILITY OF CLERK.

The acceptance of an informal or insufficient undertaking, in an action of replevin, must be taken advantage of at the earliest practical opportunity, as such defective undertaking will not deprive the court of jurisdiction, nor in any way interfere with or void the proceeding. *Morris v. Hanson*, 2 Colo. App. 154, 30 P. 139.

Defendant waives objections by pleading to merits.—Failing to take advantage of such defect, and by pleading to the merits, the defendant will be presumed to have waived his objection. *Morris v. Hanson*, 2 Colo. App. 154, 30 P. 139.

This and subdivision (i) are two methods by which the defendant below could have secured a bond with ample security to protect any rights he might have in the property. Neither of which he saw proper to pursue, and in view of the fact that the question of sufficiency or insufficiency of

the bond was properly brought to the attention of the court by the motion to dismiss, we are warranted in believing that the district court deemed the bond amply sufficient for the protection of the defendant's rights. *Id.*

V. WHEN RETURNED TO DEFENDANT. BOND.

A re-delivery bond that binds the obligors to the sheriff instead of plaintiffs does not comply with this subdivision, and is not a statutory bond. *Smith v Stubbs*, 16 Colo. App. 130, 63 P. 955, cited in notes, Ann. Cas. 1912C, 150, Ann. Cas. 1913C, 701, 45 A. L. R. 258, 270.

But it is a valid common-law obligation.—Where such bond was voluntarily executed and the property replevied was thereby returned to the principal obligor and none of its conditions were in contravention of the policy of the law, or repugnant to the provisions of any statute, it was valid as a common-law obligation. *Smith v Stubbs*, 16 Colo. App. 130, 63 P. 955, cited in notes, Ann. Cas. 1912C, 150, Ann. Cas. 1913C, 701, 45 A. L. R. 258, 270.

And upon assignment of the bond to them by the sheriff, they could maintain an action thereon in their own names. *Smith v Stubbs*, 16 Colo. App. 130, 63 P. 955, cited in notes, Ann. Cas. 1912C, 150, Ann. Cas. 1913C, 701, 45 A. L. R. 258, 270.

A verdict for the plaintiff fixing the total value of the goods, not valuing any item separately, is conclusive upon the defendant, and his surety in the re-delivery bond. *Trindle v Register Printing, etc., Co.*, 58 Colo. 81, 143 P. 282.

Acceptance of a portion of the goods does not operate as a satisfaction of the judgment.—The trial court erred in holding that the acceptance of a portion of the goods operated as a satisfaction of the judgment in replevin and the release of the surety. The part returned to the plaintiffs, and for which they gave credit to the amount of its value when returned, operated only as a partial satisfaction. *Trindle v Register Printing, etc., Co.*, 58 Colo. 81, 85, 143 P. 282.

The property must be returned in like good order and condition as when replevied. *Trindle v Register Printing, etc., Co.*, 58 Colo. 81, 84, 143 P. 282.

Dismissal of the action as against one of defendants does not discharge the surety.—In replevin action, the trial court found that one of defendants was not in possession of the property at the date of the demand therefor, nor at any time thereafter, and for that reason dismissed the action as to him. This dismissal of the action as against him did not operate to discharge

the surety as contended by defendants in error. *Trindle v Register Printing, etc., Co.*, 58 Colo. 81, 86, 143 P. 282, citing *Smith v Atkinson*, 18 Colo. 255, 32 P. 425; *Auerbach v Marks*, 10 Daly (N. Y.) 171.

VI. QUALIFICATION OF SURETIES. NEW BOND.

Party may not retain possession unless he keeps security good.—A party at whose instance a writ of replevin issues cannot retain possession of the property taken by virtue of such writ during the pendency of the action, unless he keeps his security good; and it therefore becomes imperative upon the court in which such suit is brought, or may be pending, if the bond given is insufficient for any reason, upon showing to that effect, to require a new one, and the party so ordered cannot complain unless it should appear that the bond for which another was ordered, was sufficient. *Greig v Ware*, 25 Colo. 184, 55 P. 163.

But court cannot punish party by striking his pleadings from the files.—If the new bond is not filed within the time fixed, the property should be ordered returned to the defendant; and obedience to the court's orders may be enforced by proper penalties, but the court has no authority to punish the party for failure to file a new bond by striking his pleadings from the files, and depriving him of a trial upon the merits of the case. *Greig v Ware*, 25 Colo. 184, 55 P. 163.

VII. JUDGMENT.

Cross reference.—As to right to maintain counterclaim, see committee note to this subdivision. See also, Address no. 15, appx. D.

Subdivision requires the judgment to be for the return of the entire property when in the hands of the other party. *Horn v Citizens Sav., etc., Bank*, 8 Colo. App. 535, 539, 46 P. 838; *Duffy v Wilson*, 44 Colo. 340, 344, 98 P. 826; *Jones v Messenger*, 40 Colo. 37, 41, 90 P. 64.

Or for its full value if possession cannot be had. *Horn v Citizens Sav., etc., Bank*, 8 Colo. App. 535, 539, 46 P. 838; *Duffy v Wilson*, 44 Colo. 340, 344, 98 P. 826; *Jones v Messenger*, 40 Colo. 37, 41, 90 P. 64; *Tucker v Parks*, 7 Colo. 62, 67, 1 P. 427, cited in note, 96 A. L. R. 135.

Thus, it is unimportant that the thing to be recovered cannot be identified.—It is suggested that replevin will not lie for the sheep, because they cannot be identified. That is unimportant under this subdivision. If replevin will not lie, trover will, and under this subdivision, action for possession, with the alternative recovery of the property or the value thereof in such a case as this, is equivalent practically to the two together.

The plaintiff states the ultimate facts and has such judgment as they justify. If the chattels cannot be delivered, their value must be paid, and the judgments in that respect are right. To hold otherwise would be to revert to the common law forms of action now happily abolished. *Clay, etc., Co. v. Martinez*, 74 Colo. 10, 14, 218 P. 903.

But defendant cannot complain of a judgment for the return of the property only.—A judgment for the plaintiff, in an action of replevin, in accordance with this subdivision, should, as a rule, be in the alternative for the possession of the property, or the value thereof in case a delivery cannot be had; but, since this is for the protection of the plaintiff, the defendant cannot complain of a judgment for the return of the property only. *Copeland v. Kilpatrick*, 38 Colo. 208, 88 P. 472.

A judgment must be for the possession of the entire property to be operative. *Jones v. Messenger*, 40 Colo. 37, 41, 90 P. 64; *Duffy v. Wilson*, 44 Colo. 340, 344, 98 P. 826.

A judgment in replevin against the plaintiff for the return of the property and damages for its detention, or in the alternative for its value, cannot be satisfied pro tanto by a return of a portion of the property, since this subdivision requires the return of the entire property in like condition as when taken, or judgment for its full value. *Jones v. Messenger*, 40 Colo. 37, 90 P. 64.

Where judgment has been rendered in replevin against the plaintiff for the return of the property and damages for its detention, or for the value, an allegation of the complaint, in an action to compel defendant to accept a portion of the property in pro tanto satisfaction of the judgment, that plaintiff's inability to return all the property arose from and was caused by defendant's acts, is insufficient to confer equity jurisdiction. *Id.*

Value of property is basis for judgment.—Only on evidence as to the value of property taken in replevin is there basis for judgment. *Viles v. Jackson*, 105 Colo. 68, 94 P. (2d) 1085.

But subdivision is satisfied by a finding of the total aggregate value of all the chattels wrongfully withheld. *Stevenson v. Lord*, 15 Colo. 131, 132, 25 P. 313, cited in note, *Ann. Cas.* 1912D, 851; *Copeland v. Kilpatrick*, 38 Colo. 208, 88 P. 472.

As there is no need that the judgment should declare the separate value of each item of the recovery. *Duffy v. Wilson*, 44 Colo. 340, 98 P. 826; *Copeland v. Kilpatrick*, 38 Colo. 208, 88 P. 472.

A judgment in the alternative is not required where it would be useless.—Where the goods in question have been consumed

by defendant and therefore cannot possibly be delivered, it is proper to accept a finding of guilty, assessing the value. To require an alternative judgment under this subdivision would be a useless formality. *Barnard v. Corlett*, 62 Colo. 226, 161 P. 156.

Proof of facts under allegations determines relief.—Some of the decided cases under the first clause of this subdivision indicate that in a proper case the court may award a money judgment, without its being in the alternative, even though technically it was designated an action in replevin. See *Melnick v. Bowman*, 102 Colo. 384, 79 P. (2d) 368, wherein the court said that it is the proof of the facts under the allegations in the complaint, and not the prayer, that determines the relief to be given.

Return and damages must be claimed in the answer.—Under this subdivision, to authorize a judgment in a replevin suit, for the return of the property to the defendant or for its value, or for damage for its detention, the return and the damages must be claimed in the answer. And where the answer did not claim a return of the property or damage for its detention a judgment for its return and for damages for its detention was unwarranted and must be regarded as void. *Gallup v. Wortmann*, 11 Colo. App. 308, 53 P. 247.

Measure of damages.—When neither fraud, malice, or wilful wrong in the taking or detention of the goods is alleged, the measure of damages is the value of the goods at the time of the taking, or illegal detention. *Barnard v. Corlett*, 62 Colo. 226, 161 P. 156.

Part of judgment awarding damages for indebtedness and attorney fees held void. In an action in replevin to secure possession of mortgaged property because of default in payment of the secured indebtedness, a judgment, in so far as it awards the property to plaintiff and for costs, may be valid, but void as to that part purporting to award damages for the indebtedness and for attorney fees. *French v. Commercial Credit Co.*, 99 Colo. 447, 64 P. (2d) 127.

Damages for taking and detention cannot be defeated by mere misnomer or bad form.—While defendant's demands (other than for return of the property) are denominated "further answer," "cross complaint," and "separate and further cause of action," all are in fact for damages for wrongful taking and detention, recoverable under this section. They are not to be defeated by mere misnomer or bad form. *Ellison v. Young*, 71 Colo. 385, 389, 206 P. 802.

When jurisdiction of the court attaches.—In a replevin suit the jurisdiction of the court over the property does not attach until the officer has taken possession under the writ, and where the return of the officer

on the writ shows that he never took possession of the property but left it in the possession of the defendant, a judgment which orders the return of the property by the plaintiff to the defendant is without jurisdiction and void. *Gallup v. Wortmann*, 11 Colo. App. 308, 53 P. 247.

Judgment must be limited to ascertainment of whether there was any indebtedness.—In an action in replevin by the holder of a chattel mortgage to obtain possession of the mortgaged property because the debtor was in default in payment of the secured note, the court has no jurisdiction to try the issue of indebtedness except to the point of ascertaining whether there was any indebtedness at all, and its judgment must be so limited. *French v. Commercial Credit Co.*, 99 Colo. 447, 64 P. (2d) 127.

The amount of the judgment recovered by defendant is conclusive in a subsequent suit upon the replevin bond. *Cantril v. Babcock*, 11 Colo. 143, 17 P. 296, cited in notes, 6 L. R. A. (N. S.) 624, 4 A. L. R. 551, 54 A. L. R. 69.

Where property in the hands of the United States marshal has been wrongfully replevied in the state court, such court may

properly render judgment for a return to the marshal of such property, or payment to him of the value if return be not made, although the merits of plaintiff's claim are not adjudicated. *Id.*

Where the plaintiffs in an execution gave the sheriff an indemnity bond to levy on property, a judgment against the sheriff in replevin for a return of the property is not a bar to an action in trover against the obligors of his indemnity bond. But a judgment in replevin against a sheriff for the return of property levied on by execution, is conclusive against the plaintiffs in the execution who gave the sheriff an indemnity bond to make the levy. *Woodworth v. Gorsline*, 30 Colo. 186, 69 P. 705, 58 L. R. A. 417, cited in notes, 91 Am. St. Rep. 199, 40 L. R. A. (N. S.) 732, Ann. Cas. 1914D, 476, 478, 480, 96 A. L. R. 110.

Unauthorized use by bailee gives bailor the right of immediate possession.—A use of the chattel of the bailee in a manner unauthorized by the contract of bailment gives the bailor the right of immediate possession, and he may maintain trover or replevin. *Clay, etc., Co. v. Martinez*, 74 Colo. 10, 13, 218 P. 903.

CHAPTER XIV

REAL ESTATE

Rule 105. Actions Concerning Real Estate.

(a) **Complete Adjudication of Rights.** An action may be brought for the purpose of obtaining a complete adjudication of the rights of all parties thereto, with respect to any real property and for damages, if any, for the withholding of possession. The court in its decree shall grant full and adequate relief so as to completely determine the controversy and enforce the rights of the parties. The court may at any time after the entry of the decree make such additional orders as may be required in aid of such decree.

(b) **Record Interest; Actual Possession Requires Occupant be Party.** No person claiming any interest under or through a person named as a defendant need be made a party unless his interest is shown of record in the office of the recorder in the county where the real property is situated, and the decree shall be as conclusive against him as if he had been made a party; provided, however, if such action be for the recovery of actual possession of the property, the party in actual possession shall be made a party.

Committee Note.

The language of this subdivision is contained in Senate Bill 712, section 2, approved by Governor Carr, April 17, 1941.

(c) **Disclaimer Saves Costs.** If any defendant in such action disclaims in his answer any interest in the property or allows judgment to be taken against him without answer, the plaintiff shall not recover costs against him, unless the court shall otherwise direct, provided that this subdivision shall not apply to a defendant primarily liable on any indebtedness sought to be foreclosed or established as a lien.

(d) **Execution of Quit Claim Deed Saves Costs.** If a party, 20 days or more before bringing an action for obtaining an adjudication of the rights of another person with respect to any real property, shall request of such person the execution of a quit claim deed to such property and shall also tender to him \$2.00 to cover the expense of the execution and delivery of a deed and if such person shall refuse or neglect to execute and deliver such deed, the filing by such person of a disclaimer shall not avoid the imposition upon him of the costs in the action afterwards brought. [From Code Sec. 276 A.]

(e) **Set-off for Improvements.** Where a party or those under whom he claims, holding under color of title adversely to the claims of another party, shall in good faith have made permanent improvements upon real property (other than mining property) the value of such improvements shall be al-

lowed as a set-off or as a counterclaim in favor of such party, in the event that judgment is entered against such party for possession or for damages for withholding of possession. [From Code Sec. 278.]

(f) **Lis Pendens.** After filing any pleading wherein affirmative relief is claimed affecting the title to real property, a party may file in the office of the recorder of the county in which the property is situated a notice of lis pendens containing the names of the parties, the nature of the claim, and a description of the property in that county affected thereby; such notice shall from the time of the filing for record thereof, and only from such time, be constructive notice to all persons acquiring any interest in or lien upon the property described in such notice from any grantor or from any source whatsoever. A notice of lis pendens filed as provided by law shall remain in effect for 30 days from the time of entry of final judgment in the trial court. On writ of error notice of lis pendens must be so filed in order to constitute notice of the writ. [This is from Code Sec. 38 and 2 C. S. A., Chap. 40, Sec. 115.]

(g) **Description of Real Property.** In any proceeding for the recovery of real property or an interest therein, such property shall be designated by legal description. [From Code Sec. 70.]

Committee Note to Rule.

This rule supplants all of Code Secs. 272 to 280, 282 to 288, 292 to 296, and 298 to 309, and one form of action covers all real estate pleadings. See old Code Sec. 281 [§ 12, appx. B], left in statutes, on mortgage not being a conveyance.

Cross reference.—See discussion of this rule in Address no. 7, appx. D.

Subdivision (c).—In an action where defendant disclaimed as to part of the premises and claimed title and right of possession as to the remainder, in case of judgment for plaintiff, defendant is not entitled to have part of the cost assessed against plaintiff. *Relender v. Riggs*, 20 Colo. App. 423, 79 P. 328.

If the defendant disclaimed title and set up its outlays on account of taxes legally assessed, which should have been paid by the plaintiff, and asked for judgment accordingly, then the cost would properly have been a charge against the latter under this section. *Empire Ranch, etc., Co. v. Lanning*, 49 Colo. 458, 461, 113 P. 491.

But it would be a unique doctrine indeed were a defendant permitted, on every conceivable question, to dispute and contend against the rights of a plaintiff, and, if beaten, avoid costs because plaintiff was rightly held to reimburse him certain tax outlays, when, by disclaiming title, and asking such reimbursement in the first instance, the costs would have been largely saved, and such as were necessarily incurred would have been put upon the plaintiff. *Id.*

Subdivision (f).—Lis pendens is notice of everything averred in the pleadings perti-

nent to the issue or to the relief sought, and of the contents of exhibits filed and proved. In order that the notice may thus operate, the specific property to which the suit relates must be pointed out in the pleadings in such a manner as to call the attention of all persons to the very thing and warn them not to intermeddle. * * * "The notice arising from a pending suit does not affect property not embraced within the descriptions of the pleadings; nor does its operation extend beyond the prayer for relief." *Central Sav. Bank v. Smith*, 43 Colo. 90, 99, 95 P. 307, cited in notes, 136 Am. St. Rep. 1035.

Failing to file such notice does not relieve persons who have actual notice of the pendency of the action. *Buckhorn Plaster Co. v. Consolidated Plaster Co.*, 47 Colo. 516, 533, 108 P. 27, cited in notes, Ann. Cas. 1912A, 1027, 1028, 36 A. L. R. 424.

If a suit is brought maliciously and without probable cause, and notice of lis pendens filed therein, liability would attach for such filing, for any damages occasioned thereby. *Johnston v. Deidesheimer*, 76 Colo. 559, 232 P. 1113.

It never is incumbent on either party to litigation to file lis pendens in the interest of his adversary. *Scott v. Weimer*, 99 Colo. 247, 251, 61 P. (2d) 591.

CHAPTER XV
REMEDIAL WRITS AND CONTEMPT

Rule 106. Forms of Writs Abolished.

(a) Habeas Corpus, Mandamus, Quo Warranto, Certiorari, Prohibition, Scire Facias, and Other Remedial Writs. Special forms of pleadings and writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, scire facias, and proceedings for the issuance of other remedial writs, as heretofore known, are hereby abolished. In the following cases relief may be obtained by appropriate action or by an appropriate motion under the practice prescribed in these rules:

(1) Where any person not being committed or detained for any criminal or supposed criminal matter is illegally confined or restrained of his liberty.

(2) Where the relief sought is to compel an inferior tribunal, corporation, board, officer or person to perform an act which the law specially enjoins as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, officer or person. The judgment shall include any damages sustained.

(3) When any person usurps, intrudes into, or unlawfully holds or exercises any office or franchise. The district attorney of the proper district may and, when directed by the governor so to do, shall bring an action against such person in the name of the people of the state, but if the district attorney declines so to do, it may be brought upon the relation and complaint of any person. The rule heretofore existing requiring leave of court to institute such proceedings is hereby abolished. When such an action is brought against a defendant alleged to usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise it shall be given precedence over other civil actions except similar actions previously commenced. The judgment may determine the rightful holder of the office or franchise, and shall include any damages sustained, and the court may, in its discretion, impose upon the defendant a fine not to exceed \$5,000.00 to be paid into the treasury of the state.

(4) Where an inferior tribunal (whether court, board, commission or officer) exercising judicial or quasi-judicial functions, has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy. Upon the filing of the complaint the court shall direct the issuance of a citation to the inferior tribunal to show cause why the relief requested

shall not be allowed. If the complaint is supported by an affidavit the order to show cause may be issued, or the court may forthwith order the inferior tribunal, or any person having custody of the records of the proceedings described in the complaint, to certify to the court at a specified time and place a transcript of the record and proceedings, or such portion thereof as the court may direct. If a stay of proceedings is granted the citation or order shall so state. Review shall not be extended further than to determine whether the inferior tribunal has exceeded its jurisdiction or abused its discretion.

(5) When judgment is recovered against one or more of several persons jointly indebted upon an obligation, and it is desired to proceed against the persons not originally served with the summons who did not appear in the action. Such persons may be cited to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons, and in his answer any such person may set up any defense either to the original obligation or which may have arisen subsequent to judgment, except a discharge from the original liability by the statute of limitations.

Committee Note.

The above subdivisions are based upon the following:

Federal Rule 81 (b):

- (1) 3 C. S. A., Chap. 77, Sec. 2, habeas corpus in civil cases;
- (2) Code Secs. 342-355, mandamus;
- (3) Code Secs. 321-330, quo warranto;
- (4) Supreme Court Rule 57, Code Secs. 331-341, certiorari and prohibition;
- (5) Code Secs. 255-260, scire facias.

(b) **Under Statutes.** Where a statute provides for review of the acts of any inferior tribunal (whether court, board, commission, or officer) by certiorari or writ of review, or for a proceeding in quo warranto, relief therein provided may be had under this rule.

I. Subdivision (a) (1).

II. Subdivision (a) (2).

- A. Grounds for Relief in General.
- B. When Properly Allowed.
- C. When Properly Refused.

III. Subdivision (a) (3).

- A. General Consideration.
- B. Grounds for and against Whom Action Lies.
- C. Who May Bring Action.
 1. In General.
 2. Private Parties.
- D. Exclusiveness of Remedy.

IV. Subdivision (a) (4).

- A. General Consideration.
- B. Absence of Plain, Speedy and Adequate Remedy.
- C. Extent of Review.

V. Subdivision (a) (5).

Cross Reference.

For a discussion of this rule, see Address no. 16, appx. D.

I. SUBDIVISION (a) (1).

Editor's note.—This rule boils down the substance of some thirty former code sections into the short statements appearing herein. (See Address no. 16, appx. D.) The purpose of the rule is to simplify the existing practice by abolishing the special forms of pleadings and writs, heretofore necessary for the particular relief desired. Therefore, cases on the former pleading and practice are entirely useless. However, it appears that the substantive aspects of the proceedings are preserved. For example, subdivision (a) (1) provides for relief of the same nature as was formerly provided by 3 C. S. A., ch. 77, § 2, dealing with civil habeas corpus. Thus, cases construing the substantive aspects of that sec-

tion would still be applicable to subdivision (a) (1), although the pleadings, writ and the name of the remedy are abolished.

Jurisdiction of courts.—Courts of chancery have full and complete jurisdiction in proceedings over the custody of infants. *Graham v Francis*, 83 Colo. 346, 265 P. 690.

In *Flynn v Casper*, 26 Colo. App. 344, 144 P. 1137, cited in note, Ann. Cas. 1916D, 512, it was held that proceedings by a parent demanding the custody of his infant child, was within the jurisdiction of the county court and an appeal would lie from the county court to the District Court.

II. SUBDIVISION (a) (2).

A. Grounds for Relief in General.

Cross references.—As to proceedings against a corporation refusing to deliver water, see vol. 3, ch. 90, § 148. As to proceedings to acquire irrigation rights and easements for state lands over public domain, see vol. 4, ch. 134, § 99. As to proceedings to compel action of county commissioners on petition for water works district, see vol. 4, ch. 174, § 3. As to proceedings to compel state board of equalization to act, see vol. 4, ch. 142, § 107. As to proceedings to enforce orders of the state tax commission, see vol. 4, ch. 142, § 180. As to the power of the courts to inquire into the regularity of proceedings of canvassers, see vol. 3, ch. 59, § 246. As to the power of courts to control action of board in canvassing returns for representative in general assembly, see vol. 3, ch. 59, § 251. As to proceedings against a county treasurer to compel him to release land from a tax sale, see vol. 4, ch. 142, § 264. As to proceedings to compel the issuance or transfer of corporate stock, see vol. 2, ch. 41, § 87, analysis line II, B.

Editor's note.—Subdivision (a) (2) is based on code § 342, which set forth the grounds for a writ of mandamus, which writ is now abolished. However, since the grounds of relief under this subdivision are the same as set out in Code § 342, cases concerning the question as to when relief will be granted would still be applicable, and are included in this note.

Unless a party has a clear legal right to compel the action sought, he cannot maintain it. *Civil Service Comm. v People* 88 Colo. 319, 295 P. 920. See also, *Hertz Drive-Ur-Self System v Doak*, 94 Colo. 200, 29 P. (2d) 625.

When the right claimed is doubtful, action will not lie. *People v Stapleton*, 98 Colo. 354, 357, 56 P. (2d) 931, citing *Sturmer v McCandless Inv. Co.*, 87 Colo. 23, 284 P. 778; *Bargler v Farmers Irrigation Co.*, 87 Colo. 605, 290 P. 288.

An action lies only where the petitioner has a clear legal right to have the respondent

perform a clear legal duty. *Heimbecher v Denver*, 97 Colo. 465, 468, 50 P. (2d) 785.

Where a petition shows that there is neither a clear legal right in the petitioner nor a clear legal duty corresponding thereto, relief is properly denied. *Roper v Industrial Comm.*, 93 Colo. 250, 25 P. (2d) 725.

Action lies to compel the performance of a purely ministerial duty involving no discretionary right. *Lindsey v Carlton*, 44 Colo. 42, 48, 96 P. 997, citing *People v District Court*, 14 Colo. 396, 24 P. 260, cited in note, 22 Am. St. Rep. 658; *Union Colony v Elliott*, 5 Colo. 371, cited in note, 89 Am. Dec. 732.

And it will be allowed where a statute prescribes no remedy for the refusal to perform a duty made imperative thereby, or in case of doubt whether there be another effectual remedy. *Bell v Thomas*, 49 Colo. 76, 81, 111 P. 76, 31 L. R. A. (N. S.) 664, cited in note, 1 A. L. R. 1699.

But it does not lie to compel the performance of a discretionary trust.—*Lindsey v Carlton*, 44 Colo. 42, 48, 96 P. 997, citing *People v District Court*, 14 Colo. 396, 24 P. 260, cited in note, 22 Am. St. Rep. 658; *Union Colony v Elliott*, 5 Colo. 371, cited in note, 89 Am. Dec. 732.

And it cannot usurp the functions of a writ of error.—*Lindsey v Carlton*, 44 Colo. 42, 48, 96 P. 997, citing *People v District Court*, 14 Colo. 396, 24 P. 260, cited in note, 22 Am. St. Rep. 658; *Union Colony v Elliott*, 5 Colo. 371, cited in note, 89 Am. Dec. 732.

Thus, action will not lie from the District Court to compel the county court to enter a judgment in a divorce proceeding different from the judgment which had been rendered; this being an attempt to review, annul, and modify such judgment, and to usurp the functions of a writ of error to such judgment, and also an attempt to control the discretion and judgment of the county court. *Lindsey v Carlton*, 44 Colo. 42, 96 P. 997.

Nor will it lie against a court unless it be clearly shown that such court has refused to perform some manifest duty. *Lindsey v Carlton*, 44 Colo. 42, 48, 96 P. 997, citing *People v District Court*, 14 Colo. 396, 24 P. 260, cited in note, 22 Am. St. Rep. 658; *Union Colony v Elliott*, 5 Colo. 371, cited in note, 89 Am. Dec. 732.

Action will not lie when it is apparent that the interests of third parties, who are not before the court, are involved. *Hertz Drive-Ur-Self System v Doak*, 94 Colo. 200, 29 P. (2d) 625.

In cases where adequate relief may be had by an action for damages, an action under subdivision (a) (2) will not lie as a

general rule. *Bell v. Thomas*, 49 Colo. 76, 80, 111 P. 76, 31 L. R. A. (N. S.) 664, cited in note, 1 A. L. R. 1699.

But ministerial officers may be compelled to exercise their functions although another remedy exists.—In the case of ministerial officers "there is an exception to the general rule, and they may be compelled to exercise their functions according to law, even though the party has another remedy against them. * * * It is held by the weight of authority that an action will lie, although the party may have also a remedy upon the official bond of the ministerial officer." 26 Cyc. 172, 173. *Bell v. Thomas*, 49 Colo. 76, 80, 111 P. 76, 31 L. R. A. (N. S.) 664, cited in note, 1 A. L. R. 1699.

B. When Properly Allowed.

Action lies to compel the performance of a single act.—*People v. District Court*, 81 Colo. 163, 255 P. 447.

And may also be invoked to require the execution of a series of acts.—*People v. District Court*, 81 Colo. 163, 255 P. 447.

To compel ousted officer to deliver papers to appointee.—Where an ousted secretary of an irrigation district refused to turn over the books and papers to the regular appointee, an action to compel delivery is proper. *Kepley v. People*, 76 Colo. 233, 230 P. 804, cited in note, 84 A. L. R. 1115.

To compel revocation of unlawful order of suspension.—An action under subdivision (a) (2) lies to enforce the revocation of an order of suspension unlawfully entered against a police officer who was holding his position under civil service. *Bratton v. Dice*, 93 Colo. 593, 27 P. (2d) 1028.

To compel justice of peace to issue writ of commitment.—Where a justice of the peace tried and convicted a defendant and sentenced him to imprisonment in the county jail, his duty to issue a writ of commitment was mandatory, and upon his refusal to issue such writ when demanded, action would lie to compel him to issue the writ. And it was immaterial that time had elapsed since the sentence and before the writ was demanded, exceeding the length of the term of sentence. *Mann v. People*, 16 Colo. App. 475, 66 P. 452, cited in notes, 19 L. R. A. (N. S.) 1042, 72 A. L. R. 1271.

To compel officer to act.—An action lies to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station. *Board of Trustees v. Endner*, 18 Colo. App. 65, 70 P. 152. See also, *Statton v. People*, 18 Colo. App. 85, 70 P. 157. *Colorado Public Welfare Board v. Viles*, 105 Colo. 62, 94 P. (2d) 713.

An acting public official is entitled to an audit of his claim for services rendered in

his official capacity, and an action will lie to compel such audit. *McNichols v. People*, 92 Colo. 469, 22 P. (2d) 131.

Courts will direct an officer to proceed and exercise the discretion vested in him by law. Refusal of a city auditor to approve a demand, because of claimed want of authority, amounts to a refusal to act, and an action will lie to compel action where he is vested with authority. *People v. McNichols*, 91 Colo. 141, 13 P. (2d) 266.

And to compel the issuance of a building permit which has been denied on the ground that the construction of the proposed building would infringe the zoning ordinances of the city. *Hedgcock v. People*, 98 Colo. 522, 57 P. (2d) 891.

C. When Properly Refused.

A proceeding cannot be maintained in anticipation of an omission to perform a duty or because the relator fears there will be an omission, but there must be shown an actual failure or refusal to perform the duty before an action can be maintained to compel its performance. *Orman v. People*, 18 Colo. App. 302, 71 P. 430, cited in notes, 125 Am. St. Rep. 517, 6 L. R. A. (N. S.) 754.

Or to compel appointment by civil service commission.—A person who stands second on a civil service eligible list for appointment to a clerical position cannot compel his appointment in the absence of a showing that the person standing first had been tendered and refused the appointment or had failed to make demand therefor upon request of relator. *Civil Service Comm. v. People*, 88 Colo. 319, 295 P. 920.

Or to compel city council to make appropriation for expenses of civil service commission.—An action lies only when on the one side there is a clear legal right to demand the doing of a certain thing, and on the other side a clear legal duty to do it. It does not lie to compel a city council to make an appropriation for civil service commission expenses. *Schneider v. People*, 95 Colo. 300, 35 P. (2d) 498.

Likewise, an action will not lie to test rule of procedure in workmen's compensation case.—The remedy may not be invoked in a workmen's compensation case for the purpose of testing the meaning or validity of a mere rule of procedure when the commission which framed it has seen fit to disregard it. *Roper v. Industrial Comm.*, 93 Colo. 250, 25 P. (2d) 725.

Or to compel school board to allow claims.—It is the duty of a school board to disallow invalid claims, according to its judgment, and courts cannot control that judgment by proceedings under subdivision (a) (2). *Sorensen v. Echternacht*, 74 Colo. 91, 218 P. 1046.

Or to test title to office.—When a person is in actual possession of an office under an election or commission, and exercising its duties under color of right, his title to the office cannot be tried or tested under subdivision (a) (2). This is the established doctrine, both in England and the United States, and might be supported by almost innumerable decisions. *Cripple Creek v. People*, 19 Colo. App. 399, 403, 75 P. 603, cited in notes, 19 L. R. A. (N. S.) 57, 65, 72, 84 A. L. R. 1126, quoting from *Henderson v. Glynn*, 2 Colo. App. 303, 305, 30 P. 265, cited in note, 93 A. L. R. 272.

When an office is already filled by an actual incumbent, exercising the functions of the office *de facto*, and under color of right, an action will not lie to compel the admission of another claimant, nor to determine the disputed question of title. *Cripple Creek v. People*, 19 Colo. App. 399, 403, 75 P. 603, cited in notes, 19 L. R. A. (N. S.) 57, 65, 72, 84 A. L. R. 1126.

Or to compel a ministerial officer not to act.—Judgment in an action may be that a ministerial officer—where there is a clear legal duty—shall perform, or where the duty does not appear, that he need not perform; but never that he shall not perform. If the latter judicial direction is given it must be by a judgment entered in an equitable action for injunction. *Brownlow v. Wunch*, 102 Colo. 447, 80 P. (2d) 444.

III. SUBDIVISION (a) (3).

A. General Consideration.

Editor's note.—This subdivision is based largely upon Code § 321 which set forth the grounds for quo warranto and the proper parties plaintiff in such an action. Since these remain the same under this subdivision, the cases on these questions are included in this note.

It should be noted that leave of the court is no longer necessary in order to file a complaint. See Address no. 16, appx. D.

Purpose of subdivision (a) (3) is to prevent a public wrong by ousting the usurper from office. *People v. Horan*, 34 Colo. 304, 329, 86 P. 252, 114 Am. St. Rep. 163, dissenting opinion.

Distinction between proceeding under this subdivision and election contest.—A proceeding by the people, for the purpose of trying the incumbent's title to office, regardless of the claimant's right, is not an "election contest" within the meaning of this phrase as employed in § 13, art. XIV, of the constitution. And statutes passed by the legislature in obedience to the constitutional mandate relating to contested elections do not deprive the courts of jurisdiction to inquire into usurpations and unlawful holdings of office. *People v. Londoner*, 13 Colo. 303, 22 P. 764, 6 L. R. A.

444, cited in notes, 125 Am. St. Rep. 640, 12 L. R. A. 708, 19 L. R. A. 584, 33 L. R. A. 387, 53 L. R. A. 635, 22 L. R. A. (N. S.) 813, Ann. Cas. 1913C, 161, 909, Ann. Cas. 1913E, 984.

Question of whether claimant was legally elected may be decided in proceeding under subdivision (a) (3).—Subdivision (a) (3) accords facilities for interrogating the voter afforded by an election contest. As a claimant, according to the express language of the code, may be awarded the office in the same proceeding that is availed of to oust a usurper, we cannot see why, in determining whether the claimant shall be awarded the office, the court should not go into the question of whether such claimant was legally elected, not because the defendant is interested, but because the public is. If this be not permitted we cannot see but what the purpose of the remedy will be perverted. It may be used to oust a usurper and to induct into office a successor not legally entitled thereto. The character of the remedy is such it certainly ought not to be used except for the public good. *People v. Horan*, 34 Colo. 304, 329, 86 P. 252, 114 Am. St. Rep. 163, dissenting opinion.

But a proceeding to oust a party from an office cannot be converted into a statutory election contest. *People v. Horan*, 34 Colo. 304, 86 P. 252, 114 Am. St. Rep. 163.

And the right to the official salary is not to be determined in a proceeding under subdivision (a) (3), but is to be determined in other proceedings. *Capp v. People*, 64 Colo. 58, 170 P. 399.

Franchise defined.—In *Londoner v. People*, 15 Colo. 246, 247, 25 P. 183, it is said: "A franchise with us has been defined as a particular privilege conferred upon individuals by grant from the government. Franchises are usually conferred upon corporations for the purpose of enabling them to do certain things. Franchises are vested in the corporate entity." *Grant v. Elder*, 64 Colo. 104, 111, 170 P. 198, cited in notes, 51 A. L. R. 943, 957.

B. Grounds for and against Whom Action Lies.

Cross reference.—As the proper remedy to test the validity of the organization of an irrigation district, see vol. 3, ch. 90, § 377, analysis line II.

An action lies to try right of those lawfully elected directors of private corporations.—The phrase "any franchise" in subdivision (a) (3) includes the powers and rights conferred upon a private corporation, and an action lies to try the right of those lawfully elected directors of a private cor-

poration and wrongfully prevented from acting. *Grant v Elder*, 64 Colo. 104, 170 P. 198, cited in notes, 51 A. L. R. 943, 957.

And it lies to test the title of the office of a director of an irrigation district.—*Lockhard v People*, 80 Colo. 31, 250 P. 152.

And a club organized in violation of law may be dissolved under subdivision (a) (3).—A club organized ostensibly as a social club, but in fact with the sole purpose to dispense intoxicating liquors, in violation of law and local ordinances, may be dissolved by a proceeding under subdivision (a) (3). *Canon City Labor Club v People*, 21 Colo. App. 37, 121 P. 120, cited in notes, 38 L. R. A. (N. S.) 103, Ann. Cas. 1916D, 942.

But it does not lie to test the regularity of the appointment of commissioners to hold an election upon the question whether a town shall become incorporated. *People v County Court*, 59 Colo. 52, 147 P. 329.

As such commissioners are not public officers.—An office is an employment on behalf of the government in any station or public trust, not transient, occasional, or incidental. Commissioners appointed under the statute, to hold an election upon the question whether a town shall become incorporated, are not public officers. *People v County Court*, 59 Colo. 52, 147 P. 329.

"A designation of a person to do some one act or duty, with no official tenure except as incident to that transitory function, cannot make him a public officer without involving a great absurdity. Every public office includes duties which are to be performed constantly, or as occasion arises, during some continuous tenure." *People v County Court*, 59 Colo. 52, 54, 147 P. 329, quoting from *Underwood v McDuffee*, 15 Mich. 361, 366, 93 Am. Dec. 194.

However, when the town is declared formed the validity of the proceeding may be tested under subdivision (a) (3). *People v County Court*, 59 Colo. 52, 147 P. 329.

C. Who May Bring Action.

1. In General.

As a general rule, prosecutions for wrongs done to the public must be instituted by the state through its properly authorized agents, while the individual can only sue for injuries peculiarly affecting him; and the provision permitting an action to be brought by a purely private party, upon the neglect or refusal of the district attorney to bring such action, must be construed with reference to this general rule. *People v Grand River Bridge Co.*, 13 Colo. 11, 12, 21 P. 898, 16 Am. St. Rep. 182, cited in notes, 125 Am. St. Rep. 635, 9 L. R. A. 275.

If the defendant corporation has violated the law, either by doing some forbidden act

or by neglecting to do some act enjoined upon it, it is not every person who may call it to account for such violation. *Id.*

District attorney is proper officer to determine whether public interest is involved.

—Under subdivision (a) (3), the district attorney is the proper officer to determine in the first instance whether under disclosed facts the public interest is involved, and whether or not a franchise, as contemplated by that provision, is properly an issue. *People v Painless Parker Dentist*, 85 Colo. 304, 305, 275 P. 928.

And where by statute authority is given to a particular officer, its exercise by any other officer is forbidden by implication. *Atchison, etc., R. Co. v People*, 5 Colo. 60, 65, cited in note, 7 L. R. A. 319.

Hence, the attorney general has no authority to bring an action. *Atchison, etc., R. Co. v People*, 5 Colo. 60, cited in note, 7 L. R. A. 319.

2. Private Parties.

Refusal of district attorney to bring action is sufficient to authorize action by private parties.—It was alleged and proven that the district attorney upon request made by relators and their attorneys and upon complaint being submitted to him, refused to prosecute the proceeding, and under the circumstances in this case such refusal was sufficient to authorize the court to permit the prosecution upon the relation of such private parties without the aid or sanction of the district attorney. *Canon City Labor Club v People*, 21 Colo. App. 37, 45, 121 P. 120, cited in notes, 38 L. R. A. (N. S.) 103, Ann. Cas. 1916D, 942.

But in order to support an action by the people for the redress of a wrong, that wrong must appear to have been done to the people. *People v Colorado Eastern Ry. Co.*, 8 Colo. App. 301, 306, 46 P. 219, cited in notes, 125 Am. St. Rep. 644, 22 L. R. A. (N. S.) 813, citing *Waterman on Corps.*, vol. 2, § 383; *Leslie v Lorillard*, 110 N. Y. 519, 18 N. E. 363; *Thompson v People*, 23 Wend. (N. Y.) 537; *Minnesota v Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 41 N. W. 1020; *New York v North River Sugar Refining Co.*, 121 N. Y. 582, 24 N. E. 834.

Since subdivision (a) (3) was not intended to give private person right to redress his own wrongs.—Subdivision (a) (3) was not intended to give a private person the right to question the corporate existence of another, in order to protect his own rights or redress his own wrongs, unless it may be in that class of cases where the title to an office is involved, or some similar question is presented. If the law officer should refuse, we do not doubt the private relator could proceed and institute an action to remedy a public wrong. In the latter case, however, it must appear that the ob-

ject aimed at is a public one, and is the protection of the interests and the maintenance of the welfare of the people. *People v Colorado Eastern Ry. Co.*, 8 Colo. App. 301, 307, 46 P. 219, cited in notes, 125 Am. St. Rep. 644, 22 L. R. A. (N. S.) 813. See also, *State Railroad Comm. v People*, 44 Colo. 345, 98 P. 7, 22 L. R. A. (N. S.) 810; *People v Lockhard*, 26 Colo. App. 439, 440, 143 P. 273.

And when the action is brought to protect private rights, it should not be maintained.—The remedy is for the protection of the interests of the public as contradistinguished from private rights; and that, when the object of a proceeding is the protection of the latter, the action should not be maintained. *State Railroad Comm. v People*, 44 Colo. 345, 351, 98 P. 7, 22 L. R. A. (N. S.) 810.

The provisions which give permission to a private party to bring the action and also to have the right of one other than the incumbent adjudicated, do not turn the proceeding from one to protect the public interests into one to safeguard the purely private rights of the relator. *Id.*

Person is not disqualified because of having been opposing candidate for office in question.—One possessing the qualifications of "freeholder, resident and elector" is not disqualified from acting as plaintiff in the proceedings by reason of having been the opposing candidate for the office in question. *People v Londoner*, 13 Colo. 303, 22 P. 764, 6 L. R. A. 444, cited in notes, 125 Am. St. Rep. 640, 12 L. R. A. 708, 19 L. R. A. 584, 33 L. R. A. 387, 53 L. R. A. 635, 22 L. R. A. (N. S.) 813, Ann. Cas. 1913C, 161, 909, Ann. Cas. 1913E, 984.

A certain degree of interest on the part of plaintiffs in the proceedings is generally deemed requisite; and the officious intermeddling by parties having absolutely no interest, either as taxpayers or voters, is disfavored. *People v Londoner*, 13 Colo. 303, 314, 22 P. 764, 6 L. R. A. 444, cited in notes, 125 Am. St. Rep. 640, 12 L. R. A. 708, 19 L. R. A. 584, 33 L. R. A. 387, 53 L. R. A. 635, 22 L. R. A. (N. S.) 813, Ann. Cas. 1913C, 161, 909, Ann. Cas. 1913E, 984. See also, *Canon City Labor Club v People*, 21 Colo. App. 37, 46, 121 P. 120, cited in notes, 38 L. R. A. (N. S.) 103, Ann. Cas. 1916D, 942.

A plaintiff must have some interest in the matter before he would be entitled to institute such proceedings. *People v Grand River Bridge Co.*, 13 Colo. 11, 21 P. 898, 16 Am. St. Rep. 182, cited in notes, 125 Am. St. Rep. 635, 9 L. R. A. 275; *People v Lockhard*, 26 Colo. App. 439, 442, 143 P. 273.

Resident electors and taxpayers of a city are competent plaintiffs in such case. *Canon City Labor Club v People*, 21 Colo. App. 37,

121 P. 120, cited in notes, 38 L. R. A. (N. S.) 103, Ann. Cas. 1916D, 942.

But claim for damages is not sufficient interest to authorize suit to dissolve corporation.—The fact that the plaintiff owns land which the defendant corporation has appropriated without compensation does not give him such an interest as enables him to maintain the action to dissolve the corporation. His interest is not one in which the public is concerned, being merely a right to sue for damages. *People v Grand River Bridge Co.*, 13 Colo. 11, 21 P. 898, 16 Am. St. Rep. 182, cited in notes, 125 Am. St. Rep. 635, 9 L. R. A. 275.

Private persons may maintain proceedings to dissolve corporation organized for illegal purpose.—If private persons may institute and maintain proceedings to oust the mayor of a great city, to prohibit the regents of the state university from exercising certain powers claimed by them, there would seem to be no good reason why such private persons may not, by like permission of the court, institute and maintain proceedings to dissolve a corporation alleged to have been organized *mala fide* for the sole purpose of carrying on some business in defiance of the laws of the state and the ordinances of the city, and to the detriment of the public welfare. *Canon City Labor Club v People*, 21 Colo. App. 37, 48, 121 P. 120, cited in notes, 38 L. R. A. (N. S.) 103, Ann. Cas. 1916D, 942.

Or to try the validity of contested corporate elections.—Where the validity of a corporate election is in dispute, and it involves nothing but the title to the board of directors, we think, in the absence of a statute created specially for the specific purpose of trying the validity of contested corporate elections, that a proceeding under subdivision (a) (3) is an appropriate remedy, and that private individuals elected, but wrongfully prevented from acting upon the board by the intruders, may apply to the district attorney, and, if he fails to act, may bring an action themselves in the name of the people to oust the usurpers from exercising the franchises and to install the relators. *Grant v Elder*, 64 Colo. 104, 112, 170 P. 198, cited in notes, 51 A. L. R. 943, 957.

But a private person is not entitled to maintain an action to oust a corporation of its franchise.—Under license from the city the defendant corporation had, at great expense, constructed a line of telephone occupying with its structures the public streets. The city had accepted and was still accepting valuable services from defendant and had taken no step to revoke the license. Held that a private citizen was not entitled to maintain an action to oust defendant of the franchise, especially as the municipality had the power of revocation, and the like power was vested in the inhabitants through

the initiative. *Mountain States Tel., etc., Co. v. People*, 68 Colo. 487, 190 P. 513.

D. Exclusiveness of Remedy.

A proceeding under subdivision (a) (3) is the exclusive method by which to try title to public office.—*Board of County Com'rs. v. Wharton*, 82 Colo. 466, 261 P. 4, cited in note, 93 A. L. R. 266; *Roberts v. People*, 81 Colo. 338, 339, 255 P. 461, cited in notes, 93 A. L. R. 266, 274; *Board of County Com'rs v. Gould*, 6 Colo. App. 44, 47, 39 P. 895; *People v. Londoner*, 13 Colo. 303, 314, 22 P. 764, 6 L. R. A. 444, cited in notes, 125 Am. St. Rep. 640, 12 L. R. A. 708, 19 L. R. A. 584, 33 L. R. A. 387, 53 L. R. A. 635, 22 L. R. A. (N. S.) 813, Ann. Cas. 1913C, 161, 909, Ann. Cas. 1913E, 984; *State Railroad Comm. v. People*, 44 Colo. 345, 349, 98 P. 7, 22 L. R. A. (N. S.) 810; *Wason v. Major*, 10 Colo. App. 181, 50 P. 741.

It is a general rule that when the statute provides a remedy to test the right to exercise a franchise or office, it is exclusive of all other remedies. *Atchison, etc., R. Co. v. People*, 5 Colo. 60, cited in note, 7 L. R. A. 319.

Thus, title to office cannot be tested by subdivision (a) (2).—Where a party is in actual possession of an office under an election or commission, and exercising its duties under color of right, his title to the office cannot be tried or tested by a proceeding under subdivision (a) (2). *Cripple Creek v. People*, 19 Colo. App. 399, 75 P. 603, cited in notes, 19 L. R. A. (N. S.) 57, 65, 72, 84 A. L. R. 1126.

Or in a suit brought to recover a salary.—*Board of County Com'rs v. Wharton*, 82 Colo. 466, 261 P. 4, cited in note, 93 A. L. R. 266.

And title to an office cannot be tried in a collateral proceeding.—*Board of County Com'rs v. Gould*, 6 Colo. App. 44, 39 P. 895.

IV. SUBDIVISION (a) (4).

A. General Consideration.

Editor's note.—Subdivision (a) (4) covers the ground formerly covered by the writs of certiorari and prohibition. Cases construing the substantive aspects of the sections upon which this subdivision is based are included in this note.

Purpose of action is to review the action of an inferior tribunal, board, or officer, who, in exercising judicial functions, has exceeded the jurisdictional or grossly abused the discretion which the law reposes in such tribunal or officer, and no review is allowed, nor, in the judgment of the court, any plain, speedy and adequate remedy. *Union Pac. R. Co. v. Wolfe*, 26 Colo. App. 567, 144 P. 330; *Nisbet v. Frincke*, 66 Colo. 1, 7, 179 P. 867; *Union Pac. Ry. Co. v. Bowler*, 4 Colo. App. 25, 34 P. 940.

To authorize a court finding that a municipal zoning board has grossly abused its discretion in failing to restrict an owner in the use of his property, the record should clearly show such abuse when the complaint is made by those who seek a benefit to their own properties by the imposition of restrictions on others. *Board of Adjustment v. Handley*, 105 Colo. 180, 95 P. (2d) 823.

It is to be taken from subdivision (a) (4) that if the county court exceeded its jurisdiction, or the judge thereof greatly abused his discretion, the authority was not regularly pursued. *Morefield v. Koehn*, 53 Colo. 367, 368, 127 P. 234.

In other words, it is restricted to jurisdictional questions and manifest abuse of discretion.—The remedy is restricted in its inquiry to jurisdictional questions and, under the Colorado code of procedure, to a manifest abuse of discretion. *State Civil Service Comm. v. Cummings*, 83 Colo. 379, 265 P. 687.

Thus, the court can review the action of the state board of medical examiners only upon the question of jurisdiction or great abuse of discretion. *White v. Andrew*, 70 Colo. 50, 197 P. 564, cited in note, 54 A. L. R. 1518.

The merits of the case are not involved.—On proceedings to review an order of an administrative body the only questions presented are, Did the board exceed its jurisdiction, or abuse its discretion? The merits of the controversy are not involved. *State Board v. Noble*, 65 Colo. 410, 177 P. 141, cited in notes, 54 A. L. R. 1505, 82 A. L. R. 1184.

It does not settle disputed facts.—The object of the proceeding is not to settle or determine disputed facts, but to investigate and correct errors of law of a jurisdictional nature, and under the code, abuse of discretion. *Doran v. State Board*, 78 Colo. 153, 240 P. 335, cited in note, 54 A. L. R. 1509.

And all that can be done is to quash or refuse to quash the proceeding complained of. No rights growing out of such proceeding can be enforced. *State Civil Service Comm. v. Cummings*, 83 Colo. 379, 265 P. 687.

The act of board must be judicial in nature to be reviewable.—Where the state board of land commissioners wrongfully canceled a lease of state school lands on the ground that the rent was delinquent, when in fact it was not, and executed a lease thereof to another party, the act was not judicial in its nature and is not subject to review under subdivision (a) (4). *State Board v. Carpenter*, 16 Colo. App. 436, 66 P. 165, cited in notes, 44 L. R. A. (N. S.) 195, 210.

It cannot be legislative or merely ministerial.—The court does not review an order.

action or proceeding, unless it be judicial in its nature, and not legislative or merely ministerial. *State Board v. Carpenter*, 16 Colo. App. 436, 439, 66 P. 165, cited in notes, 44 L. R. A. (N. S.) 195, 210.

It does not lie to collector of taxes or against county treasurer.—Action does not lie to the collector of taxes, either to review his action, or any prior action upon which his own is based (*Cooley on Taxation* [2d Ed.] 757); and it would be an anomalous practice to convert an action brought against a county treasurer to restrain the collection of a void tax into an action against the board of county commissioners to review its proceedings in levying the tax, even though, in a proper case, this remedy is appropriate. *Insurance Co. v. Bonner*, 24 Colo. 220, 224, 49 P. 366.

B. Absence of Plain, Speedy and Adequate Remedy.

A proceeding under subdivision (a) (4) cannot be substituted for a writ of error.—When a county court overruled defendant's motion to vacate the judgment, it had jurisdiction over the subject-matter and over the person of the defendant and exercised that jurisdiction regularly. It may be that it ought to have vacated the judgment and that it committed error in not doing so, but this is a matter to be determined by a writ of error and not by a proceeding under subdivision (a) (4). *Pierce v. Hamilton*, 55 Colo. 448, 453, 135 P. 796, cited in note, Ann. Cas. 1914C, 697.

Whatever may be meant by the words "or greatly abuse the discretion," in subdivision (a) (4) they certainly do not mean such an abuse of discretion as may be committed by a court in overruling a motion to vacate a judgment when the action of the court may be reviewed by a writ of error, for otherwise an action would lie to review the action of a county court in refusing to set aside a default and vacate a judgment taken thereon in almost any case. *Id.*

It may be maintained if remedy is not plain and adequate.—See *Union Pac. R. Co. v. Wolfe*, 26 Colo. App. 567, 571, 144 P. 330, quoting from *People v. District Court*, 26 Colo. 386, 396, 58 P. 604, cited in notes, 111 Am. St. Rep. 933, 954, 962, 50 L. R. A. 725, 51 L. R. A. 46, 109, 52 L. R. A. 299. See also, *State Civil Service Comm. v. Cummings*, 83 Colo. 379, 265 P. 687; *Union Pac. Ry. Co. v. Bowler*, 4 Colo. App. 25, 34 P. 940.

This is because if the remedy is inadequate, it is no remedy, and gives to a court of record under the code proceeding the same right, and imposes upon it the same duty, to grant relief as if no right of review existed. *Union Pac. R. Co. v. Wolfe*, 26 Colo. App. 567, 571, 144 P. 330.

It is inadequate if it constrains plaintiff to waiver of right to lawful service of proc-

ess.—Where judgment had been entered against the plaintiff in error in the court of a justice, without any lawful service of process, it is held that relief under subdivision (a) (4) was proper; that inasmuch as an appeal, or certiorari under vol. 3, ch. 96, § 132, would have constrained the plaintiff in error to a waiver of its right to a lawful service of process, such appeal or statutory certiorari was not an adequate remedy. *Union Pac. R. Co. v. Wolfe*, 26 Colo. App. 567, 144 P. 330.

Judgments of justices of the peace may be reviewed by a proceeding under subdivision (a) (4) from the county court where no appeal is provided by statute. *Loloff v. Heath*, 31 Colo. 172, 71 P. 1113.

The code remedy is applicable to proceedings before justice of the peace, under certain conditions, and the statutory remedy under vol. 3, ch. 96, § 132 is not exclusive. *Union Pac. R. Co. v. Wolfe*, 26 Colo. App. 567, 573, 144 P. 330.

Fact that no appeal or writ of error exists must be alleged.—Vol. 2, ch. 56, § 16 grants appeals to and writs of error from the supreme court to the party against whom a decree for divorce has been granted. It was held, that where a complaint is filed in the district court to review the proceeding of the county court in a divorce action, while alleging that the county court acted in an arbitrary, illegal, and unjudicial manner in some of its proceedings, did not allege that petitioner had not the right of appeal or writ of error under vol. 2, ch. 56, § 16, or that any facts existed which made such remedies impossible or unavailable to him, the district court should not have granted relief. *Carlton v. Carlton*, 44 Colo. 27, 96 P. 995.

C. Extent of Review.

Review is upon the record alone.—A review under subdivision (a) (4) is had upon the record alone and not upon the petition for the writ. *Leppel v. District Court*, 33 Colo. 24, 25, 78 P. 682, cited in note, 20 L. R. A. (N. S.) 946.

And it is confined to questions of jurisdiction.—In *People v. Board of Delegates*, 14 Cal. 479, 480, cited with approval in *Cripple Creek v. Hanley*, 19 Colo. App. 390, 75 P. 600, it is said: "It brings up no issue of law or fact not involved in the question of jurisdiction. Under no circumstances can the review be extended to the merits. Upon every question except the mere question of power, the action of the inferior tribunal is final and conclusive." *State Board v. Brown*, 70 Colo. 116, 119, 198 P. 274.

In other words, the scope of review is limited to the inquiry as to whether jurisdiction has been exceeded, discretion abused or authority regularly pursued. *Public Util-*

ities Com. v. Erie, 92 Colo. 151, 153, 18 P. (2d) 906, citing Public Utilities Comm. v. Loveland, 87 Colo. 556, 289 P. 1090; State Board v. Savelle, 90 Colo. 177, 8 P. (2d) 693, 82 A. L. R. 1176, cited in note, 79 A. L. R. 323. See also, Cripple Creek v. Hanley, 19 Colo. App. 390, 75 P. 600.

The following are some of the many cases dealing generally with the scope of review, limiting it to the inquiry as to whether jurisdiction has been exceeded, discretion abused or authority regularly pursued: Public Utilities Com. v. Loveland, 87 Colo. 556, 289 P. 1090; Board of Com'rs v. Dunlap, 83 Colo. 360, 364, 265 P. 94; State Board v. Spears, 79 Colo. 588, 247 P. 563, 54 A. L. R. 1498; Doran v. State Board, 78 Colo. 153, 157, 240 P. 335, cited in note, 54 A. L. R. 1509; State Board v. Brown, 70 Colo. 116, 198 P. 274; White v. Andrew, 70 Colo. 50, 197 P. 564, cited in note, 54 A. L. R. 1518; Dilliard v. State Board, 69 Colo. 575, 196 P. 866, cited in notes, 54 A. L. R. 1114, 1518, 79 A. L. R. 323; State Board v. Boulls, 69 Colo. 361, 195 P. 325; State Board v. Noble, 65 Colo. 410, 177 P. 141, cited in notes, 54 A. L. R. 1505, 82 A. L. R. 1184; Thompson v. State Board, 59 Colo. 549, 151 P. 436, cited in note, 54 A. L. R. 1505; Chenoweth v. State Board, 57 Colo. 74, 141 P. 132, 51 L. R. A. (N. S.) 958, Ann. Cas. 1915D, 1188, cited in notes, Ann. Cas. 1916A, 908, 54 A. L. R. 402, 1512; Graeb v. State Board, 55 Colo. 523, 139 P. 1099, 47 L. R. A. (N. S.) 1063, cited in notes, Ann. Cas. 1915D, 1194, 1195, 5 A. L. R. 99, 54 A. L. R. 1513, 79 A. L. R. 323; State Board v. Savelle, 90 Colo. 177, 183, 8 P. (2d) 693, 82 A. L. R. 1176, cited in note, 79 A. L. R. 323.

In a proper case for the issuance of the writ, the extent of the review by the district court should have been to ascertain from the record whether the county court regularly pursued its authority. Morefield v. Koehn, 53 Colo. 367, 368, 127 P. 234.

The district court has no jurisdiction to review the action of a city council in a matter of contest of election of its members, and to determine whether the action of the council in such contested election was justified by the evidence. Cripple Creek v. Hanley, 19 Colo. App. 390, 75 P. 600.

Where motions were filed in county court to set aside judgments rendered by a former county judge, and in which the present county judge had acted as counsel for the judgment debtors, the judge was disqualified to act on such motions, and it was his duty to certify the matter to the district court, and refusing to do so the district court had jurisdiction by writs of prohibition and certiorari to restrain the county judge from setting aside said judgments and to order him to certify the proceedings to the district court. People v. District Court, 26 Colo. 226, 56 P. 1115, cited in notes, 111

Am. St. Rep. 945, Ann. Cas. 1917A, 1231, 8 A. L. R. 1238.

Thus, allegations of petition are not considered.—The allegations of the petition, and the affidavits filed therewith are not to be considered. County Court v. People, 55 Colo. 258, 133 P. 752.

And the court has no power to correct a mistake of fact or erroneous conclusion from the facts, made by the inferior tribunal. State Board v. Spears, 79 Colo. 588, 247 P. 563, 54 A. L. R. 1498.

Mere irregularities are not reviewable. County Court v. People, 55 Colo. 258, 133 P. 752.

And judgment of lower court will not be rejudged on merits.—While power is vested in the courts to review the proceedings of all inferior jurisdictions, to correct jurisdictional errors, they will not rejudge their judgments on the merits. The correctional power extends no further than to keep them within the limits of their jurisdiction, and to compel them to exercise it with regularity. State Board v. Carpenter, 10 Colo. App. 436, 440, 66 P. 165, cited in notes, 44 L. R. A. (N. S.) 195, 210, quoting Board of Aldermen v. Darrow, 13 Colo. 460, 466, 22 P. 784, 16 Am. St. Rep. 215, cited in notes, 25 Am. St. Rep. 298, 40 Am. St. Rep. 45, 103 Am. St. Rep. 113, 15 L. R. A. 96.

Whether a decision on the merits is right or wrong, is not within the issue. State Board v. Spears, 79 Colo. 588, 247 P. 563, 54 A. L. R. 1498; State Board v. Brown, 70 Colo. 116, 198 P. 274.

V. SUBDIVISION (a) (5).

Editor's note.—Subdivision (a) (5) incorporates the matter contained in Code §§ 255-260, dealing with the writ of scire facias. The following cases still seem to be applicable.

Remedy is exclusive.—The method provided by subdivision (a) (5), whereby partners not served in an action against a partnership may be made individually liable on the judgment rendered therein against the partnership, is exclusive. Blythe v. Cordingly, 20 Colo. App. 508, 80 P. 495, cited in notes, 43 L. R. A. (N. S.) 542, 1 A. L. R. 1605.

When judgment may be rendered.—It is settled law of this state, that the only judgment which can be rendered against a co-partnership on a firm debt or obligation, is one against the co-partnership jointly, and the partners summoned or appearing whether the summons is served upon all or one or more of the defendants. Blythe v. Cordingly, 20 Colo. App. 508, 512, 80 P. 495, cited in notes, 43 L. R. A. (N. S.) 542, 1 A. L. R. 1605, citing Craig v. Smith, 10 Colo.

220, 15 P. 337, cited in notes, 43 L. R. A. (N. S.) 542, Ann. Cas. 1918D, 1136; *Sawyer v Armstrong*, 23 Colo. 287, 47 P. 391, cited in note, 43 L. R. A. (N. S.) 542; *Ellsberry v Block*, 28 Colo. 477, 65 P. 629, cited in notes, 43 L. R. A. (N. S.) 542, Ann. Cas.

1918D, 1136; *Dessauer v Koppin*, 3 Colo. App. 115, 32 P. 182, cited in notes, 43 L. R. A. (N. S.) 542, Ann. Cas. 1918D, 1136; *Peabody v Oleson*, 15 Colo. App. 346, 62 P. 234, cited in notes, 43 L. R. A. (N. S.) 542, Ann. Cas. 1918D, 1136.

Rule 107. Civil Contempt.

(a) **Definition.** Misbehavior of any person in the presence of the court, of a master while performing his official duties or of an arbitrator while sitting on arbitration, or misbehavior so near thereto as to obstruct the administration of justice, misbehavior of any officer of the court in his official transactions and disobedience or resistance of any person to or interference with any lawful writ, process, order, rule, decree or command of said court or any other act or omission designated as contempt by the statutes or these rules shall constitute contempt. [Supplants Code Secs. 166 and 356.]

Committee Note.

See Rule 37 (b) (1); Title 28, Sec. 385, U. S. C. A. See also *Gompers vs. Buck Stove and Range Co.*, 221 U. S. 418, 55 L. Ed. 797.

(b) **In Presence of Court.** When a contempt is committed in the presence of the court it may be punished summarily. In such case an order shall be made reciting the facts constituting the contempt, adjudging the contemnor guilty of contempt and prescribing the punishment therefor. Such order shall be final and conclusive. [Supplants Code Secs. 357 and 369.]

(c) **Out of Presence of Court.** When it appears to the court by motion supported by affidavit that a contempt has been committed out of the presence of the court, it may ex parte order a citation to issue to the person so charged to appear and show cause at a time designated why he should not be punished therefor. The citation and a copy of the motion and affidavit shall be served upon such person a reasonable time before the time designated. If such person fails to appear at the time so designated, or if the court so orders when the citation is issued or thereafter, a warrant for his arrest may issue to the sheriff. Such warrant shall fix the time for the production of such person in court. The court shall direct by endorsement thereon the amount of the bail required, and such person shall be discharged upon delivery to and approval by the sheriff or clerk of a written undertaking executed by two or more sufficient sureties or a corporate surety company, to the effect that he will appear at the time designated in the warrant, and at any time thereafter to which the hearing may be continued, or pay the sum specified. If such person fails to appear at the time designated in the warrant, or at any time to which the hearing may be continued, the undertaking may be forfeited, and the amount thereof, to the extent of the damages suffered by

the contempt, shall be paid to the aggrieved party. If he fails to make bond, the sheriff shall keep him in custody subject to the order of the court. [Supplants Code Secs. 357 to 362, incl., 367 and 368.]

Committee Note.

As criminal contempt is covered by the common law and not the Code—*People vs. News Times Pub. Co.*, 35 Colo. 253—it is not included in these rules. However, the requirements of this paragraph suggest a uniform procedure for civil contempt out of the presence of the court and for criminal contempt.

(d) **Trial and Punishment.** The court shall hear the evidence for and against the person charged and it may find him guilty of contempt and by order prescribe the punishment therefor. A fine may be imposed not exceeding the damages suffered by the contempt, plus costs of the contempt proceeding, plus reasonable attorney's fees in connection with the contempt proceeding, payable to the person damaged thereby. If the contempt consists of the failure to perform an act in the power of the person to perform he may be imprisoned until its performance. In addition thereto, to vindicate the dignity of the court, if the citation so states, a fine or imprisonment may be imposed. If any such fine is not paid the court may order the contemner imprisoned until payment thereof. [Supplants Code Secs. 363, 364 and 365.]

(e) **Criminal Prosecution and Criminal Contempt; Limitation.** Nothing herein contained shall prevent the criminal prosecution of a person charged with contempt or proceeding in criminal contempt, provided, however, that if punishment is inflicted to vindicate the dignity of the court, as provided in subdivision (d), no further proceedings in criminal contempt shall be had upon the facts stated in the motion. [Supplants Code Sec. 366.]

Committee Note.

See Rule 37 (b) (1) on contempt.

I. Definition.

A. In General.

B. What Constitutes Contempt.

1. In General.

2. Disobeying or Failure to Obey Orders of Court.

C. Power of Court to Punish.

II. In Presence of Court.

III. Out of Presence of Court.

IV. Trial and Punishment.

I. DEFINITION.

A. In General.

Cross references.—For a discussion of the distinction between criminal and civil contempts, see Address no. 16, appx. D. See also, Rule 37 (b) (1) providing that where party refuses to be sworn or refuses to answer questions after being directed to do so by court, the refusal may be considered as contempt.

Statutory enumeration of causes cannot limit the inherent power of a court to punish

for its own preservation.—See *Hughes v. People*, 5 Colo. 436, 446, cited in notes, 115 Am. St. Rep. 218, 117 Am. St. Rep. 951, 36 L. R. A. 255, 9 L. R. A. (N. S.) 1121, 8 A. L. R. 1561, 29 A. L. R. 1277.

This provision is not applicable to criminal contempts.—*People v. News-Times Pub. Co.*, 35 Colo. 253, 84 P. 912, cited in notes, 117 Am. St. Rep. 951, 6 L. R. A. (N. S.) 572, 21 L. R. A. (N. S.) 906, L. R. A. 1917C, 855, 2 A. L. R. 231, 8 A. L. R. 1549, 49 A. L. R. 656. In this connection see Address no. 16, appx. D, wherein this subject is discussed.

As proceedings for criminal contempts are governed by the common law.—*People v. News-Times Pub. Co.*, 35 Colo. 253, 84 P. 912, cited in notes, 117 Am. St. Rep. 951, 6 L. R. A. (N. S.) 572, 21 L. R. A. (N. S.) 906, L. R. A. 1917C, 855, 2 A. L. R. 231, 8 A. L. R. 1549, 49 A. L. R. 656.

Distinction between civil and criminal contempts.—Contempts of court are civil, i. e., where they consist in the disobedience of some judicial order entered for the benefit or advantage of another party to the

proceeding; criminal, i. e., acts disrespectful to the court or its process, or obstructing the administration of justice, or tending to bring the court into disrepute. *Wyatt v. People*, 17 Colo. 252, 28 P. 961, cited in notes, 115 Am. St. Rep. 952, 36 L. R. A. 255, 2 A. L. R. 232, 8 A. L. R. 1544, 1561, 1573. For a discussion of the difference between civil and criminal contempts see Address no. 16, appx. D., wherein the case of *Gompers v. Bucks Stove, etc., Co.*, 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797, is considered.

B. What Constitutes Contempt.

1. In General.

Editor's note.—The following acts are by statute made contempts: failure of administrator, executor, etc., to render accounts, vol. 4, ch. 176, § 231; refusal of county treasurer to answer questions before a committee, vol. 2, ch. 45, § 162; disobedience of a witness before a commission, vol. 4, ch. 177, § 11; failure to obey orders of state tax commission, vol. 4, ch. 142, § 169; refusal of garnishee to deliver property, vol. 3, ch. 96, § 107; disobedience of writ of habeas corpus by jailer, vol. 3, ch. 77, § 13; failure of juror to appear, vol. 3, ch. 95, § 20; practicing law without license, vol. 2, ch. 14, § 21.

Contempts generally.—There is no exact rule to define these contempts; but any disorderly conduct calculated to interrupt the proceedings; any disrespect or insolent behavior toward the judges presiding; any breach of order, decency, decorum, either by parties and persons connected with the tribunal, or by strangers present; or, a fortiori, any assault made in view of the court, is punishable in this summary way. *Hughes v. People*, 5 Colo. 436, 447, cited in notes, 115 Am. St. Rep. 218, 117 Am. St. Rep. 951, 36 L. R. A. 255, 9 L. R. A. (N. S.) 1121, 8 A. L. R. 1561, 29 A. L. R. 1277.

The question of contempt does not depend on intention, although, where the contempt was intended, this is an aggravating feature, which goes to the gravamen of the offense. *Hughes v. People*, 5 Colo. 436, 453, cited in notes, 115 Am. St. Rep. 218, 117 Am. St. Rep. 951, 36 L. R. A. 255, 9 L. R. A. (N. S.) 1121, 8 A. L. R. 1561, 29 A. L. R. 1277.

A contempt consists as well in the manner of the person committing it, as in the subject-matter of its foundation; matters which, if true, would in their very nature be scandalous, may be presented, hinted at or brought to the attention of the court in so respectful a manner, that no judge would ever think to construe a contempt therefrom; while, on the other hand, it is easy to see, when under the guise and pretense of setting out privilege and necessary mat-

ters, circumstances are detailed, and scandalous and insulting charges and innuendos are made and insinuated, upon pretended "information and belief," in a manner that bears the unmistakable earmarks of malice and deliberate contempt. *Hughes v. People*, 5 Colo. 436, 452, cited in notes, 115 Am. St. Rep. 218, 117 Am. St. Rep. 951, 36 L. R. A. 255, 9 L. R. A. (N. S.) 1121, 8 A. L. R. 1561, 29 A. L. R. 1277.

Words apparently scandalous or offensive, but susceptible of a different construction, may be explained by the speaker or writer, and he be relieved of the charge of contempt, on sworn disavowal of intent to commit it; but when the words are necessarily offensive and insulting, such disavowal, while it may excuse, cannot justify. *Hughes v. People*, 5 Colo. 436, 453, cited in notes, 115 Am. St. Rep. 218, 117 Am. St. Rep. 951, 36 L. R. A. 255, 9 L. R. A. (N. S.) 1121, 8 A. L. R. 1561, 29 A. L. R. 1277.

A person who has actual notice of an injunctive order violates it at his peril. *People v. District Court*, 19 Colo. 343, 35 P. 731, cited in notes, 56 Am. St. Rep. 861, L. R. A. 1917C, 854.

Interference by newspapers.—During the pendency of a cause the court must be permitted to proceed therein without molestation, in accordance with constitutional principles and approved legal rules and precedents. The privilege of directly interfering, in such cases, with the administration of justice by indiscriminate newspaper charges of perjury, bribery, corruption, and the like, against the parties concerned, or against those conducting the trial, is not a constitutional right. Such interference may be summarily punished as a contempt. *Cooper v. People*, 13 Colo. 337, 373, 22 P. 790, 6 L. R. A. 430, cited in notes, 22 Am. St. Rep. 418, 50 Am. St. Rep. 573, 580, 117 Am. St. Rep. 951, 961, 8 L. R. A. 585, 587, 23 L. R. A. 787, 36 L. R. A. 256, 44 L. R. A. 159, 50 L. R. A. 195, 66 L. R. A. 727, 68 L. R. A. 256, 259, L. R. A. 1917E, 713, 8 A. L. R. 1556, 49 A. L. R. 656.

But the press may, without liability to punishment for contempt, in the interest of the public good, challenge the conduct of judges and other court officers; also of parties, jurors and witnesses, in connection with causes that have been wholly determined. It may also fairly and reasonably review and comment upon court proceedings from day to day as they take place. *Id.*

2. Disobeying or Failure to Obey Orders of Court.

Where an order of the court is made in a civil action, its violation constitutes a civil, not a criminal, contempt. *Zobel v. People*, 49 Colo. 142, 145, 111 P. 846.

Disobedience of a lawful order made by the court for the benefit of a private litigant comes clearly within the rule. *Zobel v People*, 49 Colo. 142, 145, 111 P. 846.

One who refuses to pay money belonging to an estate into court in compliance with a judicial order, is guilty of civil contempt. *Munson v Luxford*, 95 Colo. 12, 34 P. (2d) 91.

Thus, a court may imprison a receiver for contempt for failure to pay over funds as ordered. *Taylor v Taylor*, 79 Colo. 487, 247 P. 174, cited in notes, 56 A. L. R. 750.

Interference with a water commissioner in the discharge of his official duties does not constitute contempt of court within this subdivision, declaring disobedience to any lawful writ, order, rule or process issued by the court to be a contempt, since he is not an officer of the court in which the decree of priorities is entered under which he is distributing water, being appointed by the governor, and, to a certain extent, being under the control and direction of the irrigation division engineer and the state engineer. *Roberson v People*, 40 Colo. 119, 90 P. 79.

Order of imprisonment for making false report held unauthorized.—An order imprisoning a quasi receiver for making false reports, unless she pay a judgment rendered against her based in part, at least, on rents and issues received from the property under claim of right, held unauthorized. *Taylor v Taylor*, 79 Colo. 487, 247 P. 174, cited in note, 56 A. L. R. 750.

C. Power of Court to Punish.

Cross reference.—As to power of public utilities commission to punish for contempt, see vol. 4, ch. 137, § 66.

The power to punish for contempt is inherent in all courts.—*Allen v Bailey*, 91 Colo. 260, 14 P. (2d) 1087.

"The right of self-preservation is an inherent right in the courts. It is not derived from the legislature, and cannot be made to depend upon the legislative will. The power of the legislative department to interfere with the manner in which the judicial department shall protect itself against insults and indignities, is denied by the supreme court of Arkansas, *State v Morrill*, 16 Ark. 384, and doubted by the supreme court of the United States. *Ex parte Robinson*, 86 U. S. (19 Wall.) 505, 510, 22 L. Ed. 205." *Hughes v People*, 5 Colo. 436, 446, cited in notes, 115 Am. St. Rep. 218, 117 Am. St. Rep. 951, 36 L. R. A. 255, 9 L. R. A. (N. S.) 1121, 8 A. L. R. 1561, 29 A. L. R. 1277, quoting with approval *In Re Woolley*, 11 Bush (Ky.) 95.

The district courts of this state have the inherent power to summarily convict and

punish, as for a contempt of court, those responsible for articles published in reference to a cause pending, when such articles are calculated to interfere with the due administration of justice in such cause. Neither the statutes nor the constitution present any barrier to the exercise of such powers. The right of trial by jury does not extend to cases of contempt. The power to punish summarily in such cases is essential to the very existence of a court. The contrary rule would place it in the power of a vicious person to so conduct himself as to prevent any kind of a trial. *Cooper v People*, 13 Colo. 337, 22 P. 790, 6 L. R. A. 430, cited in notes, 22 Am. St. Rep. 418, 50 Am. St. Rep. 573, 580, 117 Am. St. Rep. 951, 961, 8 L. R. A. 585, 587, 23 L. R. A. 787, 36 L. R. A. 256, 44 L. R. A. 159, 50 L. R. A. 195, 66 L. R. A. 727, 68 L. R. A. 256, 259, L. R. A. 1917E, 713, 8 A. L. R. 1556, 49 A. L. R. 656.

And court's right of self-preservation is not limited by statutory enumeration of causes of contempts. *Hughes v People*, 5 Colo. 436, cited in notes, 115 Am. St. Rep. 218, 117 Am. St. Rep. 951, 36 L. R. A. 255, 9 L. R. A. (N. S.) 1121, 8 A. L. R. 1561, 29 A. L. R. 1277.

But this power belongs exclusively to courts.—The power to punish for contempt is a judicial power within the meaning of the constitution. It belongs exclusively to the courts except in cases where the constitution confers such power upon some other body. *People v Swena*, 88 Colo. 337, 296 P. 271.

In the absence of statutory regulation, courts may deal with matter of contempt in a summary manner. *Guiraud v Nevada Canal Co.*, 79 Colo. 289, 245 P. 485.

II. IN PRESENCE OF COURT.

Cases of criminal contempt are not within the provisions of this subdivision.—*Eykellboom v People*, 71 Colo. 318, 206 P. 388, cited in notes, 73 A. L. R. 817, 821.

This subdivision requires the order of commitment to recite the facts only where summary punishment is inflicted. *Eykellboom v People*, 71 Colo. 318, 326, 206 P. 388, cited in notes, 73 A. L. R. 817, 821. See also, *Shore v People*, 26 Colo. 516, 59 P. 49, cited in notes, Ann. Cas. 1912D, 1340, Ann. Cas. 1913A, 959, 2 A. L. R. 170.

Provision that judgments shall be final refers only to extent of review. See *Cooper v People*, 13 Colo. 337, 373, 22 P. 790, 6 L. R. A. 430, cited in notes, 22 Am. St. Rep. 418, 50 Am. St. Rep. 573, 580, 117 Am. St. Rep. 951, 961, 8 L. R. A. 585, 587, 23 L. R. A. 787, 36 L. R. A. 256, 44 L. R. A. 159, 50 L. R. A. 195, 66 L. R. A. 727, 68 L. R. A. 256, 259, L. R. A. 1917E, 713, 8 A. L. R. 1556, 49 A. L. R. 656.

An order in contempt proceedings, if beyond the power of the trial court to enter, is subject to review by the supreme court. *Taylor v Taylor*, 79 Colo. 487, 247 P. 174, cited in note, 56 A. L. R. 750. See also, *Wyatt v People*, 17 Colo. 252, 28 P. 961, cited in notes, 115 Am. St. Rep. 952, 36 L. R. A. 255, 2 A. L. R. 232, 8 A. L. R. 1544, 1561, 1573.

But the inquiry is confined to whether the trial court had jurisdiction and regularly pursued its authority. *Fort v People*, 81 Colo. 420, 256 P. 325, cited in note, 84 A. L. R. 86; *Guiraud v Nevada Canal Co.*, 79 Colo. 289, 245 P. 485; *Fort v Co-Operative Farmers' Exchange*, 81 Colo. 431, 256 P. 319, cited in notes, 54 A. L. R. 324, 77 A. L. R. 419; *Clear Creek Power, etc., Co. v Cutler*, 79 Colo. 355, 245 P. 939, 48 A. L. R. 237; *Cooper v People*, 13 Colo. 337, 373, 22 P. 790, 6 L. R. A. 430, cited in notes, 22 Am. St. Rep. 418, 50 Am. St. Rep. 573, 580, 117 Am. St. Rep. 951, 961, 8 L. R. A. 585, 587, 23 L. R. A. 787, 36 L. R. A. 256, 44 L. R. A. 159, 50 L. R. A. 195, 66 L. R. A. 727, 68 L. R. A. 256, 259, L. R. A. 1917E, 713, 8 A. L. R. 1556, 49 A. L. R. 656.

Mere irregularities are not reviewable.—Where, in a proceeding to punish a contempt, the court acts within its jurisdiction, mere irregularities are not reviewable on error. *Zobel v People*, 49 Colo. 142, 111 P. 846.

Review of judgment of district court.—The supreme court has no jurisdiction to review the judgment of the district court imposing a penalty for a contempt of court civil in character, unless some question is involved such as is required to give the supreme court jurisdiction in other civil actions. *Naturita Canal, etc., Co. v People*, 30 Colo. 407, 70 P. 691, cited in note, 28 A. L. R. 58.

III. OUT OF PRESENCE OF COURT.

Where the contempt is charged by affidavit and the contemner makes no denial thereof, the court need not examine witnesses, in the absence of a request therefor, by the accused. *Zobel v People*, 49 Colo. 142, 111 P. 846.

Provision requiring affidavits is declaratory of common law.—This provision, as to affidavits, is simply declaratory in this particular of what may fairly be termed the modern common law practice. And the rule concerning the materiality of the affidavit should prevail to the same extent in the absence of statute. *Wyatt v People*, 17 Colo. 252, 262, 28 P. 961, cited in notes, 115 Am. St. Rep. 952, 36 L. R. A. 255, 2 A. L. R. 232, 8 A. L. R. 1544, 1561, 1573.

It is designed to meet contempts committed out of court.—The provision in this subdivision, requiring an affidavit of facts

constituting contempt, is designed to meet actual contemptuous acts committed out of the presence of the court. It has no application to contempt committed in the immediate presence of the court. *Jensen v Jensen*, 96 Colo. 151, 40 P. (2d) 238.

The affidavit must contain an averment that the charges were false as well as malicious. *Fort v Co-Operative Farmers' Exchange*, 81 Colo. 431, 442, 256 P. 319, cited in notes, 54 A. L. R. 324, 77 A. L. R. 419.

And must state facts which, if established, would constitute contempt.—A constructive contempt must be brought to the court's attention by affidavit. This affidavit must state facts which, if established, would constitute a contempt. And if it does not do so the court is without jurisdiction to proceed. This rule now prevails both at common law and under the statute. *Wyatt v People*, 17 Colo. 252, 28 P. 961, cited in notes, 115 Am. St. Rep. 952, 36 L. R. A. 255, 2 A. L. R. 232, 8 A. L. R. 1544, 1561, 1573.

But it need not set forth evidence by which declarations are to be established.—In contempt proceedings it is not necessary that the affidavit charging the offense set forth the evidence by which the general declarations therein are to be established. General declarations or ultimate facts only, are required. *Guiraud v Nevada Canal Co.*, 79 Colo. 289, 245 P. 485.

Where affidavit fails to state facts showing contempt, court is without jurisdiction.—When an affidavit is presented as a basis of a proceeding for contempt, the court must, in the first instance, examine the same, and, if the facts presented do not show that a contempt has been committed, the court will be without jurisdiction to proceed; but if the facts are sufficient, the court may take jurisdiction, and its subsequent orders will not be reviewed for mere errors. *Cooper v People*, 13 Colo. 337, 373, 22 P. 790, 6 L. R. A. 430, cited in notes, 22 Am. St. Rep. 418, 50 Am. St. Rep. 573, 580, 117 Am. St. Rep. 951, 961, 8 L. R. A. 585, 587, 23 L. R. A. 787, 36 L. R. A. 256, 44 L. R. A. 159, 50 L. R. A. 195, 66 L. R. A. 727, 68 L. R. A. 256, 259, L. R. A. 1917E, 713, 8 A. L. R. 1556, 49 A. L. R. 656.

In contempt proceedings, if the petition and affidavit state facts which if true show that a contempt was committed, the court acquires jurisdiction, otherwise not. *Fort v People*, 81 Colo. 420, 256 P. 325, cited in note, 84 A. L. R. 86.

Judgment entered without affidavit, notice or hearing is void.—A judgment of contempt entered without affidavit, notice or hearing, for non-compliance with a court order directing delivery of property to a receiver was held void for want of jurisdiction. *Pomeranz v Class*, 82 Colo. 173,

174, 257 P. 1086, cited in note, 55 A. L. R. 284.

A judgment for contempt of court is as absolutely void if there was no jurisdiction of the person against whom it was pronounced, as it would be if the judge imposing the sentence had no jurisdiction whatever of the subject-matter of contempt. *Id.*

Provision is applicable to civil contempt for violating an injunction. *Shore v People*, 26 Colo. 516, 59 P. 49, cited in notes, Ann. Cas. 1912D, 1340, Ann. Cas. 1913A, 959, 2 A. L. R. 170.

Order of commitment may be construed as order for body judgment.—An order of

commitment issued upon failure of defendant to pay money into court as directed may, under certain circumstances, be construed as equivalent to an order for body judgment. *Munson v Luxford*, 95 Colo. 12, 34 P. (2d) 91.

IV. TRIAL AND PUNISHMENT.

One charged with contempt of court has no right to a change of venue. *Guiraud v Nevada Canal Co.*, 79 Colo. 289, 245 P. 485.

Statutory provisions relating to change of venue have no application to proceedings to punish contempts unless such proceedings are expressly included in the written law. *Id.*

CHAPTER XVI
AFFIDAVITS, ARBITRATION, MISCELLANEOUS

Rule 108. Affidavits.

An affidavit may be sworn to either within or without this state before any officer authorized by law to take and certify the acknowledgment of deeds conveying lands. [Supplants Code Secs. 372 to 375, inclusive.]

For a discussion of this rule, see Address no. 16, appx. D.

An officer of a foreign jurisdiction administering an oath to an affiant is presumed to be acting within the territorial

jurisdiction for which he was appointed. That in the caption of the affidavit the venue is laid in Colorado is not sufficient to overcome this presumption. *Tucker v. Tucker*, 21 Colo. App. 94, 121 P. 125, cited in note, 74 A. L. R. 397.

Rule 109. Arbitration.

(a) **Controversies May be Arbitrated.** All controversies, which may be the subject of a civil action, may be submitted to the decision of one or more arbitrators, in the manner and with the effect set forth in this rule. [From Code Sec. 314.]

(b) **Articles of Agreement; Award.** The parties before they make their submissions, shall execute a written agreement that they will submit all matters, or some particular matter of difference, to the arbitrator named therein, and will abide the award, and that the award may be filed with the clerk of the district court, as a basis of a judgment, and that an execution may be issued for its collection. [From Code Sec. 315.]

(c) **Oath of Arbitrators.** Arbitrators shall not act until they subscribe to an oath and swear that they will well and truly try, and impartially and justly decide the matter in controversy, according to the best of their ability, which oath shall be filed with their award. [From Code Sec. 316.]

(d) **Powers of Arbitrators.** Arbitrators shall have power to issue subpoenas for witnesses, which a court of record in a proper case may aid and enforce by attachment, and after a trial and hearing, they shall decide the matters in controversy in writing. Any arbitrator may administer oaths to witnesses, and where there are three arbitrators, two of them may do any act which might be done by all. [From Code Sec. 317.]

(e) **Award Filed; Judgment; Execution.** The party in whose favor any award shall be made, may file the same with the clerk of the district court of the county wherein the matters were arbitrated, who shall enter a judgment thereon, and if such award requires the payment of money, the clerk may issue execution therefor. [From Code Sec. 318.]

(f) **Fees of Arbitrators.** Unless otherwise agreed each arbitrator shall receive \$10.00 per day for his services, and the amount of their compensation shall be included in their award and in the judgment entered thereon. The arbitrators shall not be required to deliver their award until their compensation shall have been paid. [From Code Sec. 319.]

(g) **Arbitrated Matters Held Adjudicated; Except for Fraud, etc.** Whenever it shall appear in any action that the subject matter of such action, or proceeding, or any part thereof, or the defense thereto, or of any part thereof, has been submitted to and decided by arbitrators, according to the terms of this rule, such matter so arbitrated shall be held to have been adjudicated and settled, and not open, either directly or indirectly, for review; but this shall not be construed to prevent an adjudication by arbitrators from being impeached and set aside for fraud or other sufficient cause, the same as a judgment of a court of record, nor to prohibit relief on the ground of mistake, inadvertence, surprise or excusable neglect, as in case of other judgments, orders or proceedings of the court. [From Code Sec. 320.]

- I. Controversies May Be Arbitrated.
- II. Articles of Agreement—Award.
- III. Oath of Arbitrators.
- IV. Powers of Arbitrators.
- V. Award Filed—Judgment—Execution.
- VI. Fees of Arbitrators.
- VII. Arbitrated Matters Held Adjudicated—Except for Fraud, etc.

Cross References.

For a discussion of this rule, see Address no. 16, appx. D. As to arbitration of causes in justices' courts, see vol. 3, ch. 96, § 44. As to arbitration of labor disputes, see vol. 3, ch. 97, § 29. As to arbitration of disputes as to amount of damages for animals killed by trains, see vol. 4, ch. 139, § 57.

I. CONTROVERSIES MAY BE ARBITRATED.

Purpose of rule.—The obvious purpose of the rule is to enable the parties to a controversy to adopt a simple, summary and inexpensive remedy as a means of finally settling their differences. *West v. Duncan*, 72 Colo. 253, 254, 210 P. 699.

"Arbitration is favored by the law as a convenient mode of adjusting disputes. Parties having selected their own judges, as a general rule should be bound by the

result." *Ezell v. Rocky Mountain Bean, etc., Co.*, 76 Colo. 409, 412, 232 P. 680, cited in note, 69 A. L. R. 816, quoting from *Wilson v. Wilson*, 18 Colo. 615, 620, 34 P. 175, cited in note, Ann. Cas. 1918C, 976.

And where the legislature has provided a method of arbitration the objection that such arbitration ousts the courts of jurisdiction is without merit. *Ezell v. Rocky Mountain Bean, etc., Co.*, 76 Colo. 409, 411, 232 P. 680, cited in note, 69 A. L. R. 816, citing *Zindorf Const. Co. v. Western American Co.*, 27 Wash. 31, 67 P. 374.

The legislature, having seen fit to authorize an arbitration covering matters of law as well as of fact wherein the award shall have the full force and effect of a judgment of the district court, it would be absurd to say that any consideration of public policy forbids a common law arbitration incidentally involving the determination of a question of law because such an award would oust the established judicial tribunals of their jurisdiction. *Ezell v. Rocky Mountain Bean, etc., Co.*, 76 Colo. 409, 412, 232 P. 680, cited in note, 69 A. L. R. 816.

Claim against state cannot be the subject of arbitration.—Inasmuch as a suit to enforce a claim for architectural services rendered at the instance of a state board cannot be maintained against the state, it could not be the subject of arbitration and a pretended arbitration board organized to determine the controversy was without jur-

isdiction. *Parry v. Colorado Board of Corrections*, 93 Colo. 589, 590, 28 P. (2d) 251.

II. ARTICLES OF AGREEMENT—AWARD.

Agreement to arbitrate is binding.—Where a party contracts to submit to arbitration certain questions which might arise in his dealings with another, he is bound by the contract, and a court action to settle such disputed questions, held properly dismissed. *Ezell v. Rocky Mountain Bean, etc., Co.*, 76 Colo. 409, 410, 232 P. 680, cited in note, 69 A. L. R. 816.

The arbitration provided by this provision was not intended to abolish and does not abolish common-law arbitration in this state, but its purpose was to give the award of the arbitrators the effect of a judgment at law, enforceable in like manner as a judgment. An award under a common-law arbitration has not the effect of a judgment and is not self-enforcing, but it is binding on the parties thereto, and may be made the basis of an action to carry its terms into effect or pleaded in bar of an action upon the same subject-matter. *McClelland v. Hammond*, 12 Colo. App. 82, 54 P. 538, cited in note, Ann. Cas. 1913D, 202.

Distinction between common law and statutory arbitration.—The only material difference between common law and statutory arbitration is that in a common law arbitration, suit must be brought on the award, whereas, in a statutory arbitration, the award is filed with the clerk of the court and execution issued thereon. *Ezell v. Rocky Mountain Bean, etc. Co.*, 76 Colo. 409, 410, 232 P. 680, cited in note, 69 A. L. R. 816.

In a statutory arbitration, the statute concerning awards must be considered as a part of the contract of submission, the same as though it had been inserted in the articles. *Wilson v. Wilson*, 18 Colo. 615, 34 P. 175, cited in note, Ann. Cas. 1918C, 976.

The rule, when complied with, gives to the award of arbitrators the effect of a judgment. *Lilley v. Tuttle*, 52 Colo. 121, 117 P. 896, Ann. Cas. 1913D, 196.

But it does not take away the common law right to arbitrate by parol. *Lilley v. Tuttle*, 52 Colo. 121, 117 P. 896, Ann. Cas. 1913D, 196.

Hence, as a general rule a parol submission to arbitration is valid. *Lilley v. Tuttle*, 52 Colo. 121, 117 P. 896, Ann. Cas. 1913D, 196.

Notwithstanding the provisions of this rule, parties in difference may agree by word of mouth to submit the controversy to arbitration. *Id.*

Necessity for filing award with clerk is obviated by payment.—Where it is provided

in the articles of submission to arbitrators that the award, when made, may be filed by the successful party with the clerk of the district court as the basis of a judgment, the necessity for so doing is obviated by the payment by the unsuccessful party of the amount awarded against him. *Wilson v. Wilson*, 18 Colo. 615, 34 P. 175, cited in note, Ann. Cas. 1918C, 976.

An unconditional submission to arbitrators of the matters in controversy in a replevin suit will operate to discontinue the suit, and, thereupon, it cannot be said that the merits of the case have been determined in that action. *Perrigo Gold Min. etc., Co. v. Grimes*, 2 Colo. 651, cited in notes, Ann. Cas. 1912A, 1263, 42 A. L. R. 729.

And where such submission is made, the parties are regarded as confessing the judgment, which may, thereafter, be entered according to its terms upon the award of arbitrators. *Perrigo Gold Min., etc., Co. v. Grimes*, 2 Colo. 651, cited in notes, Ann. Cas. 1912A, 1263, 42 A. L. R. 729.

When submission to arbitrators will not discontinue suit.—A submission to arbitrators of matters in controversy in a pending suit, which provides that the award of arbitrators shall have the force and effect of a verdict of a jury, and that judgment may be entered thereon in that action, is distinguishable from one which contains no such stipulation, inasmuch as it plainly requires further proceedings in the cause. By such submission the cause is not withdrawn from the court, as would be the case if there was nothing to show an intention to proceed further therein. *Perrigo Gold Min. etc., Co. v. Grimes*, 2 Colo. 651, cited in notes, Ann. Cas. 1912A, 1263, 42 A. L. R. 729.

III. OATH OF ARBITRATORS.

The provision in this subdivision that arbitrators cannot act until they take an oath is imperative. It was intended to give to parties submitting their controversies to arbitration, a tribunal acting under the sanction of an oath; and no valid award can be made if the arbitrators, or any one of them, fail to take the oath prescribed. *Hepburn v. Jones*, 4 Colo. 98.

Where a submission is under the rule, it must be presumed that the parties contemplated an adjudication of the controversies submitted by the sworn tribunal prescribed by the rule. *Id.*

But where the submission is by parol the arbitrators may, in the absence of a stipulation to the contrary, act without taking any oath. *Lilley v. Tuttle*, 52 Colo. 121, 117 P. 896, Ann. Cas. 1913D, 196.

IV. POWERS OF ARBITRATORS.

This provision had no application to the case in *Leavitt v. Windsor Land, etc., Co.* 54

F. 439, 445, because under the contract involved there had to be at least four arbitrators, and possibly ten, depending upon the construction placed upon the clause of the contract under consideration.

That property has already been taken into physical possession by plaintiff with defendant's consent on an agreement providing for a subsequent determination of compensation if there should be a controversy "according to the very right of such matters" does not change the measure of compensation. *Union Exploration Co. v. Moffat Tunnel Imp. Dist.*, 104 Colo. 109, 89 P. (2d) 257.

V. AWARD FILED—JUDGMENT—EXECUTION.

Cross reference.—As to the award of arbitrators having the effect of a judgment, see analysis line II.

The sole object of this subdivision was to obviate the necessity of bringing a suit to enforce the award. *McClelland v. Hammond*, 12 Colo. App. 82, 84, 54 P. 538, cited in note, Ann. Cas. 1913D, 202.

Notice of filing of award is not required.—Under the provisions of this subdivision the clerk of the district court is authorized to enter judgment upon the filing of an arbitration award, and no notice is required either of the filing of the award or entry of judgment thereon. *West v. Duncan*, 72 Colo. 253, 210 P. 699.

VI. FEES OF ARBITRATORS.

Cross reference.—For a discussion of this subdivision, see Address no. 16, appx. D.

Editor's note.—Section 319 of the Code of Civil Procedure fixed the fees of arbitrators at three dollars per day. Under this subdivision it is provided that they shall receive ten dollars per day.

VII. ARBITRATED MATTERS HELD ADJUDICATED—EXCEPT FOR FRAUD, ETC.

Award of arbitrators is as conclusive as final judgment.—An award of arbitrators acting under the statute and within the scope of their authority is, as to matters of fact and law, as conclusive as the final judgment of a court of last resort. *Wilson v. Wilson*, 18 Colo. 615, 34 P. 175, cited in note, Ann. Cas. 1918C, 976.

"Where parties to a contract designate a party who is authorized to determine questions relating to its execution, and stipulate that his determination shall be final and conclusive, both parties are conclusively bound by his determination of those matters." *Ezell v. Rocky Mountain Bean, etc., Co.*, 76 Colo. 409, 412, 232 P. 680, cited in

note, 69 A. L. R. 816, quoting from *Empson Packing Co. v. Clawson*, 43 Colo. 188, 192, 95 P. 546, cited in notes, Ann. Cas. 1913A, 181, 183, 46 A. L. R. 865, 54 A. L. R. 1257, 1267.

And cannot be set aside except in case of fraud or gross mistake.—Where parties to a contract designate one who is authorized to determine questions relating to its execution, and stipulate that his determination shall be final and conclusive, both parties are conclusively bound by his determination of such matters except in case of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment. *Empson Packing Co. v. Clawson*, 43 Colo. 188, 95 P. 546, cited in notes, Ann. Cas. 1913A, 181, 183, 46 A. L. R. 865, 54 A. L. R. 1257, 1267.

A party to a contract providing that the determination of a third person as to the performance of the contract shall be conclusive, who desires to avoid the determination of the third person, must allege facts presenting fraud or implying bad faith or a failure to exercise an honest judgment by such third person. *Id.*

An award may be set aside where the trial court is satisfied that by reason of a communication made to one or more of the arbitrators, pending the arbitration, by one of the parties to the controversy, a feeling of hostility to the opposite party has been engendered, which has rendered one or more members of the board partial and prejudiced, and has very likely affected the fairness of the award. Such was the nature of the charge contained in the present exceptions to the report, which the court has sustained, upon the ground, no doubt, that it was well founded in point of fact. In support of the latter proposition, we refer to *Strong v. Strong*, 9 Cush. (Mass.) 560; *Tomlin v. Cox*, 19 N. J. L. 76; *Cleland v. Hedly*, 5 R. I. 163; *Fox v. Hazelton*, 10 Pick. (Mass.) 275; *Morse, Arb.* pp. 106-108, 533, 534. *Nolan v. Colorado Cent. Consol. Min. Co.*, 63 F. 930, 936.

And only for fraud practiced upon arbitrators.—While, in the absence of statute, an award may be set aside for fraud, accident or mistake, it must be for fraud practiced upon the arbitrators, or for some accident or mistake by which they were deceived or misled. *Wilson v. Wilson*, 18 Colo. 615, 34 P. 175, cited in note, Ann. Cas. 1918C, 976.

Party who complies with award is precluded from having it set aside.—A party who with the knowledge of all material facts complies with the requirements of an award, or accepts the benefits thereof, is precluded from demanding that it be set aside. *Wilson v. Wilson*, 18 Colo. 615, 34 P. 175, cited in note, Ann. Cas. 1918C, 976.

Rights of parties to hearing.—It is a universally recognized rule that unless the agreement or a statute provides otherwise, the parties to an arbitration proceeding have an absolute right to be heard and present evidence before the arbitrators, and that a refusal on the part of the board to receive such evidence is such misconduct as affords sufficient ground for setting aside the award. *Twin Lakes Reservoir, etc., Co. v. Rogers*, 105 Colo. 49, 94 P. (2d) 1090.

And notice thereof.—Unless otherwise provided in the submission agreement, or waived, each party to an arbitration is entitled to reasonable notice of the time and place of hearings, and it is the duty of the arbitrators to give such notice. A failure in this regard renders their further proceedings invalid. *Twin Lakes Reservoir, etc., Co. v. Rogers*, 105 Colo. 49, 94 P. (2d) 1090.

Arbitrators may not adopt the conclusions of outsiders on the matters in controversy

before them without a considered determination of their own upon the information obtained from such sources, and, as a general rule, they cannot delegate their responsibility and power to others. *Twin Lakes Reservoir, etc., Co. v. Rogers*, 105 Colo. 49, 94 P. (2d) 1090.

Bias or partiality of arbitrators warrants setting aside of award.—If arbitrators conduct themselves with bias or partiality, this amounts in law to misconduct which will warrant the setting aside of the award. And this is so notwithstanding the arbitrator declared that, irrespective of bias, he tried the case fairly. *Noffsinger v. Thompson*, 98 Colo. 154, 156, 54 P. (2d) 683.

Thus where an arbitrator, misconceiving his duty, purposed to and did decide in favor of the party selecting him to act, regardless of the evidence, his participation brought about injustice of decision which required reversal of the judgment based on the award in favor of his selector. *Id.*

Rule 110. Miscellaneous.

(a) **Amendments.** No writ or process shall be quashed, nor any order or decree set aside, nor any undertaking be held invalid, nor any affidavit, traverse or other paper be held insufficient if the same be corrected within the time and manner prescribed by the court, which shall be liberal in permitting amendments. [From Code Secs. 81 and 128.]

Committee Note.

See Rules 1 C (a), 8 (b).

(b) **Use of Terms.** Words used in the present tense shall include the future; singular shall include the plural; masculine shall include the feminine; person or party shall include all manner of organizations which may sue or be sued. The use of the word clerk, sheriff, marshal, or other officer means such officer or his deputy or other person authorized to perform his duties. The word "oath" includes the word "affirmation"; and the phrase "to swear" includes "to affirm"; signature or subscription shall include mark, when the person is unable to write, his name being written near it and witnessed by a person who writes his own name as a witness. A superintendent, overseer, foreman, sales director, or person occupying a similar position, may be considered a managing agent for the purposes of these rules. [From Code Secs. 140, 457 and 478.]

Committee Note.

Under the case of *London Guarantee and Accident Co. vs. Officer*, 78 Colo. 441, 444, it was stated that unless a broader scope be given to the term "managing agent" then such term would have to be limited to just one general manager, and that such could not have been the intention of the legislature. See 4 C. S. A., Chap. 177, Sec. 16.

(c) **Certificates.** Certificates shall be made in the name of the officer either by the officer or by his deputy. [New.]

(d) **Cross-claimants, Counterclaimants and Third-party Claimants.** Where a cross-claim, counterclaim or third-party claim is filed, the claimant thereunder shall have the same rights and remedies as if a plaintiff. [From Code Sec. 175 and new.]

- I. Amendments.
- II. Use of Terms.

I. AMENDMENTS.

Cross reference.—For a discussion of this subdivision, see Address no. 16, appx. D.

Editor's note.—In construing § 128 of the Code of Civil Procedure, relating to affidavits or bonds, the court held that amendments under that section must be confined to cases in which the insufficiency was not jurisdictional, and that the section was not intended to permit interposing of affidavit where there was either none at all or its equivalent. *Mentzer v Ellison*, 7 Colo. App. 315, 43 P. 464, cited in notes, 31 L. R. A. 428, 35 L. R. A. 772.

The *Mentzer* case has been cited with approval in *Stephens v Wheeler*, 60 Colo. 351, 153 P. 444, where the court held that an affidavit for an attachment, not subscribed, and an attachment bond without sureties, are nullities and incapable of

amendment. In the present case there was not even an attempt to correct the omission. *Axelson v Columbine Laundry Co.*, 81 Colo. 254, 259, 254 P. 990, cited in notes, 52 A. L. R. 1367, 67 A. L. R. 1006.

Where a writ of attachment directed to the sheriff of one county was attempted to be executed by the sheriff of another county levying it upon property in his county, the levy was void and could not be cured by amendment after the attempted levy by changing the direction of the writ to the county in which the levy was made. *McArthur v Boynton*, 19 Colo. App. 234, 74 P. 540.

II. USE OF TERMS.

See committee note under subdivision (b). See also, Address no. 16, appx. D.

Prior to the adoption of these rules our legislature repeatedly endeavored to make it plain that, in both civil and criminal procedure, substance, not form, was the controlling consideration. See *Waite v People*, 83 Colo. 162, 175, 262 P. 1009.

CHAPTER XVII
SUPREME COURT PROCEEDINGS

Rule 111. Writ of Error.

(a) **Matters Reviewable.** A writ of error shall lie from the supreme court to:

(1) A final judgment of any district, county or juvenile court in all actions or special proceedings whether governed by these rules or by the statutes; [From Code Secs. 425 and 437.]

(2) An order refusing, granting or cancelling in whole or in part a conditional decree in proceedings for the adjudication of water priorities. [From 3 C. S. A., Chap. 90, Sec. 200.]

(3) An order granting or denying a temporary injunction; [28 U. S. C. A. 380 a.]

(4) An order appointing or denying the appointment of, or sustaining or overruling a motion to discharge, a receiver. [From Supreme Court Rule 18.]

Committee Note.

Senate Bill 498, approved by Governor Carr April 10, 1941, abolishes all forms of review by the Supreme Court other than writs of error.

(b) **Limitation on Time of Issuance.** No writ of error shall be issued after 12 months from the entry of the judgment complained of in any case within paragraphs (1) or (2) of subdivision (a) of this rule nor after 60 days from the entry of the order complained of in any case within paragraphs (3) or (4) of subdivision (a) of this rule; provided, however, that in special proceedings, if by statute a less time than 12 months is specified the statute shall control. [Supplants Supreme Court Rule 18 and Code Sec. 427. Also see 3 C. S. A., Chap. 97, Sec. 43.]

(c) **How Obtained.** To obtain a writ of error a party shall within the time fixed by this rule docket the case in the supreme court either by filing a praecipe for a writ of error or by filing a record of the proceedings in the trial court prepared in compliance with Rule 112. Where the record is not filed at the time of the docketing, the clerk of the supreme court shall issue and transmit to the clerk of the trial court a writ of error commanding that a correct transcript of the record of the case be certified to the supreme court within 60 days from the receipt of such writ, or within such additional time as the supreme court may order. Where the record is filed at the time of the docketing, the clerk of the supreme court shall issue a writ of error and shall file the same with the record of the case. [Part new and part from Supreme Court Rule 19.]

(d) **Joint or Several Writs.** Parties interested jointly, severally, or otherwise in a judgment may obtain a writ of error to review such judgment, or

any one or more of them may join therein or may obtain a writ of error separately. [From Federal Rule 74 and supplants Code Sec. 431.]

(e) **Summons to Hear Errors; Contents; Service.** Upon issuing the writ of error the clerk shall issue a summons to hear errors which shall be directed to the defendant in error, shall notify him that such writ of error has been issued, and shall command that he appear in the supreme court within 10 days from the service thereof and pay the required docket fee, and shall state that in default thereof the plaintiff in error shall not be required to serve him with any papers required by these rules and that the court may proceed to a determination of the writ of error ex parte. The summons to hear errors shall be served upon each party named in the writ of error as defendant in error either by the clerk mailing a copy thereof by registered mail, addressed to the party at his last address given in the pleadings in the trial court, or in the manner provided in Rule 4, and for that purpose a writ of error shall be deemed a proceeding in rem. A written acknowledgment of service of such summons by the defendant in error, or in his behalf by any attorney admitted to practice before the supreme court, shall be deemed sufficient service. Separate, additional or amended summons to hear errors may issue against any party at any time. [From Supreme Court Rules 20 and 21, Code Secs. 434, 435 and new.]

(f) **Specification of Points.** No assignments of error, assignments of cross error or formal joinder in error shall be required. Plaintiff in error shall file a "Specification of Points" upon which he relies for reversal of the judgment and a defendant in error may file a "Cross-Specification of Points" upon which he relies for reversal or modification of the judgment. Each such specification shall set out separately and particularly each point relied upon and shall be filed at or before the time of the filing of the brief of the party filing the specification and it may be a separate paper or may be included in the brief of such party, in which case it shall be separate from the remainder thereof. Counsel will be confined to the points so specified but the court may in its discretion notice any error appearing of record. No writ of error shall be dismissed and no specification of points shall be disregarded on account of any technical defect not affecting the substantial rights of the parties. A dismissal by plaintiff in error of the writ of error shall not affect the right of a defendant in error to seek reversal or modification of the judgment where cross-specification, or notice of intention to file the same, has theretofore been filed. [Supplants parts of Supreme Court Rules 23, 27 A, 29, 34, and all of 32, also Code Sec. 421.]

(g) **Review of Adjudication of Water Priorities.** Any party suing out a writ of error to review the whole or any part of a decree entered in any statutory proceeding adjudicating water priorities, or the change of points of diversion thereof, shall file as plaintiff in error a designation of parties showing the priority and rights claimed by him and naming the ditches, reservoirs, pipe lines and other works, and the owners thereof who may be adversely affected by such proceedings in the supreme court as defendants in

error. The alignment of parties shall be according to such designation. [From Supreme Court Rule 25.]

Committee Note to Rule 111.

For lis pendens on writ of error see Rule 105 (f). For writ of error in attachment and garnishment proceedings see Rule 102 (aa).

I. Matters Reviewable.

- A. General Consideration.
- B. Final Judgment.
- C. Orders Relating to Receivers.

II. Review of Adjudication of Water Priorities.

Cross Reference.

For a discussion of this rule, see Address no. 17, appx. D.

I. MATTERS REVIEWABLE.

A. General Consideration.

"The writ of error is a writ of right." Monti v Bishop, 3 Colo. 605; Hull v Denver Tramway Corp., 97 Colo. 523, 525, 50 P. (2d) 791.

It is a new suit. Wise v Brocker, 1 Colo. 550; Webster v Gaff, 6 Colo. 475; Stout v Gully, 13 Colo. 604, 22 P. 954, cited in notes, 26 Am. St. Rep. 362, 96 Am. St. Rep. 135, 10 L. R. A. (N. S.) 444, 10 A. L. R. 416.

The supreme court may dismiss a writ of error on its own motion. Diebold v Diebold, 74 Colo. 557, 223 P. 46, citing Unzicker v Unzicker, 74 Colo. 211, 220 P. 495.

Jurisdiction of a writ of error which otherwise does not exist cannot be conferred by act of the parties. Board of County Com'rs v McIntire, 23 Colo. 137, 139, 46 P. 638, citing Sons of America Bldg., etc., Ass'n v Denver, 15 Colo. 592, 25 P. 1091.

None but a party to the record can prosecute a writ of error. Fisher v Hanna, 21 Colo. 9, 39 P. 420, cited in notes, 119 Am. St. Rep. 748, 759.

The supreme court has no jurisdiction to review the judgment of the district court imposing a penalty for a contempt of court civil in character, unless some question is involved such as is required to give the supreme court jurisdiction in other civil actions. Naturita Canal, etc., Co. v People, 30 Colo. 407, 70 P. 691, cited in note, 28 A. L. R. 58. See Cooper v People, 13 Colo. 337, 22 P. 790, 6 L. R. A. 430, cited in notes, 22 Am. St. Rep. 418, 50 Am. St. Rep. 573, 580, 117 Am. St. Rep. 951, 961, 8 L. R. A. 585, 587, 23 L. R. A. 787, 36 L. R. A. 256, 44 L. R. A. 159, 50 L. R. A. 195, 66 L. R. A. 727, 68 L. R. A. 256, 259, L. R. A. 1917E, 713, 8 A. L. R. 1556, 49 A. L. R. 656.

B. Final Judgment.

A writ of error lies to a final judgment only. People v Eldred, 86 Colo. 174, 279 P. 41; Commercial Credit Co. v Higbee, 88 Colo. 300, 295 P. 792; Meyer v Brophy, 15 Colo. 572, 25 P. 1090; Martin v Way, 86 Colo. 232, 280 P. 488; Crews-Beggs Dry Goods Co. v Bayle, 96 Colo. 19, 20, 40 P. (2d) 233; Alvord v McGaughey, 5 Colo. 244; Marysville, etc., Land Co. v Heyde, 93 Colo. 523, 524, 27 P. (2d) 498; Wehle v Kerbs, 6 Colo. 167, cited in notes, 123 Am. St. Rep. 1044, Ann. Cas. 1918A, 516; Tatarsky v Smith, 78 Colo. 491, 242 P. 971, cited in note, 56 A. L. R. 1457; Colorado State Bank v Bird, 79 Colo. 625, 247 P. 802, cited in note, 80 A. L. R. 1187; Hadley v Fish, 3 Colo. 51; Doane v Glenn, 1 Colo. 417. It is held that a writ of error lies to review a judgment although the record of such judgment is defective. See Hoehne v Trugillo, 1 Colo. 161, 91 Am. Dec. 703, cited in note, 10 Am. St. Rep. 349; Cooper v American Cent. Ins. Co., 3 Colo. 318, cited in note 33 L. R. A. 88, 41 L. R. A. 563, 564, 43 A. L. R. 1517.—Ed note.

And if it appears on review that there is no final judgment the writ will be dismissed. People v Eldred, 86 Colo. 174, 279 P. 41; Marysville, etc., Land Co. v Heyde, 93 Colo. 523, 524, 27 P. (2d) 498; Martin v Way, 86 Colo. 232, 280 P. 488; Stuchlik v Talpers, 90 Colo. 277, 8 P. (2d) 762.

To be final the judgment must end the particular suit in which it is entered.—Doubtless it may be true that both parties upon this review desire to have this court determine the propriety of the order of the district court dismissing the action as against the bank. Under the almost unbroken line of decisions we cannot with propriety do so, because the order or judgment, which the plaintiff in error has brought up for review, is not a final judgment, but interlocutory, to which neither an appeal nor writ of error lies unless some statute expressly authorizes it, and we have no such permissive statute in this state. The question here involved has been repeatedly decided by our own court and our court of appeals. In Dusing v Nelson, 7 Colo. 184, 2 P. 922, cited in notes, 78 A. L. R. 178, 191, this court, speaking on this point, p. 186, said: "If the order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final. To be final it must end the particular suit in which it is entered." This case has several times been

cited with approval by this court and our court of appeals. *Boxwell v Greeley Union Nat. Bank*, 89 Colo. 574, 575, 5 P. (2d) 868, 80 A. L. R. 1179, citing *Rice v Van Why*, 49 Colo. 7, 111 P. 599, cited in note, 68 A. L. R. 1439; *County Court v Eagle Rock Gold Min., etc., Co.*, 50 Colo. 365, 371, 115 P. 706; *Goodknight v Harper*, 70 Colo. 41, 44, 197 P. 237; *Peters v Peters*, 82 Colo. 503, 507, 261 P. 874.

In other words it must terminate the litigation between the parties. *Boxwell v Greeley Union Nat. Bank*, 89 Colo. 574, 5 P. (2d) 868, 80 A. L. R. 1179.

And leave nothing to be done except the ministerial act of execution. *Boxwell v Greeley Union Nat. Bank*, 89 Colo. 574, 5 P. (2d) 868, 80 A. L. R. 1179.

An order denying a motion for judgment on the pleadings is a final judgment.—We think that the order of the court denying the motion for judgment on the pleadings, predicated as it must have been upon a determination adverse to plaintiff in error as to its ownership and right to possession of the property, had the force and effect of a final judgment or order disposing of the rights of petitioner. Indeed, the defendant in error so treated it at all times, until presenting this petition for rehearing. The court should regard the substance and effect of the order, rather than its form, and so considered, it is subject to review by writ of error. *Central Locomotive, etc., Works v Smith*, 27 Colo. App. 449, 457, 150 P. 241, cited in note, *Ann. Cas.* 1916A, 1258, on petition for rehearing.

But an order quashing service of summons is not a final judgment.—An order quashing service of summons and denying a default, but entering no judgment against plaintiff, is not a final judgment that can be reviewed in the appellate court. *Brockway v Smith Co.*, 17 Colo. App. 96, 66 P. 1073.

Neither is an order overruling a motion to vacate a judgment.—An order overruling a motion to vacate a judgment, is not final in the sense that it may be reviewed by writ of error. Had a writ of error to the judgment been sued out at the proper time, subsequent proceedings in the same case might be reviewed in connection with the final judgment; but the final judgment itself, which by reason of lapse of time may not be reviewed, cannot be reviewed in connection with an attempted review of the subsequent non-reviewable order. *Van Dyke v Fishman*, 77 Colo. 333, 236 P. 992; *Miller v Buyer*, 77 Colo. 329, 331, 236 P. 990; *Polk v Butterfield*, 9 Colo. 325, 12 P. 216, cited in notes, 4 L. R. A. 42, 67 L. R. A. 34; *Hughes v Felton*, 11 Colo. 489, 19 P. 444, cited in notes, 23 L. R. A. 347, 40 L. R. A. (N. S.) 17.

On review all proper deductions are to be made from the record in favor of the judgment. *Royal Tiger Mines Co. v Ahearn*, 97 Colo. 116, 47 P. (2d) 692.

Where court cannot substitute its conclusions on the facts for those of the lower court.—There being sufficient evidence to support the fact findings of the trial court and the evidence being conflicting, the appellate court is not allowed to substitute its conclusions on the facts for those of the lower court. *Retail Hdw. Mut. Fire Ins. Co. v Securities Corp.*, 97 Colo. 487, 51 P. (2d) 598.

C. Orders Relating to Receivers.

An order appointing or overruling a motion to discharge a receiver may be reviewed on writ of error before final judgment. *Boyd v Brown*, 79 Colo. 568, 247 P. 181.

Where the petitioners for the removal of a receiver did not resist the appointment of the receiver; made no objection to the business being conducted by him as a going concern; have shown no fraud; and there is no satisfactory proof of gross or any inadequacy of the price realized from the sale of assets, it was held that their conduct amounts to laches and was fortified by consideration of this rule of this court, for under the rule they had opportunity for years to seek the receiver's discharge and have review here if the trial court should refuse their request. *Thompson v Beck*, 92 Colo. 441, 444, 21 P. (2d) 712.

But matters not disposed of by trial court are not considered on such review.—Where a petition in intervention is filed in an action involving the appointment of a receiver, questions raised by the petition which have not been disposed of by the trial court, will not be considered on review of the order appointing the receiver. *Woods v Capitol Hill State Bank*, 70 Colo. 221, 199 P. 964.

II. REVIEW OF ADJUDICATION OF WATER PRIORITIES.

The Supreme Court has jurisdiction to review a general adjudication decree settling the priorities of the reservoirs upon a particular stream, and this necessarily involves the power to determine whether a reservoir to which a priority has been awarded is entitled to any priority whatsoever. *Greeley, etc., Irrigation Co. v Huppe*, 60 Colo. 535, 536, 155 P. 386.

And its judgment is final.—When parties to an adjudication have had their rights determined and embodied in a decree which is carried to the Supreme Court for review, the judgment of the latter on the law and facts is final, and the trial court is without further jurisdiction over the matters so

litigated except to comply with the mandate of the reviewing court. *Greeley, etc., Irrigation Co. v Handy Ditch Co.*, 77 Colo. 487, 240 P. 270.

It may make and direct the entry of a proper amended decree.—On writ of error to review an adjudication decree, when any part of the decree is reversed, and where practicable, the Supreme Court shall make and direct the entry of a proper amended decree. *Greeley, etc., Irrigation Co. v Handy Ditch Co.*, 77 Colo. 487, 240 P. 270.

Incomplete determination of some of claims.—Where a statutory water adjudication proceeding is brought up for review, and it appears that there was an incomplete determination of some of the claims before the trial court, the judgment is reversed on that ground only, the supreme court declining to pass upon the case piecemeal. *North-ern Colorado Irrigation Co. v Denver*, 86 Colo. 54, 278 U. 592.

In a proceeding to adjudicate priority of rights to the use of water, a general water adjudication held not final, where it failed to determine all claims presented. *Id.*

Rule 112. Record on Error.

(a) **Preparation, Certification.** The party who seeks to reverse a judgment shall file promptly with the clerk of the trial court a designation indicating the parts of the record, proceedings and evidence to be certified to the supreme court. A copy of the designation shall be served either personally or by mail upon the opposing party, if his address be known, or upon his attorney. Within 10 days thereafter any other party may serve and file a designation of additional parts of the record, proceedings and evidence to be included. There shall be transmitted to the supreme court a properly folioed true copy of the matter designated by the parties, which shall always include, whether or not designated, copies of the following: The material pleadings without unnecessary duplication, the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon, the master's report, if any, the opinion, if any, the judgment or part thereof to be reviewed, and the designations or stipulations of the parties as to matter to be included in the record. The reporter's original transcript, which shall include as far as practicable the original depositions and exhibits, may be a part of the record on error. Such other exhibits as may be designated shall also be transmitted. Copies of records and files of the clerk shall be certified by him, and all other portions of the record shall be certified by the trial judge. Carbon copies shall not be used in the record. The matter so certified and transmitted shall constitute the record on error. Essential matters omitted may be supplied. A supplemental record may be filed showing proceedings subsequent to the judgment. The record shall be fully indexed and shall be bound under the direction of the clerk of the supreme court at the cost of plaintiff in error in half sheep or cloth, with substantial paper sides, thirteen or fourteen inches in length and eight and one-quarter inches in width. [From Federal Rule 75 (a), (c); Supreme Court Rules 11, 27 A, 28, and 31; Code Secs. 66, 423, 433, and 437.]

(b) **Costs, By Whom Paid.** The cost of preparing the record shall be advanced by the party seeking to reverse the judgment, except that the trial court may, upon objections by him, order the opposing party to advance payment forthwith for the cost of preparing such parts of the record designated by him as the court shall determine are unessential to a complete understanding of the controversy; and upon a failure to comply with such order, the parts for which he has been ordered to advance payment shall be omitted from the record. [New. Supplants Supreme Court Rule 30.]

(c) **Stipulation as to Record.** Instead of serving designations as above provided, the parties by written stipulation filed with the clerk of the trial court may designate the parts of the record, proceedings, and evidence to be included in the record. [From Federal Rule 75 (f) and Supreme Court Rule 29.]

(d) **Agreed Record.** The parties may agree upon a record on error which, when certified by the trial court, shall be transmitted to the supreme court. [From Supreme Court Rule 29.]

(e) **Agreed Statement.** When the questions presented by a writ of error can be determined without an examination of all the pleadings, evidence, and proceedings in the court below, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the supreme court. The statement shall include a copy of the judgment sought to be reviewed and a concise statement of the points to be relied on by the plaintiff in error. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the questions raised by the writ of error, shall be approved by the trial court and shall then be certified to the supreme court as the record on error. [From Federal Rule 76.]

(f) **Transcript; Objections; Certification.** The party seeking reversal shall, within 60 days from the date of the judgment sought to be reviewed, lodge with the clerk of the trial court the reporter's transcript containing such parts of the proceedings and evidence as may have been designated. The clerk shall immediately give written notice thereof to opposing parties, who shall have 14 days thereafter in which to file written objections to such transcript. If none is filed, such transcript shall be signed and certified by the judge and become a part of the record in the supreme court. If objection is filed the party seeking reversal shall be immediately notified by the clerk of the trial court and the objection promptly heard and determined, whereupon the transcript shall be signed and certified. [From Supreme Court Rule 10, Code Sec. 420, and Denver District Court Rule XXI.]

Committee Note.

See Rule 5 (e) for filing with the judge. See Rule 6 (b) for enlargement of time.

(g) **More than One Writ of Error.** When more than one writ of error is brought to review the same judgment a single record on error shall be prepared containing all the matter designated or agreed upon by the parties without duplication. [From Federal Rule 75 (k).]

Cross reference.—For a discussion of this rule, see Address no. 17, appx. D.

Preparation of record.—A trial judge had no power to intervene in a dispute between defendants which insisted that all papers considered on a single motion seeking six items of relief be printed and plaintiffs which objected to including in the record any papers except those relating to item seeking dismissal of the complaint as to certain parties because the appeal (writ of error in Colorado) was only from the judgment entered thereon. *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 1 F. R. D. 249.

Where record failed to show that appellant had ever served or filed a designation of the record, or proceedings and evidence in the court below to be contained in the record, and more than a month had lapsed since court had denied motion to remand case for new trial on ground that appellant was unable to complete her record, it was too late for her to supplement the record on appeal, and appellee was entitled to dis-

missal of the appeal. *Leimer v. State Mut. Life Assur. Co.*, 107 F. (2d) 1003. It should be noted that review in Colorado is by writ of error rather than appeal as in the federal courts. (See Address no. 17, appx. D.) However, the above principles would seem to be applicable.—Ed. note.

What amounts to an agreed record.—The presentation to the judge of the court below of a record on error, and its certificate by his honor, upon the statement of opposing counsel that they have no objection, amounts to an agreed record. But the record must be certified by the clerk of the court. *Hoover v. Schott*, 66 Colo. 456, 182 P. 883.

Unapproved recitals not part of agreed statement.—Recitals which were not approved by the trial court and were expressly disapproved formed no part of the "record" which consisted of an agreed statement prepared and signed by the parties and approved by the trial court pursuant to this subdivision. *Graham v. Carr*, 112 F. (2d) 908.

Rule 113. Supersedeas and Stay of Execution.

(a) **Application For; After Record Filed.** Whenever plaintiff in error desires a stay of execution pending the determination of a writ of error, he may apply to the supreme court for a supersedeas at any time after the filing therein of the record prepared and certified in accordance with Rule 112. A succinct printed or typewritten brief shall be filed with such application for supersedeas and served upon the defendant in error. Within 10 days after such service the defendant in error may file and serve upon the plaintiff in error a brief in opposition. The plaintiff in error may reply thereto within 5 days from such service. The application shall then stand submitted. At the time of filing his first brief either party may request a final determination of the controversy. Upon the application for a supersedeas the court may affirm or reverse the judgment. Pending the determination of an application for supersedeas, the court may order a stay of execution or make any other order appropriate to preserve the status quo or to protect the rights of the parties. [From Supreme Court Rules 22 and 23.]

(b) **Review of Stay of Execution; Verified Statement.** If any party is prejudiced by any ruling or order of the trial court in respect to any applica-

tion for a stay of execution under Rule 62, he may docket the case in the supreme court by filing a verified statement setting forth the nature of the case, the judgment and the rulings complained of, and the court may order a stay of execution or may grant, modify or restore an injunction for such time and upon such terms and conditions as it may determine, and may make such further orders in the premises as are necessary for the protection of the parties. [From Supreme Court Rule 22.]

(c) **Bond.** No supersedeas shall issue when prohibited by statute nor until the plaintiff in error, or someone in his behalf, shall execute and present to the clerk for his approval a supersedeas bond which shall have such surety as the court requires or which shall be accompanied by the deposit with the clerk of cash in the amount thereof. Except where the statutes prescribe different conditions the bond shall be conditioned for the satisfaction of the judgment in full or as modified, together with costs, interest and damages for delay, if, for any reason, the writ of error is dismissed or the judgment is affirmed or modified. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed by the court at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the writ of error, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property or bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on writ of error, interest and damages for delay. When the judgment determines the right to an office, the amount of the supersedeas bond shall be fixed at such sum as will cover the emoluments of the office up to such time as the writ of error is determined, plus the costs of action and costs on writ of error. Recovery upon such bond shall be for the use and benefit of the person adjudged entitled to the said office. Whenever a bond is executed by an attorney in fact, the original power of attorney shall be filed with the bond in the office of the clerk of the supreme court, unless it shall appear that the power of attorney contains other powers than the mere power to execute the bond in question in which case a true copy thereof shall be filed and proof thereof made as required by the clerk. [From Federal Rule 73 (d), Supreme Court Rule 27, Code Sec. 428, and new.]

Committee Note.

Some statutes provide that under no circumstances shall a writ of error stay the enforcement of the judgment. See 3 C. S. A., Chap. 90, Sec. 90.

(d) **When Bond Not Required.** The supreme court may, in its discretion, dispense with or limit the amount of supersedeas bond when the plaintiff in error is an executor, administrator, conservator or guardian of an estate and has given sufficient bond as such. The state, the county commissioners of the various counties, cities, towns and school districts and all charitable,

educational and reformatory institutions under the patronage or control of the state and all public officials when suing or defending in their official capacities for the benefit of the public shall not be required to furnish supersedeas bond. [From Code Sec. 430.]

(e) **Bond; Amendment; Increase.** The supreme court may allow a defective supersedeas bond to be amended and, if a supersedeas bond is found to be insufficient, a new or additional bond may be required. [From Code Sec. 429 and new.]

(f) **Bond; Liability of Surety.** By entering into a supersedeas bond given pursuant to this rule, the surety submits himself to the jurisdiction of the court to which the writ of error is directed and irrevocably appoints the clerk of that court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be determined and enforced in the court to which the writ of error is directed on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of that court who forthwith shall mail copies to the surety if his address is known. [From Federal Rule 73 (f). Supplants part of Code Sec. 429.]

(g) **Bond; Release of Lien; Notice of Lis Pendens.** If a judgment for the payment of money has been made a lien upon real estate, when a supersedeas bond is given such lien shall be released thereby. The clerk of the supreme court shall issue a certificate that the judgment has been superseded, and such certificate may be recorded with the recorder of the county in which such real estate is situated. [From Code Sec. 428.]

(h) **Bond Effective As to Parties Filing Same.** In case a writ of error shall be sued out by two or more persons, and supersedeas bond shall be filed by a lesser number, the supersedeas shall be good as to each person filing such bond. The rights of all parties shall be determined at the same time and in the same manner as if all such parties had joined in the filing of the bond. [From Code Sec. 432.]

(i) **Endorsement When Granted.** When a supersedeas had been granted the clerk shall endorse upon the writ of error "supersedeas has been granted," and shall sign the endorsement. [From Supreme Court Rule 24.]

(j) **Stay of Execution.** A certified copy of the writ of error so endorsed may be served upon any officer holding an execution, and thereupon all proceedings under such execution shall be discontinued, and such officer shall return the same into the court from which it was issued together with the copy of the writ of error served upon him, and shall set forth in his return what he has done under the execution. [From Supreme Court Rule 26.]

- I. Subdivision (a).
- II. Subdivision (b).
- III. Subdivision (c).
- IV. Subdivision (d).
- V. Subdivision (e).
- VI. Subdivision (f).

Cross Reference.

For a discussion of this rule, see Address no. 17, appx. D.

I. SUBDIVISION (a).

This rule must be observed, and the Supreme Court will grant the application for supersedeas only after compliance with the

rule. *Alsup v Alsup*, 76 Colo. 260, 261, 230 P. 796.

Record must be complete before supersedeas will be granted.—While the record must be complete before an application for supersedeas will be granted, in a case involving many parties and many causes of action and counterclaims, if it is complete so far as concerns those controversies in which error is assigned, it will be sufficient. *Murray v Stuart*, 77 Colo. 167, 234 P. 1113.

Whether or not a supersedeas should be granted will not be considered until an application is made for the writ. *Ward v Ward*, 89 Colo. 396, 3 P. (2d) 415.

Where a supersedeas would serve only to stay an execution for costs application for the writ will be denied. *Hunter v Stapleton*, 77 Colo. 456, 236 P. 1013.

Answer and argument against a motion to dismiss application are unnecessary where the supersedeas has been granted. *Bernstein v Goldberg*, 81 Colo. 39, 253 P. 477.

II. SUBDIVISION (b).

For stay of proceedings to enforce a judgment, see Rule 62.

III. SUBDIVISION (c).

The issuance of a writ of supersedeas is the consideration for the giving of a supersedeas bond. *Buchhalter v Solomon*, 78 Colo. 227, 241, P. 718, cited in notes, 86 A. L. R. 312, 322.

A charitable institution has the right to execute a supersedeas bond as principal. *Buchhalter v Solomon*, 78 Colo. 227, 241 P. 718, cited in notes, 86 A. L. R. 312, 322.

A supersedeas writ may not be granted on an invalid bond. *Buchhalter v Solomon*, 78 Colo. 227, 241 P. 718, cited in notes, 86 A. L. R. 312, 322.

The consent of a surety company to execute a supersedeas bond upon condition amounts to a refusal where the condition is unfulfilled. *Bosworth v Garwood*, 79 Colo. 391, 246 P. 555.

Burden to show cause why the execution should not issue.—In a proceeding by scire facias to obtain execution upon a judgment on a supersedeas bond, the burden is upon the surety to show cause why the execution should not issue. *Bosworth v Garwood*, 79 Colo. 391, 246 P. 555.

There can be no supersedeas where plaintiff in error announces he cannot furnish bond therefor. *Riant Amusement Co. v Bailey*, 80 Colo. 65, 249 P. 7.

IV. SUBDIVISION (d).

The court assumes but does not decide, that "writ of error" means or includes a supersedeas, but the court cannot agree that the defendant corporations are in the control or patronage of the state within the meaning of this subdivision. If they are, all charitable corporations are, whether domestic or foreign. Surely the legislature never intended to permit supersedeas without bond to such. The present corporations are no more under the control of the state than is every corporation; neither, whatever the word patronage may mean, are they more under the patronage of the state than any other charitable corporation. The court will not attempt to formulate a definition of the legislature's intention, but suggests, by way of example, that the regents of the state university doubtless could, in a proper case, get a supersedeas without bond, but the University of Denver probably could not. *Buchhalter v Solomon*, 78 Colo. 227, 230, 241 P. 718, cited in notes, 86 A. L. R. 312, 322.

V. SUBDIVISION (e).

Provisions for amendment are broad, and they are given a liberal construction in furtherance of justice. *Colorado Inv. etc., Co. v Riverview Drainage Dist.*, 83 Colo. 468, 472, 266 P. 501, citing *Nelson v Chittenden*, 53 Colo. 30, 123 P. 656, Ann. Cas. 1914A, 1198; *Sigel-Campion Live Stock Co. v Holly*, 44 Colo. 580, 587, 101 P. 68, cited in notes, 38 A. L. R. 1098, 96 A. L. R. 81; *Devine v Western Slope Fruit Growers Ass'n*, 70 Colo. 14, 196 P. 329; *Alamo Hotel, etc., Co. v Toledo Scales Co.*, 71 Colo. 577, 208 P. 476.

VI. SUBDIVISION (f).

In entering into the bond the sureties agreed in effect, to abide by the law permitting the entry of judgment. *Buchhalter v Solomon*, 78 Colo. 227, 230, 241 P. 718, cited in notes, 86 A. L. R. 312, 322.

The plaintiff in error claims that the equities of the surety on the re-delivery bond are superior to those of the sureties on the supersedeas bond because the supersedeas caused the delay (that is, amounted to an extension of the maturity of the principal's obligation on the first bond), and so prevented the company from realizing on the collateral while it was good; that since this was voluntary on the part of the supersedeas surety, and done for the benefit of the principal, he, plaintiff in error, is entitled to exoneration from her. The court thinks he is right. The argument is sound and based on the ordinary rules as to treatment of sureties; it is moreover well supported by authority. *Bosworth v Garwood*, 79 Colo. 391, 392, 246 P. 555.

Rule 114. Costs.

(a) **Fees of Clerk.** There shall be paid to the clerk of the supreme court the following fees: \$20.00 as docket fee of plaintiff in error except where application for supersedeas is made at the time of the filing of the record; \$10.00 as docket fee of plaintiff in error where application for supersedeas is made at the time of the filing of the record; \$10.00 as additional docket fee of plaintiff in error upon allowance of writ of supersedeas or further prosecution of the cause; \$5.00 as docket fee of defendant in error. Such fees shall be taxed and recovered as costs. There shall be paid to the clerk the fees allowed by law for copies of records before delivery thereof. [From Supreme Court Rules 23, 52 and 53.]

(b) **Proceeding by a Poor Person.** Any litigant upon filing in the supreme court a motion under oath that because of his poverty he is unable to pay the fees in the supreme court, and that he believes he is entitled to the redress he seeks by such writ of error, and that sets forth briefly a statement of the points on which he intends to rely, may, in the discretion of the court, be permitted to prosecute a writ of error without being required to pay such fees or costs. If permission is granted, he may proceed on a typewritten abstract of record and brief. [New.]

(c) **Costs.** Unless otherwise ordered the successful party on writ of error shall recover as costs in the supreme court his actual costs paid to the clerk of the supreme court, his expenses actually and necessarily incurred in procuring the record on writ of error not exceeding twenty cents per folio, and his expenses actually and necessarily incurred for printing the abstract of record, not exceeding \$1.00 per page. The supreme court may impose additional costs or order the remission of costs. [From Supreme Court Rule 51.]

(d) **Statement to Trial Court.** Upon request the clerk shall send a written statement to the clerk of the trial court of the costs recoverable in the supreme court which amount may be included in the execution for costs issued by the trial court, subject to the provisions of Rule 118 (e). [New.]

- I. Fees of Clerk.
- II. Proceeding by a Poor Person.
- III. Costs.
- IV. Statement to Trial Court.

Cross Reference.

For a discussion of this rule, see Address no. 17, appx. D.

I. FEES OF CLERK.

In construing Rule 53 of the Supreme Court Rules, one of the rules from which this subdivision was taken, the court said that costs in an action are recoverable only by virtue of the statute allowing them, and there being no provision in the statutes allowing costs in a proceeding to annex con-

tiguous towns and cities, costs cannot be allowed in such proceeding in the lower court; but a writ of error is a new and independent action, wherein the right to costs is expressly provided by § 18, ch. 43, vol. 2, and by this rule. Under said statute and rule the successful party may recover costs incurred in the Supreme Court upon writ of error in annexation proceedings. Phillips v Corbin, 25 Colo. 567, 56 P. 180.

II. PROCEEDING BY A POOR PERSON.

For a discussion of this subdivision, see Address no. 17, appx. D.

III. COSTS.

Cross references.—As to costs incurred in the Supreme Court, see § 18, ch. 43, vol. 2. As to costs in general, see ch. 43, vol. 2.

Editor's note.—The costs allowed by this subdivision are the same as those allowed by Rule 51 of the Supreme Court Rules from which it was taken. The cases in this note are constructions of that rule.

Costs, strictly so called, are a matter of statute or rule of court. Antero, etc., Reservoir Co. v Lowe, 70 Colo. 467, 203 P. 265.

They are only to reimburse successful party.—Antero, etc., Reservoir Co. v Lowe, 70 Colo. 467, 471, 203 P. 265.

Liability of state for costs.—It was not the intention of the Supreme Court in adopting this rule to make the state liable for costs when it is an unsuccessful party litigant. Dietemann v People, 78 Colo. 92, 95, 239 P. 1020.

Recovery of costs for all trials of same

cause.—Where there is more than one trial of the same cause, the successful party is entitled to recover costs for all the trials. Wallace Plumbing Co. v Dillon, 73 Colo. 10, 213 P. 130.

Where a suit is instituted and prosecuted vexatiously, defendant's attorney fees may be taxed as costs. London v Allison, 87 Colo. 27, 284 P. 776.

Objection after payment of costs.—When there is no fraud or wrongful purpose or mistake of fact, one may not object further to a taxation of costs against him after he has paid them, or received payment thereof. Webber v Phister, 71 Colo. 332, 206 P. 385.

IV. STATEMENT TO TRIAL COURT.

For a discussion of this subdivision, see Address no. 17, appx. D.

Rule 115. Abstracts, Briefs, Motions and Withdrawal of Papers.

(a) **Abstract of Record; Contents.** Except as provided in subdivision (k) of this rule relating to causes determined by the Industrial Commission, plaintiff in error shall within 30 days after filing the record or, where application for supersedeas is pending, within 30 days from the date of the determination thereof, file with the clerk fifteen printed copies of an abstract of the record. Such abstract shall contain a brief statement of the contents of the pleadings, the judgment, and other essential parts of the record; but when necessary such matters may be stated fully or in the exact words of the record. Essential matters omitted may be supplied. Defendant in error may, within the time allowed for his brief, file fifteen copies of a supplemental abstract, and when the same is essential the cost thereof shall be charged to plaintiff in error. The abstract shall be indexed and the folio numbers of the record shown on the margin thereof. [From Supreme Court Rules 36 and 38, and Code Sec. 442.]

(b) **Briefs; When Filed.** Except as provided by Rule 118 (b) and subdivision (k) of this rule, the brief of plaintiff in error may be filed at any time within 30 days after the filing of the abstract of record. The defendant in error shall file his brief within 30 days after service of copies of the brief of the plaintiff in error, and within 20 days after service thereof upon him plaintiff in error may file a reply brief. Supplemental briefs shall be filed only upon leave of court. Fifteen copies of every brief shall be filed. [From Supreme Court Rules 38 and 39 and Code Sec. 442.]

(c) **Briefs; Contents.** Every brief filed in the supreme court, except one filed in support of or in opposition to a motion, shall contain separately in the order following:

(1) A subject index of the entire brief.

(2) A table of all cases or statutes cited. Cases shall be first stated in alphabetical order giving title, volume and page with citations to the official reports and to the reporter system. Colorado statutes shall be cited by reference to official compilations only. Each case or statute shall be indexed as to every page on which it is cited.

(3) A concise statement of the case containing all that is material to the consideration of the questions presented with appropriate folio references.

(4) A separate and particular statement of each point intended to be urged with appropriate references to the "Specification of Points".

(5) A concise summary of the argument.

(6) The argument exhibiting clearly the points of fact and law being presented and citing the authorities and statutes relied upon. When any other than a Colorado statute is cited so much thereof as may be necessary to the decision shall be printed in full either in the body of the argument or in an appendix. References to the record shall be accompanied by appropriate folio numbers. When the reference is to the evidence, to the giving or refusal to give an instruction, or to a ruling upon the report of a master, the folio citation must be specific, and if the reference is to an exhibit, both the folio number at which the exhibit appears and at which it was offered in evidence must be indicated.

(7) The "Specification of Points" provided for in Rule 111 (f) unless such "Specification of Points" shall have been theretofore filed separately. Briefs of defendants in error need not contain a statement of the case (3) unless that presented in the brief of plaintiff in error is controverted or deemed insufficient, nor the statement of points (4); provided that where a defendant in error seeks the modification or reversal of a judgment he shall separately state the points relied upon (4) with appropriate reference to the "Cross Specification of Points", and separately the "Cross Specification of Points" provided for in Rule 111 (f) unless it shall have been theretofore filed. Reply briefs shall be confined strictly to answering new matters raised by the adversary's brief. [From Supreme Court Rules 37 to 42, both inclusive. Also from Rule 27, U. S. Supreme Court, and the rules of the U. S. Circuit Courts of Appeals.]

(d) **Failure to File Abstract of Record or Brief; Effect of.** If plaintiff in error neglects to file an abstract or brief as required, the opposite party may proceed ex parte, or the court upon motion of a party or upon its own motion may dismiss the writ of error without notice. If defendant in error fails to file his brief as required disposition of the writ of error may be had ex parte. [From Supreme Court Rules 34 and 40.]

(e) **Time to File; Time for Filing May be Extended or Abridged by Court only.** No stipulation or motion shall suspend the operation of the rules, but for good cause shown, the court, or a justice thereof in vacation,

may extend or abridge the time for filing the abstract of record, briefs, or other papers. [From Supreme Court Rule 41.]

(f) **Motions and Briefs Thereon.** All motions shall be typewritten. The party filing any such motion shall have 3 days in which to file a brief in support thereof; the party opposing shall have 5 days after service thereof to answer, and 3 days shall then be allowed after service for reply. The motion shall then stand submitted. [From Supreme Court Rule 46.]

(g) **Amicus Curiae.** An attorney admitted to practice before the supreme court may appear as amicus curiae in any pending cause only by request of the court, or by leave of court upon motion filed, setting forth the particular employment, relationship, or interest by reason whereof such leave is sought. [From Supreme Court Rule 17.]

(h) **Printing or Typewriting Abstracts and Briefs.** All abstracts of record and briefs shall bear, on the front cover, the number and title of the case, the court to which the writ of error lies, the name of the trial judge, and the names and addresses of attorneys filing the same. Typewritten briefs shall be legible and upon good paper eight and one-half inches by thirteen or fourteen inches. Except as otherwise provided, all briefs shall be printed and shall be on white wove antique finish book paper weighing sixty pounds to the ream, twenty-five inches by thirty-eight inches. They shall be printed on pages nine and one-quarter inches by seven and one-half inches when trimmed, in small pica type, leaded, face of type page twenty-two by forty ems pica, so printed as to leave an inside margin of one and one-half inches, and an outside margin of two and three-eighth inches, and a bottom margin of two inches. Extracts and quotations must be in the same type, either solid or indented. [From Supreme Court Rules 36 A and 37.]

(i) **Copies to be Served or Filed.** Two copies of each printed brief, abstract, and other paper and one copy of each typewritten paper shall be served on all parties, and proof of service filed with the clerk. No such service shall be required upon a defendant in error who has not entered his appearance in the supreme court as stated in the summons to hear errors, but an additional copy of each such paper shall be filed with the clerk. [From Supreme Court Rule 38.]

Committee Note.

For service see Rule 5.

(j) **Withdrawal of Papers from Files.** No paper shall be taken from the files, without leave of court, except the record, which may be withdrawn by counsel for 20 days for the purpose of making abstracts. Every paper taken from the files must be retained in the custody of the party withdrawing it and must not be in any manner mutilated, taken apart, cut or marked. [From Supreme Court Rule 47.]

(k) **Industrial Commission.** On motion for writs of error in cases determined by the Industrial Commission the record of the proceedings before the commission shall be arranged in chronological order, omitting all dupli-

cates, with folio numbers on the left margin, and a table of contents, which shall refer to the folio numbers. Briefs may be printed or typewritten. Within 15 days after issuance of the writ plaintiff in error shall file his brief; within 10 days after service thereof upon him defendant in error shall file his brief, and within 5 days after service thereof upon him plaintiff in error may file a reply brief. Ten copies of all such briefs shall be filed. No abstract of record is required. Such cases shall not be argued orally except upon order of the court. [From Supreme Court Rules 44 A and 45.]

- I. Subdivision (a).
 - A. General Consideration.
 - B. Application.
- II. Subdivision (c).
- III. Subdivision (e).
- IV. Subdivision (h).
- V. Subdivision (k).

Cross Reference.

For a discussion of this rule, see Address no. 17, appx. D.

I. SUDIVISION (a).

A. General Consideration.

Editor's note.—This subdivision is taken almost verbatim from Supreme Court Rule 36. Hence, cases construing that rule are placed in this note.

Counsel must comply with requirements in preparing cases for hearing.—The requirements were not adopted merely for the protection or convenience of litigants, but in a large measure as aids to the court in disposing of causes submitted and the practice cannot be tolerated of allowing counsel to determine for themselves in what manner they shall prepare a case for hearing, in disregard of the requirements prescribed by the statute. *Dubois v. People*, 26 Colo. 165, 166, 57 P. 187.

The Supreme Court has repeatedly visited the disregard of the requirements concerning abstracts and briefs with the penalty of a dismissal. *Dubois v. People*, 26 Colo. 165, 166, 57 P. 187, citing *Denver, etc., Ry. Co. v. Woy*, 7 Colo. 556, 5 P. 815; *Wilson v. People*, 25 Colo. 375, 55 P. 721; *Meyer v. Helland*, 2 Colo. App. 209, 29 P. 1135; *McDonald v. McLeod*, 3 Colo. App. 344, 33 P. 285; *Hammond v. Herdman*, 3 Colo. App. 379, 33 P. 933; *Buckey v. Phenicie*, 4 Colo. App. 204, 35 P. 277. See also, *Meldrum v. Bassler*, 40 Colo. 506, 90 P. 1033.

Thus upon failure of plaintiffs in error to include in the abstract of the record a copy of or reference to the decree and the special findings made by the jury, which were confirmed and added to by the court, the writ may summarily be dismissed. *Hurd v. Fleck*, 34 Colo. 262, 265, 82 P. 485, cited in note, Ann. Cas. 1913A, 684.

"Plaintiff in error shall prepare and file a printed abstract of the record which must set forth fully the points relied upon for the reversal of the judgment, and if in this respect the abstract is defective, the * * * writ of error may be dismissed." *Zall Jewelry Co. v. Stoddard*, 68 Colo. 395, 397, 190 P. 506, quoting from *Brennan Mercantile Co. v. Vickers*, 31 Colo. 324, 325, 73 P. 46.

So also a judgment may be affirmed upon appellant's failure to comply with the requirements for preparing abstracts and printing briefs. *Mitchell v. Pearson*, 34 Colo. 281, 82 P. 447.

By this provision, the printing of the abstract is made imperative, and the appellant or plaintiff in error, in order to obtain a review of his case, is compelled to incur the expense of such printing. *Phillips v. Corbin*, 25 Colo. 567, 570, 56 P. 180.

It requires that the abstract contain a brief statement of the contents of the pleadings, not such of them as the plaintiff in error thinks should be abstracted, but all of the pleadings in the case. *Palmer v. Sackett*, 82 Colo. 61, 64, 256 P. 1093.

"If counsel desire to question the sufficiency of any pleading such pleading should be in the abstract and other portions of the pleadings sufficient to understand the question urged." *Zall Jewelry Co. v. Stoddard*, 68 Colo. 395, 397, 190 P. 506, quoting from *Gerspach v. Barhyte*, 17 Colo. App. 489, 490, 68 P. 1057.

Errors assigned, which are not sufficiently presented by the record as abstracted, will not be passed upon. *Imboden v. People*, 40 Colo. 142, 150, 90 P. 608, cited in notes, 136 Am. St. Rep. 155, 40 L. R. A. (N. S.) 974, Ann. Cas. 1913A, 1208, 13 A. L. R. 1446, 24 A. L. R. 1411, citing *Venner v. Denver Union Water Co.*, 32 Colo. 205, 75 P. 412; *Zipperian v. People*, 33 Colo. 134, 79 P. 1018, cited in notes, 130 Am. St. Rep. 640, 641, 19 L. R. A. (N. S.) 486, 37 L. R. A. (N. S.) 791, 38 L. R. A. (N. S.) 1096, 52 L. R. A. (N. S.) 158, Ann. Cas. 1914C, 223; *Means v. Gotthelf*, 31 Colo. 168, 71 P. 1117.

As where the abstract fails to set forth enough of the record to disclose the nature of the controversy, the proceedings or judgment in the court below. *Purdy v. Geary*.

45 Colo. 129, 100 P. 426. See also, *Zall Jewelry Co. v. Stoddard*, 68 Colo. 395, 190 P. 506.

In such case it is presumed that trial court committed no prejudicial error.—Where the abstract of record is so deficient that the questions argued by plaintiffs in error in their brief cannot be determined by the reviewing court, it will be presumed that no prejudicial error was committed by the trial court. *Kestle v. Preuit*, 88 Colo. 419, 298 P. 415.

Parties who desire to urge error on the refusal to admit documents must put them in the abstract. References to the transcript of record are not in compliance with the rules. *Zall Jewelry Co. v. Stoddard*, 68 Colo. 395, 398, 190 P. 506. See also, *Michigan Fire, etc., Ins. Co. v. Wich*, 8 Colo. App. 409, 46 P. 687, cited in notes, 16 L. R. A. (N. S.) 1221, 23 L. R. A. (N. S.) 1150, Ann. Cas. 1916B, 948.

As court is not required to look elsewhere than abstract.—“Where the court is unable to determine from an inspection of the abstract whether any error was committed by the trial court, the practice does not require it to look elsewhere for the information.” *Zall Jewelry Co. v. Stoddard*, 68 Colo. 395, 398, 190 P. 506, quoting from *Denver Machinery Co. v. Merchant's Pub. Co.*, 4 Colo. App. 146, 35 P. 192.

The same rule applies where the abstract does not disclose an objection made and exception saved to the alleged erroneous ruling. “We are not obliged to search through the record to find that which it is clearly the duty of counsel to point out and print in his abstract.” *Zall Jewelry Co. v. Stoddard*, 68 Colo. 395, 399, 190 P. 506, quoting from *Thompson v. DeWeese-Dye Ditch, etc., Co.*, 25 Colo. 243, 248, 53 P. 507, cited in note, 9 A. L. R. 588.

But, under this provision defects in an abstract may, if necessary, be remedied. They are sometimes condoned. *Dailey v. Aspen Democrat Pub. Co.*, 46 Colo. 145, 146, 103 P. 303; *Lombard v. Overland Ditch, etc., Co.*, 41 Colo. 253, 92 P. 695. And for defects in the abstract the writ of error may be dismissed (*Macdermid v. Watkins*, 41 Colo. 231, 92 P. 701); only, however, when the plaintiff in error fails to offer a sufficient abstract after the defects are called to his attention (*Brennan Mercantile Co. v. Vickers*, 31 Colo. 324, 73 P. 46). *Sponce v. Denver*, 94 Colo. 578, 586, 32 P. (2d) 186, from dissenting opinion of Mr. Justice Bouck.

Under some circumstances and when there has been an apparent effort to comply with this provision, doubtless the Supreme Court would look to the transcript for the necessary information lacking in the abstract, or require a supplemental abstract filed, but where the abstract is so radically

deficient, the Supreme Court, consistent with good practice, must enforce the requirements and make the only order appropriate in the premises, dismissal of the writ of error. *Purdy v. Geary*, 45 Colo. 129, 131, 100 P. 426.

Interlineations made in an abstract in an effort to correct it, even if authorized, do not constitute a compliance with this provision. *Mitchell v. Pearson*, 34 Colo. 281, 284, 82 P. 447.

Folio numbers on the record should follow each other in numerical order. *Thompson v. McGregor*, 82 Colo. 146, 257 P. 364.

B. Application.

Objections and exceptions to the admission or exclusion of testimony must appear in the abstract. *Zall Jewelry Co. v. Stoddard*, 68 Colo. 395, 398, 190 P. 506.

An assignment of error based upon a document not appearing in the abstract will not be considered. *Zall Jewelry Co. v. Stoddard*, 68 Colo. 395, 397, 190 P. 506.

Failure to present contract in abstract.—An assignment of error based on instructions given relative to a written contract will not be considered where the contract is not presented in the abstract of record. *Merriner v. Jeppson*, 19 Colo. App. 218, 74 P. 341.

An assignment of error based on the admission of improper evidence in relation to a written contract will not be considered where the written contract is not presented in the abstract of record. *Id.*

Failure to properly present question of sufficiency of evidence.—On appeal, a motion for a new trial was relied on as presenting the question of the sufficiency of the evidence, but the only reference thereto in the abstract was “Affidavit of M. L. Brown, on motion for a new trial showing remarks of counsel in arguments objected to.” and it did not appear that any exception was reserved to any ruling the court might have made. It was held, that this is a plain violation of this provision, requiring the points relied on for reversal to be fully set forth in the abstract, and that, therefore, the sufficiency of the evidence to sustain the judgment cannot be reviewed. *Erie Min., etc., Co. v. Gearing*, 43 Colo. 181, 95 P. 300.

Where the evidence is not abstracted, the reviewing court will assume that it supported all the facts pleaded by the successful party and essential to the judgment. *Heini v. Bank of Krenmling*, 93 Colo. 350, 25 P. (2d) 1113, 89 A. L. R. 1442.

Competency of witnesses.—Where there is nothing in the abstract tending to call in question the competency of witnesses, and opposing counsel do not call attention to

anything in the transcript supplying the deficiency of the abstract, the appellate court will presume that the trial judge correctly determined such question, notwithstanding assignments of error concerning such competency. *Roberson v Wilmoth*, 40 Colo. 74, 90 P. 95.

Instructions.—Assignments of error based on the refusal of the court to give instructions requested will not be considered unless the abstract of record presents all the instructions given. *Pueblo v Froney*, 18 Colo. App. 351, 71 P. 893.

II. SUBDIVISION (c).

In the preparation of briefs counsel should comply with the requirements as to citation of cases. *Industrial Comm. v Continental Inv. Co.*, 85 Colo. 475, 277 P. 303.

Since a failure to so comply may result in having the brief stricken from the files. *Smart v Radetsky*, 86 Colo. 93, 278 P. 609.

Attempt to cite cases without name or volume is violation of provision.—A brief which attempts to cite decided cases, without giving the name of the case, or without giving the report in which it is found is a violation of this provision. *Clark v Kraig*, 21 Colo. App. 196, 120 P. 1044, cited in note, 59 A. L. R. 769.

III. SUBDIVISION (e).

Stipulations fixing or extending time for filing abstracts and briefs are disregarded unless expressly approved.—Parties cannot by stipulation or agreement fix or extend the time for filing abstracts and briefs in the Supreme Court contrary to the rules, and unless such agreements are approved by the court, they will be disregarded, and where the rules are ignored in the filing of abstracts and briefs by plaintiff in error the writ of error will be dismissed notwithstanding defendant in error may not insist on such dismissal. *Wilson v People*, 25 Colo. 375, 55 P. 721. See also, *La Junta, etc., Canal Co. v Fort Lyon Canal Co.*, 25 Colo. 515, 55 P. 728.

This rule will be rigidly enforced, where such alleged stipulations are oral, and a dispute arises between counsel as to what they

were, or whether or not, in fact, they were made, as we will not undertake to determine any disputed questions of fact on such matters. Rules of the court are for the purpose of enforcing an orderly and diligent preparation and submission of causes. They provide that when the required steps in each case cannot be taken within the time limited, on good cause shown, such time may be extended, but the application for such extension, except on the happening of an unforeseen contingency, must be made before the time to take the step for which further time is asked, has expired. *La Junta, etc., Canal Co. v Fort Lyon Canal Co.*, 25 Colo. 515, 519, 55 P. 728.

Motion for shorter time to file briefs is not considered where party requesting same caused delay.—A motion by plaintiff in error, asking that defendants in error be ruled to a shorter time for filing briefs will not be considered where the negligence of plaintiff in error in failing to have scire facias issued and served on defendants in error as required by the rules of the court is the cause of the case not being at issue. *State Board v People*, 29 Colo. 353, 68 P. 236.

IV. SUBDIVISION (h).

Noncompliance will result in dismissal.—Where an appellant or plaintiff in error fails to comply with this provision, the appeal or writ of error will be dismissed. *Dubois v People*, 26 Colo. 165, 57 P. 187.

Example of noncompliance.—A reply brief which, instead of being printed as such rule requires, is in indistinct and blurred type-writing flagrantly violates this provision. *Mitchell v Pearson*, 34 Colo. 281, 284, 82 P. 447.

V. SUBDIVISION (k).

Where brief of plaintiff in error was due December 15 and filed February 19 following, motion of defendant in error to dismiss because of delay in filing the brief is denied, because not filed in apt time, both abstract and brief having been filed before the motion was made. *Connell v Continental Cas. Co.*, 87 Colo. 249, 286 P. 278.

Rule 116. Original Jurisdiction.

A party seeking to invoke the original jurisdiction of the supreme court shall set forth in his complaint the circumstances which render it necessary or proper that the supreme court exercise its original jurisdiction. Cases in which the court exercises such jurisdiction shall be governed by these rules,

subject to the power of the court to prescribe different procedure. Relief in the nature of prohibition will not be granted except in matters of great public importance. The fact that a court has erroneously granted or denied change of venue, or is otherwise proceeding without or in excess of jurisdiction, will not be regarded as sufficient. [From Supreme Court Rule 57, Code Sec. 330, and Rule 5, United States Supreme Court. See also Colorado Constitution, Art. VI, Sec. 3.]

Committee Note.

See Rule 106, (4) for relief in the nature of prohibition.

Cross reference.—For a discussion of this rule, see Address no. 17, appx. D.

Editor's note.—Although the writ of prohibition has been abolished (see Rule 106), the nature remains the same, hence the following cases construing Rule 57 of the Supreme Court Rules, from which this rule was taken, have been placed in this note as they seem to still be applicable.

Relief is discretionary with the Supreme Court and is not granted unless in connection with other matters the inferior court has no jurisdiction to act. *People v. District Court*, 74 Colo. 48, 218 P. 912, cited in note, 55 A. L. R. 1127; *People v. County Court*, 77 Colo. 172, 235 P. 370; *People v. District Court*, 81 Colo. 163, 255 P. 447.

So an action will not lie to enjoin an order of the county court that a party to an action before it appear before a notary to have his deposition taken as upon cross-examination. *People v. County Court*, 77 Colo. 172, 235 P. 370.

It is not a matter of right. *People v. County Court*, 77 Colo. 172, 235 P. 370.

It is a power conferred by the constitution by means of which, when necessary, supervisory control may be exercised over inferior tribunals, acting without or in excess of their jurisdiction. Although the questions involved upon which the relief is asked may be reviewed on appeal or error, that is not conclusive against the right as to relief if in the judgment of the court, such remedies are not plain, speedy and adequate. *People v. District Court*, 30 Colo. 123, 130, 69 P. 597, cited in notes, 111 Am. St. Rep. 962, Ann. Cas. 1917A, 940, citing *People v. District Court*, 26 Colo. 386, 58 P. 604, 46 L. R. A. 850, cited in notes, 111 Am. St. Rep. 933, 954, 962, 50 L. R. A. 725, 51 L. R. A. 46, 109, 52 L. R. A. 299; *McInerney v. Denver*, 17 Colo. 302, 29 P. 516, cited in notes, 37 Am. St. Rep. 494, 92 Am. St. Rep.

96, 100, 102, 98 Am. St. Rep. 542, 104 Am. St. Rep. 1012, 110 Am. St. Rep. 150, 111 Am. St. Rep. 976, 1 L. R. A. (N. S.) 384, 17 L. R. A. (N. S.) 55, 70, Ann. Cas. 1912C, 37, 17 A. L. R. 574, 81 A. L. R. 732; *People v. District Court*, 29 Colo. 83, 66 P. 1068, cited in note, 11 Am. St. Rep. 957.

It will not issue when the petitioner has failed to act with reasonable promptness. *James v. James*, 95 Colo. 1, 32 P. (2d) 821.

Ordinarily, relief only lies to prevent the lower court from proceeding further with the cause, but where this would not give the relator the relief to which he is entitled, it may direct that all proceedings had in excess of jurisdiction be quashed and the order entered which should have been. *People v. District Court*, 30 Colo. 123, 130, 69 P. 597, cited in notes, 111 Am. St. Rep. 962, Ann. Cas. 1917A, 940, citing *People v. District Court*, 23 Colo. 466, 48 P. 500, cited in notes, 111 Am. St. Rep. 976, 978, 51 L. R. A. 45, 45 L. R. A. (N. S.) 1123, Ann. Cas. 1915D, 1007; *People v. District Court*, 28 Colo. 161, 63 P. 321, cited in note, 111 Am. St. Rep. 949.

It is allowed against trial in improper county.—In an action on contract, it appearing that defendant was entitled to have the case tried in the county of his residence, relief is allowed against the trial in another county. *People v. District Court*, 74 Colo. 121, 218 P. 1047.

It cannot supersede the ordinary functions of an appeal. *People v. District Court*, 30 Colo. 123, 132, 69 P. 597, cited in notes, 111 Am. St. Rep. 962, Ann. Cas. 1917A, 940; *People v. District Court*, 81 Colo. 163, 255 P. 447.

Lower court and judge are indispensable parties.—In an application to the appellate tribunal for relief against an inferior court, the court and judge thereof are indispensable parties. *James v. James*, 95 Colo. 1, 32 P. (2d) 821.

Rule 117. Oral Arguments.

Oral argument may be had on final hearing only by order of court, either on its own motion or on written request filed by a party at any time prior to the expiration of 15 days after the time when the reply brief may be filed; provided, however, that should the court conclude to make a final determination of any cause on application for supersedeas, oral argument will be allowed thereon if a motion therefor be filed before the expiration of 5 days from the time the reply brief may be filed. The clerk shall give the attorneys notice of the date set for argument. Arguments will be limited to 30 minutes to a side unless the court extends the time upon request filed before the date of argument has been set. If a case is argued orally in department, a party may during the argument request further oral argument should the case be heard by the court en banc, and failure to make such request shall constitute a waiver of the privilege. Oral argument will not be permitted on petition for rehearing. Failure to file opening, answer or reply brief shall preclude the party so failing from demanding oral argument. Reading of written or printed arguments or lengthy citations will not be permitted. [From Supreme Court Rule 43.]

For a discussion of this rule, see Address no. 17, appx. D.

In construing Rule 43 of the Supreme Court Rules from which this rule was taken, the court said that where no request for further oral argument was made, nor was

any request for an argument en banc made until after the announcement of the court's decision, the right, if it existed, was waived. *Scott v. Shook*, 80 Colo. 40, 48, 249 P. 259, 47 A. L. R. 1108, cited in notes, 79 A. L. R. 593, 604.

Rule 118. Disposition of Cause.

(a) **Failure to Prosecute Writ.** In all cases where the plaintiff in error shall fail duly to prosecute the writ of error, the supreme court may, upon dismissal thereof, enter judgment against the plaintiff in error for not more than twenty per cent of the amount of the judgment to reverse which the writ of error was sued out for damages in consequence of the delay occasioned by the writ of error. [Code Sec. 436.]

Committee Note.

2 C. S. A., Chap. 70, Secs. 19 and 23, applies to writs of error to review judgments in forcible entry and detainer proceedings.

(b) **Advancement on Docket.** Any pending action may be advanced on the docket and may be disposed of in such order as the court shall determine. In matters of great public importance the court may make such orders relating to the time and necessity for the filing of an abstract of record, the time of filing printed or typewritten briefs, and the time and necessity

for oral argument as it deems the circumstances demand. [From Code Secs. 329 and 330.]

(c) **Rehearings.** A petition for rehearing shall bear the cover endorsement prescribed in Rule 115 (h), the name of the justice who wrote the opinion, and shall state whether the decision was en banc or in department. It may be filed within 15 days after the filing of the opinion of the court, and shall briefly state the points claimed to have been overlooked or misapprehended by the court with proper references to the record and authorities relied upon. It shall be printed in conformity with Rule 115 (h), except where the decision was on application for supersedeas. No answer will be permitted and no action will be taken save to grant or deny the rehearing. The filing of such petition shall suspend proceedings under the decision until the petition is disposed of, unless the court shall direct otherwise. [From Supreme Court Rules 48 and 49.]

(d) **Affirmation.** When a writ of error is dismissed the supreme court may affirm the judgment. When the writ is dismissed, or the judgment is affirmed, the clerk of the trial court, upon the filing in his office of the remittitur, shall issue execution upon the judgment and proceed as though no writ of error had been prosecuted. [From Supreme Court Rule 55 and Code Sec. 440.]

(e) **Reversal.** On reversing a judgment the supreme court may order a retrial only of specified questions of fact. On a partial reversal it may enter such judgment as it shall deem proper or may remand the cause for further proceedings. Upon remand for further proceedings the payment of costs by the defendant in error shall not be a condition thereof, but the costs recovered upon writ of error shall await final determination of the case. If final determination be adverse to plaintiff in error, his costs recovered on writ of error shall be offset against the judgment finally recovered against him. [From Supreme Court Rule 54, Code Sec. 438.]

(f) **Disposition of Cause.** In all cases on writ of error the supreme court may enter final judgment and may issue execution thereon, or may remand the cause to the trial court in order that execution may there be issued or that other proceedings may be had therein. Any judgment may be affirmed without written opinion, but on reversal the court shall give its reasons for such action, except in cases where it renders judgment or directs what judgment shall be entered in the trial court. When the supreme court is equally divided in opinion, the judgment of the trial court shall stand affirmed. The supreme court shall disregard any error or defect not affecting the substantial rights of the parties. [From Supreme Court Rule 55, and Code Secs. 437 and 439.]

(g) **Remittitur.** Upon the denial of a petition for rehearing, or upon the expiration of the time allowed for filing the same, if no such petition shall have been filed, the clerk shall, except in an original proceeding, issue remittitur to the trial court and within 30 days thereafter return to the trial court, or otherwise dispose of as the supreme court may direct, all exhibits remaining in his office and not bound with the record. [From Supreme Court Rule 50.]

(h) **Copies of Opinion.** Where a written opinion is handed down the clerk shall mail a copy to the trial judge and to one attorney on each side of the case. [From Supreme Court Rule 56.]

- I. Rehearings.
- II. Reversal.
- III. Disposition of Cause.
 - A. General Consideration.
 - B. Divided Court.
 - C. Error not affecting Substantial Rights of the Parties.
- IV. Remittitur.

Cross Reference.

For a discussion of this rule, see Address no. 17, appx. D.

I. REHEARINGS.

The object of a petition for rehearing is to give the parties an opportunity to point out mistakes of law or fact, or both, which it may be claimed the court has made in reaching its conclusion. *Norris v Kelsey*, 60 Colo. 297, 301, 152 P. 1167, cited in note, 28 A. L. R. 1029.

A petition for rehearing will be stricken when it is a reargument in violation of this rule. *Washington Securities Co. v Goodstein*, 79 Colo. 343, 344, 246 P. 278.

So applications containing recital of evidence, and argument against the conclusions announced violates this rule.—See *Book v Book*, 71 Colo. 502, 208 P. 474; *Union Mut. Ins. Co. v Securities Corp.*, 83 Colo. 176, 263 P. 408.

But rule does not prohibit the citation of authorities, or a reference to those cited in the briefs; but it does aim to prevent the reargument of questions on which the court has passed. To refer the court to a specific matter, deemed necessary for consideration, is much more likely to produce the desired result than is an extended reargument in which such matter is included. *Book v Book*, 71 Colo. 502, 507, 208 P. 474.

A petition stating a point the court might have overlooked, and showing the relation of that point to the court's decision, and nothing irrelevant thereto, does not violate this rule. *Colburn v Ernst*, 75 Colo. 120, 223 P. 759.

The rule is not enforced where a cause is decided upon a question not raised by the record nor argued by counsel. *Model Land, etc., Co. v Baca Irrigating Ditch Co.*, 83 Colo. 131, 262 P. 517.

A three to three division of the Supreme Court on the question of granting or denying the first petition for a rehearing operates

to deny that petition. For that reason, under this rule, the plaintiff in error was without legal right to file the second petition for rehearing, and we should not have permitted him to do so. Under this rule, such petition should now be stricken, or if not stricken, then denied. *People v Tucker*, 96 Colo. 273, 274, 42 P. (2d) 472.

A petition which contains insulting criticism of the courts or flagrantly disregards court rules will be stricken. *Goodrich v Union Oil Co.*, 85 Colo. 218, 274 P. 935.

The appellate court holds jurisdiction of the cause for a fixed period for the purpose of permitting an application for a rehearing, and in no case except upon special order, is this jurisdiction relinquished during such period. *Norris v Kelsey*, 60 Colo. 297, 301, 152 P. 1167, cited in notes, 28 A. L. R. 1029.

In case the petition is filed, jurisdiction is retained until such application is finally disposed of, and which may result in a modification or even a reversal of the original judgment of the appellate court. *Norris v Kelsey*, 60 Colo. 297, 301, 152 P. 1167, cited in note, 28 A. L. R. 1029.

Thus the jurisdiction of the district court is not restored until the cause is finally disposed of by the appellate court. While the date of the actual issuance of the mandate may not be controlling, yet the date when such mandate may issue under the rules of the court, must be held to be the earliest date upon which the district court can acquire jurisdiction. Until this occurs the lower court is without jurisdiction for any purpose. *Norris v Kelsey*, 60 Colo. 297, 301, 152 P. 1167, cited in note, 28 A. L. R. 1029.

II. REVERSAL.

A judgment must be consistent with some legitimate theory based on the testimony, otherwise it should be set aside. *Mystic Tailoring Co. v Jacobstein*, 94 Colo. 306, 30 P. (2d) 263.

Where court may direct the proper judgment.—Where on review the record clearly discloses the entry of an erroneous judgment by the trial court, the cause may be remanded with directions to enter the proper judgment. *Mystic Tailoring Co. v Jacobstein*, 94 Colo. 306, 30 P. (2d) 263.

Where the trial court misconceives the force and effect of the evidence—in which there is little conflict—and reaches an erroneous conclusion, the reviewing court may direct the proper relief. *Kountz v Olson*, 94 Colo. 186, 29 P. (2d) 627.

Where plaintiff delays in taking steps to have the cause retried.—Where the Supreme Court reversed a judgment and remanded

the cause for further proceedings, and plaintiff failed for eight years to take any steps to have the cause retried, a motion to dismiss for want of prosecution should have been sustained, no reasonable excuse for the delay being shown. *Yampa Valley Coal Co. v. Velotta*, 83 Colo. 235, 263 P. 717.

Mixed questions of law and fact presented for determination, must be decided by the trial court, and where left undecided, the cause will be remanded for additional findings. *Cook v. Cook*, 74 Colo. 339, 221 P. 883.

On reversal of a judgment in an action for damages, the reviewing court orders a retrial only upon the question of liability, holding the amount of damages to have been established on the first trial. *Boyle v. Bay*, 81 Colo. 125, 126, 254 P. 156, cited in notes, 62 A. L. R. 1258, 1312, 1322.

III. DISPOSITION OF CAUSE.

A. General Consideration.

The same question cannot be re-litigated between the same parties merely by bringing in a different action. *Estate of Palmer*, 91 Colo. 79, 82, 11 P. (2d) 807, citing *Gordon v. Johnson*, 3 Colo. App. 139, 32 P. 347.

Judgment affirmed where a retrial would result in the same judgment.—*Boyd v. Munson*, 59 Colo. 166, 147 P. 662; *Swanson v. First Nat. Bank*, 74 Colo. 135, 139, 219 P. 784.

Conclusiveness of unreversed judgment.—“When a right or fact has been judicially tried and determined by a court of competent jurisdiction, * * * the judgment of the court, so long as it remains unreversed, should be conclusive upon the parties, and those in privity with them in law or estate.” 15 R. C. L., p. 953, § 430. *Estate of Palmer*, 91 Colo. 79, 82, 11 P. (2d) 807.

B. Divided Court.

Where one justice did not sit and the remaining six divided equally the judgment is affirmed by operation of law. *Speer v. People*, 52 Colo. 325, 122 P. 768; *Menzel v. McKee Live Stock Comm. Co.*, 71 Colo. 326, 206 P. 383; *People v. Stapleton*, 79 Colo. 629, 630, 247 P. 1062; *Pring v. Brown*, 96 Colo. 284, 42 P. (2d) 607; *People v. Tucker*, 96 Colo. 273, 42 P. (2d) 472; *Midland Oil Refining Co. v. Allen*, 93 Colo. 102, 23 P. (2d) 1119; *Craddock v. Craddock*, 90 Colo. 284, 8 P. (2d) 1112; *La Argo v. Cronbaugh*, 90 Colo. 286, 8 P. (2d) 1112; *Denver v. Gunter*, 63 Colo. 69, 163 P. 1118; *Court-right v. Legislative Statutory Comm.*, 100 Colo. 82, 65 P. (2d) 710; *Creel v. Pueblo Masonic Bldg. Ass'n*, 100 Colo. 281, 68 P. (2d) 23; *Larson v. Kalcevic*, 99 Colo. 279, 62 P. (2d) 572; *Taylor v. Board of Control*, 105 Colo. 219, 94 P. (2d) 184; *Snyder v. Board for Appointment, etc.*, 106 Colo. 83, 101 P. (2d) 436.

And constitutes no precedent. *Menzel v. McKee Live Stock Comm. Co.*, 71 Colo. 326, 206 P. 383; *People v. Stapleton*, 79 Colo. 629, 630, 247 P. 1062.

It has the same effect as if entered with the approval of all the justices. *Estate of Palmer*, 91 Colo. 79, 11 P. (2d) 807.

C. Error not Affecting Substantial Rights of the Parties.

Error which clearly does not prejudice the substantial rights of the complaining party, is not ground for reversal. *Parker v. Ullom*, 84 Colo. 433, 434, 271 P. 187; *School Dist. v. Union High School Dist.*, 25 Colo. App. 510, 139 P. 1039, cited in notes, Ann. Cas. 1917C, 922, 72 A. L. R. 502; *Swanson v. First Nat. Bank*, 74 Colo. 135, 219 P. 784; *Myers v. Hayden*, 82 Colo. 98, 257 P. 351; *Thuro v. Meredith*, 75 Colo. 471, 226 P. 867.

The principal contention of plaintiff in error is that the court erred in allowing the jury to find against the defendant on its counterclaim against plaintiff. There is evidence that defendant agreed to give plaintiff the lumber in the old bridge in consideration of having a contour road on plaintiff's land while a new bridge was being constructed. The defendant prevented plaintiff from getting more than a third of the old lumber. Plaintiff then took a certain amount of form lumber which had been used in the construction of the new bridge. The counterclaim is for this form lumber. There is evidence that defendant's employees authorized plaintiff to substitute the form lumber for the old lumber. The briefs are voluminous with a discussion of various questions, but the court finds nothing in them to preclude it from affirming the judgment under this section. *Colorado Bridge, etc., Co. v. Preuit*, 75 Colo. 107, 109, 224 P. 222.

Misnomer does not affect substantial rights of the parties.—The failure to insert the words “The board of” before the words “county commissioners of the county of Phillips” was a mistake in the name—a typical case of misnomer, which, if called to the attention of the trial court, could, and of course would, have been corrected. It was a mere defect which could not possibly affect the substantial rights of the parties, and such defects we are required to disregard. *Deere Plow Co. v. Phillips County*, 97 Colo. 196, 199, 48 P. (2d) 793, dissenting opinion of Mr. Justice Butler.

Neither does a variance between the pleading and proof. *Hiner v. Cassidy*, 92 Colo. 78, 80, 18 P. (2d) 309, citing *Otis & Co. v. Teal*, 74 Colo. 336, 221 P. 884, cited in notes, 57 A. L. R. 1151.

The complaint alleges that the representations were made with knowledge of their falsity. It is claimed that the proof does not show actual knowledge of the falsity, but that plaintiff relies on evidence of a

reckless disregard as to the truth of the representations, and it is argued that this is a fatal variance. This variance, if such existed, was not such as affected the substantial rights of the parties. It was, therefore, such error or defect as this court may disregard. In *Turk v Botsford*, 70 Ore. 198, 139 P. 925, it was held that such a variance was not one, in that case, as actually misled the adverse party to his prejudice in maintaining his defense upon the merits. In the court's opinion the same situation exists here. The variance did not constitute reversible error. *Otis & Co. v Teal*, 74 Colo. 336, 338, 221 P. 884, cited in note, 57 A. L. R. 1151.

The court does not think that the plaintiff in error is in a position to complain that the allegations of the complaint were not supported by the evidence or that there was a variance between the pleading and the proof. From our examination of the abstracts of the record we are forced to reach the conclusion that the evidence disclosed a greater degree of wrong-doing on the part of the detective than that alleged in the complaint, and we are unable to see that there was such a variance between pleading and proof as was prejudicial to the plaintiff in error. Under these circumstances the court cannot reverse the judgment on such grounds. *Southwestern Surety Ins. Co. v Miller*, 63 Colo. 15, 20, 164 P. 507.

Or a harmless instruction.—The court charged that if the jury should find for the plaintiff they should also state in their verdict that defendant was guilty of fraud and wilful deceit. There was no entry upon the docket of the court of the term for which

the defendant might be committed, and no order of commitment. It is held that the error in the instruction was harmless and should be disregarded. *Howard v Mitchell*, 27 Colo. App. 45, 146 P. 486.

Likewise the same is true where two issues for a single finding were submitted to the jury.—In a controversy over the ownership of certain securities, error, if any, in submitting to the jury two issues for a single finding, held to be without prejudice, where the record discloses that the complaining party was estopped from claiming ownership. *Johnson v Elliott*, 76 Colo. 358, 231 P. 675.

And of an improper admission of evidence to a fact which is established by other sufficient evidence.—*Pagosa Springs v People*, 23 Colo. App. 479, 130 P. 618, cited in notes, Ann. Cas. 1915C, 989, Ann. Cas. 1918E, 1153, 33 A. L. R. 1377.

IV. REMITTITUR.

This rule directs the clerk to issue remittitur, but contains no suggestion that it is essential to further proceeding in the trial court. In fact, the practice from earliest times has been for the clerk to issue the mandate only upon request. *Haggott v Plains Iron Works Co.*, 74 Colo. 37, 39, 218 P. 909, construing former rule 49.

When a case is determined in the supreme court on review, the lower court is thereupon immediately reinvested with jurisdiction without the issuance of, or receipt by the clerk of the trial court, of a remittitur. *Haggott v Plains Iron Works Co.*, 74 Colo. 37, 218 P. 909.

Rule 119. Sessions and Terms.

(a) **Sessions En Banc and In Departments.** The chief justice may convene the court en banc at any time, and shall do so on the written request of three justices. Subject to this provision, or as limited by the constitution, sessions of the court in departments for the purpose of hearing oral arguments, and designation of the justices to hear such arguments, shall be under the direction and control of the chief justice. In case of his absence or inability to act such duties shall devolve upon the justice who would next be entitled to become chief justice. [Supreme Court Rule 15.]

(b) **Terms.** The court shall always be open, all recesses being taken subject to call. At the close of business on the last day of each term the clerk shall enter an order adjourning the term. [Supplants Supreme Court Rule 16.]

For a discussion of this rule, see Address no. 17, appx. D.

CHAPTER XVIII

MILITARY SERVICE PROVISIONS

Rule 120. Orders Authorizing Sales Under Powers.

(a) **Motion and Notice.** Whenever by law an order of court is required authorizing a sale under a power of sale contained in an instrument, any interested person may file a motion verified by the oath of such person or of someone in his behalf, in any court of record asking for such order; such motion shall describe the instrument containing the power and the property sought to be sold thereunder and shall state the names of the persons having any interest in such property and shall state the address of each such person or shall state that his address is unknown. The court shall by order fix a time and place for the hearing of such motion. The clerk shall issue a notice containing a description of the instrument and of the property sought to be sold thereunder and the time and place of the hearing and shall state that an order is asked authorizing a sale of said property under such power of sale. Such notice shall be served by the clerk mailing, not less than ten days before the hearing, a copy thereof to each person stated in the motion as having any interest in such property whose address is stated in such motion and by the clerk posting, not less than ten days before the hearing, a copy thereof in a prominent place in his office. Such mailing and posting shall be evidenced by the certificate of the clerk.

(b) **Sales of Real Estate.** Provided, however, that when the property to be sold is real estate and the power of sale is contained in a deed of trust to a Public Trustee, the motion need state the names of only those persons who have any record interest in such real estate and the address of each such person as such address is given in the recorded instrument of writing and copies of the notice need be mailed only to each person so named in the motion whose address is so stated. If such recorded instrument of writing does not give such address no copy of the notice need be mailed to the particular person whose address is not so given; provided, however, that where only the county and state is given as the address of such person, then the copy of the notice shall be mailed to the county seat of such county.

(c) **Hearing and Order.** No motions or pleadings shall be required or permitted to be filed by anyone other than the person who filed the motion for the order authorizing the sale. At the time and place set for the hearing or to which the hearing may be continued, the court shall examine such affidavits as may have been filed and hear such testimony as may be offered and shall then summarily determine the motion and grant or deny said

motion and enter an order accordingly. At any time before the entry of such order the court may require such additional notice to be given as it may see fit.

(d) **Return of Sale.** The court shall require a return of such sale to be made to the court for its approval.

(e) **Docket Fee.** A docket fee of \$5.00 shall be paid by the person filing such motion.

Committee Note.

This rule was suggested by the real estate group of the Code Committee to facilitate compliance with Sec. 302 [3] Soldiers' and Sailors' Civil Relief Act of 1940, reading as follows: "No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court." This rule was adopted by the Supreme Court Oct. 28, 1940, to be effective Nov. 1, 1940.

For a discussion of this rule, see Address no. 7, appx. D.

CHAPTER XIX

RULES GOVERNING ADMISSIONS TO THE BAR

Rule 201. Examining Committees. A committee of law examiners is hereby constituted consisting of nine members of the bar, each of at least five years' standing. The members of said committee shall be appointed by the Supreme Court and hold office for a term of five years and until the appointment of their successors. Said committee shall be known as "The Law Committee" and its duty shall be to pass upon the educational qualifications, general and legal, of all applicants for admission to the bar.

A character committee is hereby constituted consisting of five members of the bar, each of at least five years' standing. The members of said committee shall be appointed by the Supreme Court and hold office for a term of five years and until the appointment of their successors. Said committee shall be known as "The Bar Committee" and its duty shall be to pass upon the ethical and moral qualifications of all applicants for admission to the bar.

In emergencies, vacancies in either committee shall be filled by the acting chief justice.

Rule 202. Classifications of Applicants. Applicants for admission to the bar are hereby divided into four classes, A, B, C, and D.

(A). Those who, not then being citizens of Colorado, have been admitted outside of this state (by the highest court of the jurisdiction having such power) and have practiced there eight years of the ten years immediately preceding application here, comprise class A.

(B). Those who, not then being citizens of Colorado, have been admitted outside this state (by the highest court of the jurisdiction having such power and under requirements equal to ours) and have practiced there three years of the five years immediately preceding application here, or taught for such period in an approved law school, comprise class B.

(C). Those who have been admitted outside this state, but do not belong to either class A or class B, comprise class C.

(D). Residents of Colorado who have not been admitted in any state, comprise class D.

Rule 203. Applications in Duplicate; When Filed. All applications shall be addressed to the court, made in duplicate on blanks furnished by the law committee and filed with the secretary of that committee. Those of classes C and D, with their accompanying affidavits and certificates, must be so filed not more than sixty and not less than thirty days before the date of the examination.

Rule 204. Affidavit as to Qualifications; Examination Fees. Every applicant shall accompany his application with an examination fee, which shall be \$35.00 for applicants in classes A and B and \$10.00 for applicants in classes C and D, and shall attach thereto his own affidavit that he is a citizen of the United States, that he believes in the form of government thereof and has never been disloyal thereto, that he is over the age of 21 years (giving his age), that he is a resident of Colorado (giving his address), that he has never been convicted of a felony, and that if admitted it is his intention to begin the practice of law within this state, or the teaching of law in an approved law school in Colorado, within three months from the date of his admission and to make the same his permanent and usual occupation.

Out of every examination fee of \$35.00 paid by applicants in classes A and B, the sum of \$25.00 shall be paid to the bar committee to defray the expenses of the committee's investigation of the character of such applicants.

Rule 205. Additional Affidavit in Classes A, B, and C. Every applicant in class A, B or C shall accompany his application with his own affidavit where he has resided and practiced during the period covered by his classification and that no disbarment proceedings were ever instituted against him, or, if such there were, reciting the forum, grounds and result thereof.

Rule 206. Proof of Requirements. Applicants in classes B and C shall furnish proof of the standard of requirements in the state of their admission, if requested by the law committee.

Rule 207. Qualifications Preliminary to Law Study. Every applicant in class C or D shall furnish satisfactory proof that at the beginning of his law studies he was eighteen years of age and had successfully completed two years of work in an approved college or university.

Rule 208. Classes C and D. Every applicant in class C or D shall have:

- (1) Completed the three year course of an approved day law school, or
- (2) Completed the three year course of a Colorado night school heretofore approved, or
- (3) Completed the four year course of any other approved night law school.

Rule 209. Admissions Not Entitled to Credit. Applicants who have been admitted in other jurisdictions while they were citizens of Colorado, or admitted by other than the highest court of the jurisdiction having such power, or admitted in jurisdictions whose requirements are less than ours and practiced therein less than eight years, shall be given no credit by reason of such admission.

Rule 210. Proof of Moral and Ethical Qualifications. Proof of the moral and ethical qualifications of applicants in classes A and B shall be by three affidavits, one of a member of the bar in good standing in the community where petitioner last practiced; one of a business man actively engaged in business therein; and one of a member of the bar in good standing known

personally to some member of the bar committee. Proof of such qualifications of applicants in classes C and D shall be by three affidavits; one of an instructor in the law school attended by applicant; one of a member of the bar in good standing known personally to some member of the bar committee; and one of a person chosen by applicant.

In any case the bar committee may require further proof.

Rule 211. Proof of Educational Qualifications. The general educational qualifications of applicants in classes A and B shall be established, *prima facie*, by proof of the required admission and practice. If contested, proof shall be made as required by the law committee and approved by the court.

Proof of the qualifications of applicants in classes C and D shall be by the certificate of an approved college or university of the completion of work therein as provided in Rule 207.

Rule 212. Proof of Legal Educational Qualifications. The legal educational qualifications of applicants in classes A and B shall be established, *prima facie*, by proof of the required admission and practice. If contested, proof shall be made as required by the law committee and approved by the court.

The legal educational qualifications of applicants in classes C and D shall be established by passing an examination conducted by the law committee as in these rules provided.

Rule 213. Special Credits in Class C. What credit shall be given applicants in class C by reason of study, admission or practice outside of Colorado, will be determined by the court according to the facts in each case, except as provided in Rule 209.

Rule 214. Semi-Annual Examinations. The law committee shall hold two examinations each year. Unless otherwise ordered, such examinations shall be held the last week in June or the first week in July, and the first week in December in the Capitol Building at Denver, Colorado.

Rule 215. Character Certificates Transferred to Bar Committee. Immediately upon receipt of an application for admission the secretary of the law committee shall transmit to the bar committee one copy thereof together with such affidavits and certificates as relate to the moral and ethical qualifications of the applicant.

Rule 216. Personal Interviews. The members of the bar committee, or a majority thereof, shall personally interview each applicant; those in classes A and B at such time as may be convenient and those in classes C and D at the time of the examination by the law committee. Such personal interviews may be considered by the bar committee in making its report.

Rule 217. Additional Examinations. Any applicant in class C or D who fails on examination to establish his legal educational qualifications may take the next succeeding examination. If he then fails he will be barred from fur-

ther examination for a period of one year. If he fails the third time he will be re-examined only by special permission of the court en banc and for good cause shown.

Rule 218. Notice of Applications; Objections; Reports and Recommendations. Within ten days after each examination of applicants in classes C and D the law committee shall furnish to the clerk of the Supreme Court, the clerk of the district court in each county, and to the secretary of the Colorado Bar Association, the names and addresses of all persons who have taken said examination. Each clerk shall immediately post the same in a conspicuous place in his office, keep them so posted for a period of thirty days, and furnish them to newspapers as may be requested.

Any person may, during said thirty days, present to the law committee any information bearing upon the question of the propriety of the admission of any such applicant; and any person, or any bar association may, during said period object to such admission. Should information so presented relate to the ethical or moral qualifications of the applicant it shall be immediately referred to the bar committee for its report. All such information shall be held confidential by the committees and the court unless in the opinion of the court its disclosure becomes necessary in a hearing on the application. The reports of the bar committee on applications in classes A and B shall be delivered to the secretary of the law committee within fifty days after the filing of the application, and those in classes C and D within fifty days after the taking of the examination. Within ten days from the date of the receipt of such reports the said secretary shall transmit the same, together with the reports of the law committee to the clerk of this court. Said reports shall cover any objections made to the admission of any applicant and all special information filed with the committee, and shall set forth the recommendation of each committee and the reasons therefor.

Rule 219. Applications Considered; Objections Heard. As soon as convenient after the receipt of the reports of the committees the court will consider the same and order that the several applicants be, or be not, admitted, or that their applications be continued for further hearing or consideration. The court may, in its discretion, consider objections to the admission of any applicant irrespective of the presentation of the same within said thirty-day period; provided always, that no applicant will be refused admission by reason of any charges without an opportunity to be heard. Hearing shall be had before the court en banc, in department, the grievance committee of the Colorado Bar Association, or a commissioner, as the court may determine. Immediately thereafter the evidence and findings shall be filed with the court, unless otherwise ordered.

Rule 220. All Admissions by Order En Banc. The admission of all applicants shall be by order of the court en banc, duly entered of record, from which any justice may dissent; and certificates of admission issued to applicants shall be signed by the justices, or a majority thereof.

Rule 221. Date for Administration of Oath. At the time of the entry of the order of admission of applicants in classes C and D the court will designate a day certain for the administration of the oath and the clerk of the court will notify said applicants thereof.

Rule 222. Oath of Admission, Discipline for Violation, and Code of Ethics. Every applicant shall, before receiving a certificate of admission, pay the license fee required by statute and take the following oath, before the Supreme Court en banc:

"I do solemnly swear by the everliving God; that,

I will support the Constitution of the United States and the Constitution of the state of Colorado;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice."

For good cause shown and by order of the acting chief justice said oath may be taken in open session of the district court, or otherwise, and when so taken shall be subscribed and filed with the clerk of the Supreme Court.

Note by Court.

As to affirmation in lieu of oath, section 2, Chapter 115, '35 C. S. A.

Rule 223. Violation of Oath Cause for Discipline. Any conduct inconsistent with the principles of said oath shall be considered unbecoming an attorney and cause for discipline.

Rule 224. Effect of Disbarment in Another State. Any attorney of this court who shall be disbarred by any court of the United States or the highest court of any other state or territory shall thereupon be cited to show cause why he should not be disbarred here. Upon that hearing the judgment of disbarment shall be prima facie proof of guilt.

Rule 225. Disbarment Upon Conviction of a Felony; Reinstatement. Should any member of the bar of this state be convicted of a felony the clerk of the court in which such conviction is had shall forthwith transmit to the

clerk of the Supreme Court a certified copy of the judgment. The Supreme Court may thereupon summarily suspend the defendant from his office of attorney at law. Such suspension shall stand until the defendant be ultimately acquitted of the felony, or in a disciplinary proceeding be restored to his said office, or until the further order of the Supreme Court.

Rule 226. Persons Not Permitted to Practice. Neither disbarred attorneys nor persons whose applications for examination or admission have been rejected for their failure to show good character, will be permitted to practice as attorneys in any justice of the peace or other court in this state.

Rule 227. Rules Applicable to Probate Practice. Practice in probate is the practice of law.

"'Practicing law,' forbidden to persons not thereto duly licensed, is not limited to practice before the courts. Corporations shall not practice law. The practice of drafting wills, living trust indentures and life insurance trust agreements is the practice

of law and counsel for executors and trustees named therein may not act as counsel for their testators or creators." *People v. Denver Clearing House*, 99 Colo. 50, 59 P. (2d) 468, cited in notes, 105 A. L. R. 1365, 1367, 1370, 1378, 111 A. L. R. 21, 26.

Rule 228. Canons of Ethics. The court adopts the Canons of Ethics published herein as a standard of professional conduct.

Canons of professional ethics were long ago adopted by the American Bar Association, and are set forth on pages 769-782, vol. 53, of the reports of the association, for the year 1928. As there said, they do not deny the existence of others equally imperative, though not specifically mentioned. They have been widely followed in other states, and by this rule, they are recommended as a standard of professional conduct. This court has considered them of such great importance as to have been printed as an

appendix to the 1924 and 1929 editions of our rules. We deem it highly essential to refer to these canons of ethics, at least by general reference. *People v. Ginsberg*, 87 Colo. 115, 121, 285 P. 758.

The fourth canon of ethics as recommended by this rule is declared to be in effect a statement of the substantive law. *Miller v. People*, 92 Colo. 481, 500, 22 P. (2d) 626, dissenting opinion of Mr. Justice Bouck.

Rule 229. Establishment and Administration of "Examination Fund." All examination fees required by Rule 204 shall be paid to the secretary of the law committee and be by him kept in a separate fund to be known as the "examination fund," which shall be used only to pay expenses incident to examinations, admission and discipline, as the court shall direct or approve. Said fund shall be kept in a depository designated by the chief justice, and be paid out only on warrants of said secretary countersigned by the chairman of said law committee and approved by the acting chief justice. For the faithful accounting therefor said secretary shall give security as directed by the court and approved by the chief justice.

Not less than thirty days nor more than sixty days after each regular examination the secretary of the law committee shall make and transmit in duplicate to the chairman of said committee a statement showing in detail all receipts and disbursements of said examination fund. One of said statements shall be forthwith transmitted by said chairman to the chief justice with such comments and recommendations as he may think proper.

CHAPTER XX
DISCIPLINE OF ATTORNEYS

Rule 241. Title of Proceedings. Proceedings in discipline shall be in the name of the people of the state of Colorado on the complaint of the Colorado Bar Association which shall act through its committee on grievances. Upon leave of the court first obtained, such proceedings may be on the complaint of other persons.

Rule 242. Pleadings, Service. In such proceedings the pleadings shall consist of a complaint and an answer, which shall be filed within 20 days after service of a copy of the complaint upon the defendant. Service and proof of service shall be made as provided in Rule 4. Upon failure to answer, the complaint shall be taken as confessed.

Rule 243. Evidence. Hearing shall be had as provided by Rule 219.

Rule 244. Delay. It shall be the duty of the plaintiff on notice to the defendant or his attorney to call the attention of the court to any delay.

Rule 245. Briefs and Arguments. Printed briefs and arguments and oral arguments shall be made and filed as required by rules of court in other cases, the brief of the plaintiff within ten days after the return of the evidence.

Rule 246. Orders. The court may disbar, suspend, censure or reprimand the defendant or take such other action as shall be just.

Rule 247. Costs. No initial fee shall be required of either party but the court may assess costs as it shall see fit.

Rule 248. Duty of Grievance Committee. The committee on grievances of the Colorado Bar Association shall investigate, on its own motion or upon complaint of any person, the improper conduct of any licensed attorney which affects his profession and the conduct of any other person purporting to act as an attorney. The files and transactions of the committee shall not be public records unless released by vote of the committee with the approval of the court.

Rule 249. Informal Hearings. If upon investigation and after opportunity to be heard the committee on grievances shall determine that the conduct of an attorney deserves a lesser penalty than disbarment or suspension, it may report this finding to the Supreme Court informally in a written communication setting forth the facts found and the conclusion of the committee. The court may then, after giving him opportunity to be heard informally before the court or committee thereof, publicly or privately reprimand the defendant or take such action as it thinks wise. The reprimand in such case, if public, shall

be administered by the reading of an order from the bench rebuking the person named for unprofessional conduct, and no part of the proceedings except in said order shall be included in the records of the court, but all other papers shall be returned to the files of the committee. The fact of such reprimand private or public shall be taken into consideration in any subsequent disciplinary proceedings against the defendant.

Rule 250. Attorney General. The attorney general shall prepare and prosecute all cases referred to him by the court for that purpose.

CHAPTER XXI

LIBRARY

Rule 261. Abstracts and Briefs. The clerk shall file with the librarian of the Supreme Court library a complete set of the printed abstracts of record and briefs filed in all cases, which shall be suitably bound in volumes uniform in size, as near as practicable, with the reports of this court, which shall become a part of the court library. The clerk shall also cause one set of the printed briefs and abstracts to be bound for the files of this court.

Rule 262. Withdrawal of Books; Abuse of Privileges. Books may be withdrawn from the library by others than members of the court only upon the written order of the acting chief justice. Before being so withdrawn they shall be registered with the librarian and must be returned within five days.

For any violation of this rule, or for abuse or mutilation of volumes, or any misuse of library privileges, the same may be withdrawn from the offender.

Rule 263. Silence in Library. Silence is required in the library. Employees shall observe and enforce this rule.

Rule 264. Proof of Parts of Book. Whenever proof of the laws of any other state, territory or foreign government is required, and the official print thereof is on file in the Supreme Court library, a typewritten copy thereof, certified by the librarian or clerk of this court to be the same as that contained in the official volume cited, shall have the same force and effect as such printed volume. [See Rule 44 C (f)].

Appendix A Forms

(See Rule 84)

Introductory Statement.

1. The following forms are intended for illustration only. They are limited in number. No attempt is made to furnish a manual of forms. Each form assumes the action to be brought in the City and County of Denver. The number of the action and, wherever the district has divisions, the division in which the action is pending, should be indicated in the caption of all papers filed after the action is assigned to a division.

2. Except where otherwise indicated each pleading, motion, and other paper should have a caption similar to that of the summons, with the designation of the particular paper substituted for the word "Summons." In the caption of the summons and in the caption of the complaint all parties must be named but in other pleadings and papers, it is sufficient to state the name of the first party on either side, with an appropriate indication of other parties. See Rules 4 (c), 7 (b) (2), and 10 C (a).

3. When the action is in the County Court, the complaint in all cases should contain the jurisdictional allegation, as set forth at Form 2.

4. Each pleading, motion, and other paper is to be signed in his individual name by at least one attorney of record (Rule 11). The attorney's name is to be followed by his address as indicated in Form 3. In forms following Form 3 the signature and address are not indicated. The plaintiff's address must be given on the complaint and the defendant's address on the answer. This is to furnish a proper address for service if writ of error is later sued out. (Rule 111 (e)).

5. If a party is not represented by an attorney, the signature and address of the party are required in place of those of the attorney.

Form 1.—Summons.

IN THE DISTRICT COURT IN AND FOR THE CITY AND
COUNTY OF DENVER AND STATE OF COLORADO

CIVIL ACTION NO..... DIV.....

A. B.,

vs.

C. D.,

Plaintiff,

Defendant.

SUMMONS

THE PEOPLE OF THE STATE OF COLORADO:

To the above named defendant, GREETING:

You are hereby summoned and required to file with the clerk an answer to the complaint within 20 days after service of this summons upon you. If you fail so to do, judgment by default will be taken against you for the relief demanded in the complaint.

If service upon you is made outside the State of Colorado, or by publication, or if a copy of the complaint be not served upon you with this summons, you are required to file your answer to the complaint within 30 days after service of this summons upon you.

This is an action*

Dated....., 19.....

.....
Clerk of the Court.

.....
Attorney for Plaintiff.

Address.....
.....

*If the summons is published or served without a copy of the complaint, after the word "action" state the relief demanded. If body execution is sought the summons must state "founded upon tort."

[Supplants Code Sec. 37.]

Form 2.—Allegation of Jurisdiction [for cases in the County Court.]

1. That the amount [or value of the property] involved herein does not exceed two thousand dollars.

Form 3.—Complaint on a Promissory Note

1. Defendant on or about June 1, 1939, executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on June 1, 1940, the sum of dollars with interest thereon at the rate of.....per cent. per annum].

2. Defendant owes to plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the sum of dollars, interest, and costs.

Signed :.....

Attorney for Plaintiff.

Address :.....

Address of Plaintiff :.....

Committee Notes.

1. The pleader may use the material in one of the three sets of brackets. His choice will depend upon whether he desires to plead the document verbatim, or by exhibit, or according to its legal effect.

2. Under the rules free joinder of claims is permitted. See Rules 8 (e) and 18. Consequently the claims set forth in each and all of the following forms may be joined with this complaint or with each other. Ordinarily each claim should be stated in a separate division of the complaint, and the divisions should be designated as counts successively numbered. In particular the rules permit alternative and inconsistent pleading. See Form 10.

3. On complaint and answer address of parties must be furnished. See Rules 11 and 111 (e).

Form 4.—Complaint on an Account

Defendant owes plaintiff dollars according to the account hereto annexed as Exhibit A.

Wherefore (etc. as in Form 3).

Form 5.—Complaint for Goods Sold and Delivered

Defendant owes plaintiff dollars for goods sold and delivered by plaintiff to defendant between June 1, 1939, and December 1, 1939.

Wherefore (etc. as in Form 3).

Committee Note.

This form may be used either where the action is for an agreed price or where it is for the reasonable value of the goods.

Form 6.—Complaint for Money Lent

Defendant owes plaintiff dollars for money lent by plaintiff to defendant on June 1, 1939.

Wherefore (etc. as in Form 3).

Form 7.—Complaint for Money Paid by Mistake

Defendant owes plaintiff dollars for money paid by plaintiff to defendant by mistake on June 1, 1939, under the following circumstances : [here state the circumstances with particularity—see Rule 9 (b)].

Wherefore (etc. as in Form 3).

Form 8.—Complaint for Money Had and Received

Defendant owes plaintiff dollars for money had and received from one G. H. on June 1, 1939, to be paid by defendant to plaintiff.

Wherefore (etc. as in Form 3).

Form 9.—Complaint for Negligence

1. On June 1, 1939, in a public highway called Broadway Street in Denver, Colorado, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of dollars.

Wherefore plaintiff demands judgment against defendant in the sum of dollars and costs.

Committee Note.

Since contributory negligence is an affirmative defense, the complaint need contain no allegation of due care of plaintiff.

Form 10.—Complaint for Negligence Where Plaintiff Is Unable to Determine Definitely Whether the Person Responsible Is C. D. or E. F. or Whether Both Are Responsible and Where His Evidence May Justify a Finding of Wilfulness or of Recklessness or of Negligence

A. B.,		} COMPLAINANT
	Plaintiff,	
	vs.	
C. D. and E. F.,		} DEFENDANTS
	Defendants.	

1. On June 1, 1939, in a public highway called Broadway Street, in Denver, Colorado, defendant C. D. or defendant E. F., or both defendants C. D. and E. F. wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of dollars.

Wherefore plaintiff demands judgment against C. D. or against E. F. or against both in the sum of dollars and costs.

Form 11.—Complaint for Conversion

1. On or about December 1, 1939, defendant converted to his own use ten bonds of the Company (here insert brief identification as by number and issue) of the value of dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum ofdollars, interest, and costs.

Form 12.—Complaint for Specific Performance of Contract to Convey Land

- 1. On or about December 1, 1939, plaintiff and defendant entered into an agreement in writing a copy of which is hereto annexed as Exhibit A.
- 2. In accordance with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.
- 3. Plaintiff now offers to pay the purchase price.

Wherefore plaintiff demands: 1, that defendant be required specifically to perform said agreement; 2, damages in the sum of dollars; and 3, that if specific performance is not granted plaintiff have judgment against defendant in the sum of dollars.

Committee Note.

Here, as in Form 3, plaintiff may set forth the contract verbatim in the complaint or plead it, as indicated, by exhibit, or plead it according to its legal effect.

Form 13.—Complaint on Claim for Debt and to Set Aside Fraudulent Conveyance under Rule 18 (b)

A. B.,

C. D. and E. F.,

vs.

Plaintiff,

Defendants.

COMPLAINT

- 1. Defendant C. D. on or about executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant C. D. promised to pay to plaintiff or order on the sum of dollars with interest thereon at the rate of per cent. per annum].
- 2. Defendant C. D. owes to plaintiff the amount of said note and interest.
- 3. Defendant C. D. on or about conveyed all his property, real and personal [or specify and describe] to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to.

Wherefore plaintiff demands: 1, That plaintiff have judgment against defendant C. D. for dollars and interest; 2, that the aforesaid conveyance to defendant E. F. be declared void and the judgment herein be declared a lien on said property; 3, that plaintiff have judgment against the defendants for costs.

Form 14.—Complaint for Interpleader and Declaratory Relief

- 1. On or about June 1, 1938, plaintiff issued to G. H. a policy of life insurance whereby plaintiff promised to pay to K. L. as beneficiary the sum of dollars upon the death of G. H. The policy required the payment by G. H. of a stipulated premium on June 1, 1939, and annually thereafter as a condition precedent to its continuance in force.

2. No part of the premium due June 1, 1938, was ever paid and the policy ceased to have any force or effect on July 1, 1938.

3. Thereafter, on September 1, 1938, G. H. and K. L. died as the result of a collision between a locomotive and the automobile in which G. H. and K. L. were riding.

4. Defendant C. D. is the duly appointed and acting executor of the will of G. H.; defendant E. F. is the duly appointed and acting executor of the will of K. L.; defendant X. Y. claims to have been duly designated as beneficiary of said policy in place of K. L.

5. Each of defendants, C. D., E. F., and X. Y. is claiming that the above-mentioned policy was in full force and effect at the time of the death of G. H.; each of them is claimed to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

6. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G. H.

Wherefore plaintiff demands that the court adjudge:

1. That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

2. That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

3. That, if the court shall determine that said policy was in force at the death of G. H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

4. That plaintiff recover its costs.

Form 15.—Motion to Dismiss, Presenting Defenses of Failure to State a Claim, and of Lack of Service of Process

The defendant moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action or in lieu thereof to quash the return of service of summons on the ground: [Here state reasons, such as, (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the State of Colorado; (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M. N. and X. Y. hereto annexed as Exhibit A and Exhibit B respectively; (c) etc.]

3. To dismiss the action on the ground: [Here state the same.]

Signed :.....

Attorney for Defendant.

Address :.....

Notice of Motion

To :.....
Attorney for Plaintiff.

Please take notice that on, the day of, A. D. 19....., the undersigned will apply to the court to set the attached motion for hearing [or to hear the attached motion forthwith].

Signed :.....
Attorney for Defendant.

Address :.....

Received a copy of the within notice and motion at the City and County of Denver, Colorado, this day of, A. D. 194...., at the hour of M.

.....
Attorney for Plaintiff.

Form 16.—Answer Presenting Defenses under Rule 12 (b)

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

If defendant is indebted to plaintiffs for the goods mentioned in the complaint, he is indebted to them jointly with G. H. G. H. is alive; is a citizen and resident of this state, is subject to the jurisdiction of this court, as to both service of process and venue; can be made a party, but has not been made one.

Third Defense

Defendant admits the allegation contained in paragraphs 1 and 4 of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint; and denies each and every other allegation contained in the complaint.

Fourth Defense

The right of action set forth in the complaint did not accrue within six years next before the commencement of this action.

Counterclaim

(Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint.)

Cross-Claim Against Defendant M. N.

(Here set forth the claim constituting a cross-claim against defendant M. N. in the manner in which a claim is pleaded in a complaint.)

Signed :.....
Attorney for Defendant.

Address :.....

Defendant's address :.....

Form 17.—Answer to Complaint Set Forth in Form 8, with Counterclaim for Interpleader

Defense

Defendant denies the allegations stated to the extent set forth in the counterclaim herein.

Counterclaim for Interpleader

1. Defendant received the sum of dollars as a deposit from E. F.

2. Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of it which he claims to have received from E. F.

3. E. F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore defendant demands:

1. That the court order E. F. to be made a party defendant to respond to the complaint and to this counterclaim.*

2. That the court order the plaintiff and E. F. to interplead their respective claims.

3. That the court adjudge whether the plaintiff or E. F. is entitled to the sum of money.

4. That the court discharge defendant from all liability in the premises except to the person it shall adjudge entitled to the sum of money.

5. That the court award to the defendant its costs and attorney's fees.

Form 18.—Motion to Bring in Third-Party Defendant

Defendant moves for leave to make E. F. a party to this action and that there be served upon him summons and third-party complaint as set forth in Exhibit A hereto attached.

Signed :.....
Attorney for Defendant C. D.

Address :.....

Notice of Motion

[Contents the same as in Form 15. No notice is necessary if the motion is made before the moving defendant has served his answer.]

*Rule 13 (h) provides for the court ordering parties to a counterclaim, but who are not parties to the original action, to be brought in as defendants.

Exhibit A

IN THE DISTRICT COURT IN AND FOR THE CITY AND
COUNTY OF DENVER AND STATE OF COLORADO

CIVIL ACTION NO..... DIV.....

A. B.,		Plaintiff,	}	SUMMONS
	vs.			
C. D.,		Defendant,		
		and		
		Third-party	}	
		plaintiff,		
	vs.			
E. F.,		Third-party		
		defendant.		

THE PEOPLE OF THE STATE OF COLORADO:
To the above-named third-party defendant, GREETING:

You are hereby summoned and required to file with the clerk an answer to the third-party complaint, a copy of which is herewith served upon you, and an answer to the complaint of the plaintiff, a copy of which is herewith served upon you, within 20 days after service of this summons upon you. If you fail so to do, judgment by default will be taken against you for the relief demanded in the third-party complaint.

If service upon you is made outside the State of Colorado, you are required to file your answer to said third-party complaint and your answer to said complaint of the plaintiff within 30 days after service of this summons upon you.*

Dated....., 19.....

.....
Clerk of the Court.	Attorney for Plaintiff.
Address :.....	

*If body execution is sought the summons must state the claim set out in said third-party complaint is "founded upon tort."

IN THE DISTRICT COURT IN AND FOR THE CITY AND
COUNTY OF DENVER AND STATE OF COLORADO

CIVIL ACTION NO..... DIV.....

A. B.,		Plaintiff,	} THIRD-PARTY COMPLAINT
	vs.		
C. D.,		Defendant and Third-party plaintiff,	
	vs.		
E. F.,		Third-party defendant.	

1. Plaintiff A. B. has filed against defendant C. D. a complaint, a copy of which is hereto attached as "Exhibit C."

2. [Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D., or upon which A. B. is entitled to recover from E. F. and not from C. D. The statement should be framed as in an original complaint.]

Wherefore C. D. demands judgment against third-party defendant E. F. for all sums that may be adjudged against defendant C. D. in favor of plaintiff A. B.

Signed :.....
Attorney for C. D., Third-party plaintiff.

Address :.....

Address of Third-party plaintiff :.....

Form 19.—Motion to Intervene as a Defendant under Rule 24

IN THE DISTRICT COURT IN AND FOR THE CITY AND
COUNTY OF DENVER AND STATE OF COLORADO

CIVIL ACTION NO..... DIV.....

A. B.,		Plaintiff,	} MOTION TO INTERVENE AS A DEFENDANT
	vs.		
C. D.,		Defendant.	
E. F., Applicant for intervention.			

E. F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the grounds (here state them) and as such has a defense

to plaintiff's claim presenting (both questions of law and of fact) which are common to the main action.*

Signed :.....
 Attorney for E. F., Applicant for intervention.
 Address :.....

*For other grounds of intervention, either of right or in the discretion of the court, see Rule 24 (a) and (b).

Notice of Motion
 [Contents the same as in Form 15]

IN THE DISTRICT COURT IN AND FOR THE CITY AND
 COUNTY OF DENVER AND STATE OF COLORADO

CIVIL ACTION NO..... DIV.....

A. B.,		Plaintiff,	} INTERVENER'S ANSWER
	vs.		
C. D.,		Defendant.	
E. F.,		Intervener.	

First Defense

Intervener admits the allegations stated in paragraphs and of the complaint; denies the allegations in paragraphs and

Second Defense

[Set forth any defenses]

Signed :.....
 Attorney for E. F., Intervener.
 Address :.....

Form 20.—Motion for Production of Documents, etc., under Rule 34

Plaintiff A. B. moves the court for an order requiring defendant C. D.

1. To produce and to permit plaintiff to inspect and to copy each of the following documents:

[Here list the documents and describe each of them.]

2. To produce and permit plaintiff to inspect and to photograph each of the following objects:

[Here list the objects and describe each of them.]

3. To permit plaintiff to enter [here describe property to be entered] and to inspect and to photograph [here describe the portion of the real property and the objects to be inspected and photographed.]

Defendant C. D. has the possession, custody, or control of each of the foregoing documents and objects and of the above mentioned real estate.

Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.

Signed:.....
Attorney for Plaintiff.

Address:.....

Notice of Motion
[Contents the same as in Form 15]

Exhibit A

State of Colorado.
City and County of Denver.

A. B., being first duly sworn says:

1. [Here set forth all that plaintiff knows which shows that defendant has the papers or objects in his possession or control.]
2. [Here set forth all that plaintiff knows which shows that each of the above mentioned items is relevant to some issue in the action.]

Signed: A. B.

[Jurat]

Form 21.—Request for Admission under Rule 36

Plaintiff A. B. requests defendant C. D. to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.

[Here list the documents and describe each document.]

2. That each of the following statements is true.

[Here list the statements.]

Signed:.....
Attorney for Plaintiff.

Address:.....

Form 22.—Allegation of Reason for Omitting Party

When it is necessary, under Rule 19 (c), for the pleader to set forth in his pleading the names of persons who ought to be made parties, but who are not so made, there should be an allegation such as the one set out below:

John Doe named in this complaint is not made a party to this action [because he is not subject to the jurisdiction of this court] or [for reasons stated].

Form 23.—Writ of Garnishment

IN THE DISTRICT COURT IN AND FOR THE CITY AND
COUNTY OF DENVER AND STATE OF COLORADO
CIVIL ACTION NO..... DIV.....

A. B.,		} WRIT OF GARNISHMENT
	vs.	
C. D.,		
	Plaintiff,	
	Defendant.	

The People of the State of Colorado :

To.....Garnishee.

You are hereby notified that you are attached as garnishee in the above entitled action, and you are commanded not to pay any debt due or to become due from yourself to the said....., defendants, or either of them, and that you must retain possession and control of all personal property, effects, and choses in action of said..... defendants, or either of them, in order that the same may be dealt with according to law; you are required to answer the interrogatories attached hereto within 20 days from the date of the service of this writ upon you. In case of your failure within the time aforesaid, the plaintiff may apply to the court for relief against you ex parte.

Given under my hand this day of, 194.....
.....
Sheriff.

Interrogatories

1. Are you in any manner indebted to the defendants, or either of them, either in property or money, and is the same now due? If not due, when is the same to become due? State fully all particulars.

Answer.

2. Have you in your possession, in your charge, or under your control, any property, effects, goods, chattels, rights, credits, or choses in action of said defendants, or either of them, or in which he is interested? If so, state what is the value of the same, and state fully all particulars.

Answer.

3. Do you know of any debts owing to the said defendant, whether due or not due, or any property, effects, goods, chattels, rights, credits, or choses in action, belonging to him, or in which he is interested, and now in the possession or under the control of others? If so, state the particulars.

Answer.

[Insert other interrogatories.]

.....
(Signature of Garnishee.)

I [insert the name of garnishee], do solemnly swear (or affirm) that the answers to the foregoing interrogatories by me subscribed, are true, so help me God.

.....
(Signature of Garnishee.)

Subscribed and sworn to before me this day of
19.....

.....
(Signature of Officer.)

[From Code Secs. 133, 134 and 136.]

Appendix B

Miscellaneous Provisions of the Code of Civil Procedure Left in the Statutes.

§ 1. **Limitation of One Year from March 14, 1923, to Set Aside Judgments against Unknown Parties.** No action shall be brought after the expiration of one year from the date this section goes into effect to set aside any decree or judgment entered in any action heretofore brought against unknown parties where there has been a substantial compliance with section 50 of the code of civil procedure of the Revised Statutes of 1908 or where there has been a substantial compliance with the requirements of this section. [L. '87, p. 109, § 4; Code '08, § 50; L. '23, p. 218, § 1; § 50 (i) Code of Civil Procedure.]

§ 2. **Libel and Slander; How Pleaded.** In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts, for the purpose of showing the application to the plaintiff, of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff shall establish on the trial that it was so published or spoken. [L. '87, p. 114, § 68; Code '08, § 74; § 74 of the Code of Civil Procedure.]

Cross reference.—See the following section and the note thereto.

It is proper for the injured party to plead that the defamatory words were spoken by the master, although in fact they were uttered by his employee. In such a situation the acts of the servant are the acts of the master, where the defamatory words were spoken or published by the authority or with the consent of the latter. *Kendall v. Lively*, 94 Colo. 483, 31 P. (2d) 343.

Pleading identity of party libelled.—It has been held under a similar statute that even where the person against whom the libelous charge is made is so ambiguously described that, without the aid of extrinsic facts, his identity cannot be ascertained, it is sufficient

to state generally that it was published concerning the plaintiff and that the averments and colloquium which were formerly necessary to connect the libel with the plaintiff may be dispensed with. See *Petsch v. Dispatch Printing Co.*, 40 Minn. 291, 41 N. W. 1034. *Craig v. Pueblo Press Pub. Co.*, 5 Colo. App. 208, 212, 37 P. 945, cited in notes, 48 L. R. A. (N. S.) 1217, Ann. Cas. 1914D, 1151, 91 A. L. R. 1163.

Evidence of pecuniary loss is unnecessary to a right of action for a libelous charge of attempt to commit murder. *Republican Pub. Co. v. Miner*, 12 Colo. 77.

Applied in *Switzer v. Anthony*, 71 Colo. 291, 206 P. 391; *Bearman v. People*, 91 Colo. 486, 16 P. (2d) 425.

§ 3. **Same; Pleading and Evidence.** In an action for libel or slander the defendant may, in his answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and whether he prove the justification or not, he may give in evi-

dence the mitigating circumstances. [L. '87, p. 114, § 69; Code '08, § 75; § 75 of the Code of Civil Procedure.]

I. Defenses.

A. Truth.

B. Qualified Privilege.

II. Mitigation of Damages.

I. DEFENSES.

A. Truth.

Truth of published matter, established by evidence, is a complete justification and defense. *Republican Pub. Co. v Mosman*, 15 Colo. 399, 409, 24 P. 1051, cited in notes, 29 Am. St. Rep. 668, 116 Am. St. Rep. 804, 812, Ann. Cas. 1914C, 291, 43 A. L. R. 888, 90 A. L. R. 1176, 1196, 92 A. L. R. 1128.

Other states have legislative provisions similar to this section concerning the rights of defendants in actions for damages for libel and slander, and the scope thereof has been considered by the courts of those states. See *Bush v Prosser*, 11 N. Y. 347; *Bisbey v Shaw*, 12 N. Y. 67; *Wilson v Fitch*, 41 Cal. 363. *Republican Pub. Co. v Miner*, 12 Colo. 77, 87, 20 P. 345, cited in notes, 15 Am. St. Rep. 339, 341, 56 A. L. R. 255.

The truth of the charge must be shown.—Where the publication is not privileged, the rule is that where the libelous article is published as being alleged in the complaint, it is not sufficient as a defense to show that it was thus alleged, but the truth of the charge must be shown. See *Republican Pub. Co. v Miner*, 3 Colo. App. 568, 34 P. 485, cited in notes, Ann. Cas. 1918E, 101, 40 A. L. R. 583, 66 A. L. R. 1257, 1259; *Starkie on Slander and Libel*, 278; *Townshend on Slander and Libel*, (4th Ed.), sec. 210; *Odgers on Libel and Slander*, pp. 161-172; *Jones, etc., Co. v Townsend*, 21 Fla. 431, 58 Am. Rep. 676; *Skinner v Powers*, 1 Wend. (N. Y.) 451; *Dement v Houston Printing Co.*, 14 Tex. Civ. App. 391, 37 S. W. 985; *Evans v Smith*, 5 T. B. Mon. (Ky.) 363, 17 Am. Dec. 74; *Cooley on Torts* (2d Ed.), p. 220. *Meeker v Post Printing, etc., Co.*, 55 Colo. 355, 357, 135 P. 457, Ann. Cas. 1915A, 126, cited in notes, 50 L. R. A. (N. S.) 1042, 51 L. R. A. (N. S.) 369, 52 L. R. A. (N. S.) 208, Ann. Cas. 1914D, 898, Ann. Cas. 1915D, 892, 896, 1267, 1269, Ann. Cas. 1918C, 335, 43 A. L. R. 888, 52 A. L. R. 1438, 74 A. L. R. 733.

The defendant may plead the truth of the alleged libel without admitting the publication. *Daniels v Stock*, 21 Colo. App. 651, 652, 126 P. 281, cited in note, Ann. Cas. 1917C, 712.

B. Qualified Privilege.

Qualified privilege is an affirmative defense to be pleaded by defendant. *Rado-*

vich v Douglas, 84 Colo. 149, 268 P. 575. See also *Morley v Post Printing, etc., Co.*, 84 Colo. 41, 268 P. 540.

This defense may be pleaded without admitting the publication.—See *Daniels v Stock*, 21 Colo. App. 651, 652, 126 P. 281, cited in note, Ann. Cas. 1917C, 712.

Defense of privilege is destroyed if plaintiff proves actual malice.—It is the law that the condition that makes a published communication privileged is that it be not made maliciously. In such a case the law does not imply malice from the publication itself, but casts upon the plaintiff the burden of alleging and proving actual malice; but if he does this, the defense of privilege is destroyed. *Morley v Post Printing, etc., Co.*, 84 Colo. 41, 42, 268 P. 540.

The defense of qualified privilege is precluded where it is not pleaded, and facts alleged in the complaint, upon which it might be based, are denied. *Radovich v Douglas*, 84 Colo. 149, 268 P. 575.

Unless the complaint sufficiently pleads facts showing that the publication is privileged then it is not necessary that defendant affirmatively plead that defense. *Radovich v Douglas*, 84 Colo. 149, 268 P. 575.

Where it appears from the allegations of the complaint that the publication sued upon is privileged, a demurrer is the proper method of raising the point. *Morley v Post Printing, etc., Co.*, 84 Colo. 41, 42, 268 P. 540.

II. MITIGATION OF DAMAGES.

Defendant may rely upon mitigating circumstances to reduce the damages, though pleaded in bar of the action. *Rocky Mountain News Printing Co. v Fridborn*, 46 Colo. 440, 104 P. 956, 24 L. R. A. (N. S.) 891, cited in notes, 48 L. R. A. (N. S.) 618, Ann. Cas. 1914D, 898.

The defendant is entitled to give in evidence any circumstances properly in mitigation of said publication, for the purpose of reducing the amount of damages, even if the publication was, in fact, false. *Republican Pub. Co. v Mosman*, 15 Colo. 399, 409, 24 P. 1051, cited in notes, 29 Am. St. Rep. 668, 116 Am. St. Rep. 804, 812, Ann. Cas. 1914C, 291, 43 A. L. R. 888, 90 A. L. R. 1176, 1196, 92 A. L. R. 1128.

The mitigating circumstances are limited to those tending to show a mitigation of the injury inflicted—a mitigation of the damages naturally flowing therefrom. *Republican Pub. Co. v Miner*, 12 Colo. 77, 88, 20 P. 345, cited in notes, 15 Am. St. Rep. 339, 341, 56 A. L. R. 255.

Thus the circumstances showing the acts and conduct of the party inflicting injury by libel or slander in retracting or explaining the matter published, or anything else tending to lessen or to remove the injury or in any way to restore the injured party to the esteem previously enjoyed, are admissible in mitigation. *Id.*

The accusation being an attempt to murder a family by poison, the answer alleging publication in good faith for a lawful purpose, without averring its truth, evidence that the persons mentioned in the alleged libelous article were poisoned; that a representative of defendant called on plaintiff after the publication of the accusation, and she refused to see him; and that the charges in the article were currently reported in the neighborhood at and before its publication,—is not admissible under this section as such facts do not tend to reduce the damage, and, no punitive damages being allowed in Colorado, circumstances tending to establish or rebut the inference of malice are immaterial. *Id.*

Thus rumors and reports prior to publication are admissible.—Giving our statute a liberal construction, and especially considering how the pleadings in this action are framed, we are of the opinion that common reports and rumors, to the same effect as the defamatory publication complained of, if circulated before such publication and without the agency of the defendant, were proper to be admitted in evidence, and should have been submitted to the jury by an appropriate and well-guarded instruction, not in any sense as a justification of the publication, but as matter tending in some degree, perhaps, to show that the plaintiff had suffered less damages than he might otherwise have sustained by reason of the publication. *Republican Pub. Co. v. Mosman*, 15 Colo. 399, 412, 24 P. 1051, cited in notes, 29 Am. St. Rep. 668, 116 Am. St. Rep. 804, 812, Ann. Cas. 1914C, 291, 43 A. L. R. 888, 90 A. L. R. 1176, 1196, 92 A. L. R. 1128.

And good faith may be pleaded.—In *Edwards v. San Jose Printing, etc., Soc.*, 99 Cal. 431, 34 P. 128, 37 Am. St. Rep. 70, it is held, that while good faith is not a defense, it may be pleaded in mitigation of damages. *Rocky Mountain News Printing Co. v. Fridborn*, 46 Colo. 440, 451, 104 P. 956, 24 L. R. A. (N. S.) 891, cited in notes, 48 L. R. A. (N. S.) 618, Ann. Cas. 1914D, 898.

So also it has been held that a defendant newspaper may plead that it merely copied the libelous article from another paper. See *Arnott v. Standard Ass'n*, 57 Conn. 86, 17 A. 361, 3 L. R. A. 69. *Rocky Mountain News Printing Co. v. Fridborn*, 46 Colo. 440, 451, 104 P. 956, 24 L. R. A. (N. S.) 891, cited in notes, 48 L. R. A. (N. S.) 618, Ann. Cas. 1914D, 898.

The denial of malice does not constitute a good plea in mitigation of damages; it sets forth no allegation of facts as required by our code and held by all the authorities necessary in order to make up such an issue. *Meeker v. Post Printing, etc., Co.*, 55 Colo. 355, 359, 135 P. 457, Ann. Cas. 1915A, 126, cited in notes, 50 L. R. A. (N. S.) 1042, 51 L. R. A. (N. S.) 369, 52 L. R. A. (N. S.) 208, Ann. Cas. 1914D, 898, Ann. Cas. 1915D, 892, 896, 1267, 1269, Ann. Cas. 1918C, 335, 43 A. L. R. 888, 52 A. L. R. 1438, 74 A. L. R. 733.

The mitigating circumstances are new matter to be pleaded in the answer.—Under code provisions like ours, it is held that justification and mitigating circumstances are new matter to be pleaded in the answer. See *Bliss on Code Pleading* (3d Ed.). §§ 361-363; vol. 13, Ency. of Pl. & Pr., p. 77; *McKane v. Brooklyn Citizen*, 53 Hun. 132, 6 N. Y. S. 171; *Fry v. Bennett*, 3 N. Y. Super. Ct. 201; *Mielenz v. Quasdorf*, 68 Iowa 726, 28 N. W. 41. *Meeker v. Post Printing, etc., Co.*, 55 Colo. 355, 358, 135 P. 457, Ann. Cas. 1915A, 126, cited in notes, 50 L. R. A. (N. S.) 1042, 51 L. R. A. (N. S.) 369, 52 L. R. A. (N. S.) 208, Ann. Cas. 1914D, 898, Ann. Cas. 1915D, 892, 896, 1267, 1269, Ann. Cas. 1918C, 335, 43 A. L. R. 888, 52 A. L. R. 1438, 74 A. L. R. 733.

Which should state the facts relied upon.—The general rule is in specially pleading mitigating circumstances that the answer should state the facts on which the mitigation is predicated. See 25 Cyc. 464; *Fenstermaker v. Tribune Pub. Co.*, 13 Utah 532, 45 P. 1097, 35 L. R. A. 611; *Knox v. Commercial Agency*, 40 Hun. 508. *Meeker v. Post Printing, etc., Co.*, 55 Colo. 355, 358, 135 P. 457, Ann. Cas. 1915A, 126, cited in notes, 50 L. R. A. (N. S.) 1042, 51 L. R. A. (N. S.) 369, 52 L. R. A. (N. S.) 208, Ann. Cas. 1914D, 898, Ann. Cas. 1915D, 892, 896, 1267, 1269, Ann. Cas. 1918C, 335, 43 A. L. R. 888, 52 A. L. R. 1438, 74 A. L. R. 733.

In order to advise plaintiff so that issues may be framed thereon.—One reason for the rule requiring a defendant to plead his facts in mitigation of damages is, that the plaintiff may be advised as to what facts the defendant relies upon as his defense in that respect, and in order that issues may be framed thereon, so as to prevent surprise at the trial concerning the facts which the defendant intends to prove in order to sustain this defense. It is based upon the same necessity which requires written pleadings in all cases in courts of record. *Rocky Mountain News v. Fridborn*, 46 Colo. 440, 104 P. 956, 24 L. R. A. (N. S.) 891, cited in notes, 48 L. R. A. (N. S.) 618, Ann. Cas. 1914D, 898; *Meeker v. Post Printing, etc., Co.*, 55 Colo. 355, 359, 135 P. 457, Ann. Cas. 1915A, 126, cited in notes, 50 L. R. A. (N. S.) 1042, 51 L. R. A. (N. S.) 369, 52 L.

R. A. (N. S.) 208, Ann. Cas. 1914D, 898, Cas. 1918C, 335, 43 A. L. R. 888, 52 A. L. Ann. Cas. 1915D, 892, 896, 1267, 1269, Ann. R. 1438, 74 A. L. R. 733.

§ 4. **Funds of State and Municipal Corporations Subject to Garnishment; Salaries and Fees Exempt.** The state of Colorado, municipal corporations, quasi-municipal corporations, and any officer, board or commission thereof, having the control of the disbursing of any fund, whether the same be derived from appropriations, levies, fees, licenses, special taxes, or otherwise, within the state of Colorado, shall be subject to garnishment upon writs of attachment and execution in the same manner as private corporations are now, or may hereafter be, subject to garnishment under such writs; provided, however, that the state of Colorado shall not be subject to garnishment regarding salaries, or fees, due to any officer designated as such, and whose salary, or fees, is fixed by the provisions of the constitution of the state of Colorado. [L. '27, p. 374, § 1; § 132A of the Code of Civil Procedure.]

Cross reference.—As to procedure, see Rule 103 (c).

Former section held unconstitutional.—Session Laws 1911, p. 445, § 1, so far as it concerns the garnishment of counties, is unconstitutional and void because the subject of garnishment of counties is not clearly expressed in the title of the act. *McFerson v Board of County Com'rs*, 78 Colo. 354, 241 P. 733. See const. art. 5, § 21.

In the absence of a statutory provision therefor, a county is not subject to garnishment. *McFerson v Board of County Com'rs*, 78 Colo. 354, 241 P. 733.

"Municipal corporations" held not to comprehend counties.—It was held in *Sterner v Board of County Com'rs*, 5 Colo. App. 379, 38 P. 839, cited in notes, 51 Am. St. Rep. 119, 37 L. R. A. 208, 2 A. L. R. 1587, 46 A. L. R. 648, 60 A. L. R. 828 (followed in *Gann v Board of County Com'rs*, 6 Colo. App. 484, 41 P. 829, cited in notes, 37 L. R. A. 208, 60 A. L. R. 828, and *Board of County Com'rs v Brown Bros.*, 6 Colo. App. 43, 39 P. 989, cited in notes, 51 Am. St. Rep. 119, 37 L. R. A. 208, 60 A. L. R. 828) that the words "municipal corporations" as used in the act of 1891 do not comprehend coun-

ties, and that, therefore, counties are not subject to garnishment. In the body of the act of 1891 the term "municipal corporations" was used without any qualifications or associated terms, just as it was in the title. What it meant in the body of the act was what it meant in the title, and vice versa. It didn't include counties within its meaning. Moreover, a county is not, strictly speaking, a municipal corporation. 15 C. J. 392. *McFerson v Board of County Com'rs*, 78 Colo. 354, 356, 241 P. 733.

A municipal corporation is not subject to garnishment for the salary of a public officer, on the ground of public policy. The act of 1891 (Sess. Laws, 1891, p. 234) making municipal corporations subject to garnishment the same as private corporations and persons, was not intended to make such corporations liable to garnishment for officers' salaries. *Troy Laundry, etc., Co. v Denver*, 11 Colo. App. 368, 53 P. 256, cited in notes, 96 Am. St. Rep. 451, 54 L. R. A. 570, 59 L. R. A. 354, 56 A. L. R. 602; *Lewis v Denver*, 9 Colo. App. 328, 48 P. 317, cited in notes, 96 Am. St. Rep. 451, 56 A. L. R. 602.

Applied in *State v Elkins*, 84 Colo. 409, 270 P. 875.

§ 5. **Other Salaries, Wages and Fees.** It is hereby declared that no provision of sections 4 to 8 is contrary to public policy, and that the provisions of said sections are meant to apply to all salaries, wages, fees, credits, choses in action, other than such as are exempt under the provisions of the last preceding section, whether the collection of the same might be enforced under any action in court, by writ of mandamus, or in any manner whatsoever. [L. '27, p. 375, § 2; § 132B of the Code of Civil Procedure.]

§ 6. **Summons; How Served.** Garnishee summons issued upon writs of attachment and execution shall be served upon the officer of such state, municipal corporation, quasi-municipal corporation, board of commission

thereof, whose duty it is to issue warrants, checks, or money for the payment to any officer, employee, or other person, whose salary, wages, earnings or money due him is sought to be held. Service of such garnishee summons on such officer shall be made by leaving a copy thereof with him, personally, or in the event of his absence from his office, then by leaving a copy thereof in his office with the chief clerk, deputy or other employee of the office then in charge thereof. [L. '27, p. 375, § 3; § 132C of the Code of Civil Procedure.]

§ 7. **Garnishee to Answer.** It shall be the duty of such officer to answer any garnishee summons served upon him, under the provisions of sections 4 to 8, in the same manner as is now, or may be hereafter, provided by law for the answer of garnishee summons by private corporations; provided, however, that if such answer is accompanied by a certificate of such officer that the same is true, such answer need not be under oath or affirmation, and such officer shall not be required to appear and answer in person, but may file his answer in writing or submit the same by United States mail to the court, or clerk thereof, or the justice of the peace, designated in such summons, and provided further, the said officer need not include as money due the amount of any warrant, or check, drawn and signed, prior to the time of the service of such garnishee summons. [L. '27, p. 375, § 4; § 132D of the Code of Civil Procedure.]

§ 8. **Order of Court.** Such officer shall abide by the order of the court, or the justice of the peace, with regard to paying into court any amount ordered, not however in excess of the salary, wages, earnings or money due such officer, employee or other person whose salary, wages or money due him is sought to be held to the time of the service of such garnishee summons. [L. '27, p. 376, § 5; § 132E of the Code of Civil Procedure.]

§ 9. **Injunction to Stay Proceedings at Law; Venue.** No writ of injunction shall be granted to stay proceedings, under a judgment obtained before a justice of the peace, for a sum not exceeding twenty dollars, exclusive of costs. [L. '87, p. 140, § 145; Code '08, § 161; § 162 of the Code of Civil Procedure.]

See committee note under Rule 65 C (i).

§ 10. **Judgment Docket Open for Inspection.** The judgment docket shall be open at all times, during office hours, for the inspection of the public, without charge; and it shall be the duty of the clerk to arrange the several dockets and books of record kept by him in such manner as to facilitate their inspection. [L. '87, p. 166, § 231; Code '08, § 250; § 251 of the Code of Civil Procedure.]

§ 11. **Transcript of Justice's Judgment May Be Filed in District Court; Execution; Lien.** A transcript of any judgment rendered, by any justice of the peace, duly certified by such justice, may be filed with the clerk of the district court of the county in which said judgment was rendered, and there-

upon the clerk shall make entries thereof in the register of actions and in the judgment docket, and may therefor issue execution for the collection thereof within such county, the same as if such judgment had been rendered by such district court; also a transcript of the entry of such judgment in the judgment docket aforesaid, certified by such clerk, may be filed with the recorder of the county in which such judgment shall have been rendered; and from the time of filing such transcript, such judgment shall become a lien upon all of the property of the judgment debtor, except personal property and property exempt from execution, in such county, in the same manner and to the same extent as if judgment had been originally rendered in a court of record. Said lien shall continue for six years from the entry of judgment, unless the judgment be previously satisfied. [L. '87, p. 167, § 234; Code '08, § 253; § 254 of the Code of Civil Procedure.]

Editor's note.—For an article entitled "Enforcement of Justice Court Judgments," by Mr. Royal C. Rubright, of the Denver Bar, see Dicta XII, no. 12, p. 274.

Prior legislation.—It is true, the code deals mainly with pleadings and practice in courts of record; but it is a mistake to assume that, prior to 1887, it in nowise affected actions before justices of the peace, or practice in justices' courts. The act, prior to the year mentioned, related to "civil actions in the courts of justice" of the state. This language is clearly sufficient to cover legislation pertaining to justices of the peace and their courts. Several provisions—such, for instance, this section, expressly deal with this class of courts. Hughes v. Fisher, 10 Colo. 383, 386, 15 P. 702, cited in notes, 14 Am. St. Rep. 793, 5 L. R. A. 617, 26 L. R. A. 622, Ann. Cas. 1912B, 446, 13 A. L. R. 253, 266.

This section is for the protection of judgment debtors, and strangers ought not to be permitted to complain of the insufficiency or irregularity of such proceedings. Second Industrial Bank v. Marshall, 87 Colo. 541, 289 P. 598.

Filing and recording of the transcript does not constitute a new judgment.—Plaintiffs in error contend that the filing and recording of the transcript constitute a new judgment, which is in effect a judgment of the district court, and that the statute of limitations begins to run only from the date of filing. The court cannot agree with that contention. There is nothing in this section which recognizes the proceedings as constituting a new judgment. The reference at all times is to the judgment entered by a justice of the peace. Davis Bros. Drug Co. v. Counter, 75 Colo. 239, 241, 225 P. 245.

In Dieffenbach v. Roch, 112 N. Y. 621, 20 N. E. 560, 2 L. R. A. 829, the court had under consideration a statute which provided that a judgment of a justice of the peace when recorded should be "a lien on the real estate of the defendant within the county in the same manner and with like effect as if such judgment had been rendered in the court of common pleas." The court held that the docketing of a judgment is not synonymous with "rendering" a judgment, and that, therefore, the judgment did not become a judgment of the county court. In the opinion it is pointed out that the word "rendered" is always used in the sense of judgments given by judicial action; that a county clerk by recording a transcript of judgment, does not render a judgment in any proper sense of the term. Id.

Giving of a lien does not involve the boundaries or title to real property.—In Floyd v. Sellers, 7 Colo. App. 498, 506, 44 P. 373, cited in note, 26 A. L. R. 446, it is said that a judgment lien continues for six years whether execution issue or not. No penalty being attached by law to failure to make a return within ninety days, no court should impose it, and thus nullify an express statutory provision giving six years as the duration of the lien. Plaintiffs in error call attention to § 25 of art. 6 of the constitution which provides that the jurisdiction of a justice of the peace shall not extend to cases "where the boundaries or title to real property shall be called in question." It is urged that the legislature in view of the provision, must have intended that the judgment creating a lien should be a district court judgment, and not a judgment of a justice court. The answer to this is that the giving of a lien does not involve the boundaries or title to real property. Davis Bros. Drug Co. v. Counter, 75 Colo. 239, 243, 225 P. 245.

§ 12. **Mortgage Not Deemed a Conveyance; Trust Deeds.** A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property

without foreclosure and sale, and the fact of a deed being a mortgage in effect, may be proved by oral testimony; but this section shall not apply to trust deeds with power of sale. [L. '87, p. 174, § 261; Code '08, § 280; § 281 of the Code of Civil Procedure.]

- I. General Consideration.
- II. Effect of Section.
- III. Evidence.
- IV. Foreclosure and Sale.

I. GENERAL CONSIDERATION.

Editor's note.—For an excellent article, entitled "Must Colorado Real Property Installment Sale Contracts Be Foreclosed as Mortgages?" by Mr. Percy S. Morris of the Denver Bar, wherein the effect of this section on such contracts is discussed in connection with § 4 of ch. 70, vol. 3, see Dicta IX, no. 11, p. 320.

Value is one test of character of transaction.—In an action to have a deed, absolute on its face, declared a mortgage, value is one test tending to show the character of the transaction. *Wilson v Gien*, 90 Colo. 27, 5 P. (2d) 880, cited in note, 90 A. L. R. 954; *Taylor v Briggs*, 99 Colo. 89, 60 P. (2d) 1081.

And conveyance of land, with contemporaneous bond to reconvey, is sometimes accepted as strong evidence that a mortgage is intended; but where it appears that an absolute transfer was the purpose of the parties, this intention prevails. *Baird v Baird*, 48 Colo. 506, 111 P. 79, cited in notes, L. R. A. 1916B, 200, 250, 311, 341, 406, 427, 466, 506, 566, Ann. Cas. 1914B, 354, 28 A. L. R. 554.

Laches.—Where an action to have a deed declared a mortgage is brought within two months after the creditor repudiates his agreement to allow redemption, the contention that plaintiff was guilty of laches in not sooner instituting the action, is, under the facts disclosed, held untenable. *Ver Straten v Worth*, 79 Colo. 30, 243 P. 1104.

Quitclaim deed, given and intended as security for a debt, is in law a mortgage. *Morris v Cheney*, 81 Colo. 393, 255 P. 987.

A quitclaim deed, taken in connection with a contemporaneous written agreement concerning possession of the property, held to constitute security for a debt, and therefore a mortgage. *Id.*

Installment contracts.—A contracted to sell land to B, the latter to pay the purchase price in installments. It was held that the contract was in effect a mortgage which secured to A the performance of the obligations of B. *Pope v Parker*, 84 Colo. 535, 271 P. 1118.

Contract for the sale and purchase of real estate on the installment plan, where the vendor retained possession, held, under the disclosed facts not to be a mortgage, and not to be treated as such under this section. *American Mtg. Co. v Logan*, 90 Colo. 157, 7 P. (2d) 953, distinguishing *Pope v Parker*, 84 Colo. 535, 271 P. 1118.

This section when read with § 4, ch. 70, vol. 3, clearly indicates that an installment contract where time is of the essence is not a mortgage and is not to be treated as such; for if it were, either actually or in effect, a mortgage, the vendor could not recover possession under the unlawful detainer act until after foreclosure and sale, and then only in the event that he purchased at the sale. *American Mtg. Co. v Logan*, 90 Colo. 157, 161, 7 P. (2d) 953.

Provision in sale contract that on default vendor might re-enter and sell premises held void. *Pope v Parker*, 84 Colo. 535, 271 P. 1118.

Appointment of receiver to collect rents and profits.—Although this section provides that the owner of a real estate mortgage shall not be entitled to the possession of the mortgaged property without foreclosure and sale, where such a mortgage pledges rents and profits as part of the security, and the security is inadequate and the mortgagor insolvent, a court of equity may appoint a receiver any time after filing the suit of foreclosure to collect the rents and profits and have the same applied on the mortgage debt. *Moncrieff v Hare*, 38 Colo. 221, 87 P. 1082, 7 L. R. A. (N. S.) 1001, cited in notes, 4 A. L. R. 1408, 26 A. L. R. 41. See *Elmira Mechanics' Society v Stanchfield*, 160 F. 811, 813.

Lease of part of premises is unaffected by mortgagor's placing of mortgagee in possession.—Where a mortgagor assigns rent to the mortgagee and voluntarily places the latter in possession with power of operation and management of the property, the mortgagee stands in the shoes of the mortgagor, and a lease of a part of the mortgaged premises is unaffected by the change save only as to the person entitled to receive the rent. *Fidelity Bond, etc., Co. v Paul*, 90 Colo. 94, 6 P. (2d) 462. As to termination of lease, see analysis line IV.

Stated in *McCormick v First Nat. Bank*, 88 Colo. 599, 299 P. 7.

Cited in *Dalby v Longmont*, 81 Colo. 271, 256 P. 310; *Illinois Bldg. Co. v Patterson*, 91 Colo. 391, 15 P. (2d) 699, dissenting opinion.

II. EFFECT OF SECTION.

This section deprives the mortgage of its common-law character, and the mortgagee of all possession and right of possession, before or after condition broken, until after foreclosure and sale. *Fidelity Bond, etc., Co. v Paul*, 90 Colo. 94, 98, 6 P. (2d) 462; *Pueblo, etc., R. Co. v Beshoar*, 8 Colo. 32, 34, 5 P. 639, cited in notes, 43 Am. St. Rep. 435, Ann. Cas. 1913A, 1051, 37 A. L. R. 1129; *Moncrieff v Hare*, 38 Colo. 221, 226, 87 P. 1082, 7 L. R. A. (N. S.) 1001, cited in notes, 4 A. L. R. 1408, 26 A. L. R. 41; *Erwin v West*, 105 Colo. 71, 99 P. (2d) 201.

Under it a mortgagee has a lien merely, and if out of possession, and not entitled to possession, cannot maintain an action of trespass for damages. *Pueblo, etc., R. Co. v Beshoar*, 8 Colo. 32, 5 P. 639, cited in notes, 43 Am. St. Rep. 435, Ann. Cas. 1913A, 1051, 37 A. L. R. 1129.

It is the settled law of this state that a mortgage does not vest title in the mortgagee, but creates a mere lien. *Fehringer v Martin*, 22 Colo. App. 634, 638, 126 P. 1131.

Under this section the mortgagor of lands is still the owner thereof, notwithstanding the mortgage. *Hendricks v Julesburg*, 55 Colo. 59, 132 P. 61, cited in notes, Ann. Cas. 1918E, 769, 2 A. L. R. 783, 801, 62 A. L. R. 1030.

And the fact that the mortgage is in the form of a deed absolute on its face does not change the rule, as it affects the mortgagee, and his representatives. *Fehringer v Martin*, 22 Colo. App. 634, 638, 126 P. 1131, citing *Pueblo, etc., Valley R. Co. v Beshoar*, 8 Colo. 32, 5 P. 639, cited in notes, 43 Am. St. Rep. 435, Ann. Cas. 1913A, 1051, 37 A. L. R. 1129.

By virtue of this section an absolute deed intended merely as security has no greater effect than a mortgage with a defeasance expressed. *Fehringer v Martin*, 22 Colo. App. 634, 126 P. 1131.

Right of mortgagor to rentals.—Where a trust deed does not expressly pledge rents and profits of the mortgaged premises in payment of the debt, and where the mortgagor is in possession, no receiver appointed, and no foreclosure decree entered, the mortgagor is entitled to the rentals. *Erwin v West*, 105 Colo. 71, 99 P. (2d) 201.

III. EVIDENCE.

Documentary, parol, or circumstantial evidence may be received to show that a deed absolute in terms is in fact a mortgage. In the instant case the evidence was examined and held sufficient to establish a parol agreement that a certain trustee's deed of lands, should stand as a mortgage, redeemable by the grantee of the original

grantor in trust. *Davis v Pursel*, 55 Colo. 287, 134 P. 107, cited in notes, L. R. A. 1916B, 195, 257, 377, 418.

So, oral evidence is admissible to show a deed is a mortgage, even though fraud or mistake is not alleged specifically. *Ver Straten v Worth*, 79 Colo. 30, 243 P. 1104.

Under this section a deed purporting to be an absolute conveyance may be proven by parol evidence to be, in effect, a mortgage. *Oppegard v Oppegard*, 90 Colo. 483, 488, 10 P. (2d) 333; *Denver Sanitarium, etc., Ass'n v Roberts*, 65 Colo. 60, 174 P. 300, cited in note, 79 A. L. R. 948; *Baird v Baird*, 48 Colo. 506, 111 P. 79, cited in notes, L. R. A. 1916B, 200, 250, 311, 341, 406, 427, 466, 506, 566, Ann. Cas. 1914B, 354, 28 A. L. R. 554.

In an action to redeem from what purports to be an absolute sale of lands, though the object of the parties to the transaction is expressed in one or more separate writings, it is competent to prove by parol evidence that the real transaction is a mortgage, regardless of the number of writings by which it is evidenced. *Blackstock v Robertson*, 42 Colo. 472, 479, 94 P. 336, cited in notes, L. R. A. 1916B, 81, 280.

But to have that effect, the evidence must be clear, certain and unequivocal, and must be convincing beyond a reasonable doubt. *Oppegard v Oppegard*, 90 Colo. 483, 488, 10 P. (2d) 333; *Denver Sanitarium, etc., Ass'n v Roberts*, 65 Colo. 60, 174 P. 300, cited in note, 79 A. L. R. 948; *Baird v Baird*, 48 Colo. 506, 508, 111 P. 79, cited in notes, L. R. A. 1916B, 200, 250, 311, 341, 406, 427, 466, 506, 566, Ann. Cas. 1914B, 354, 28 A. L. R. 554, citing *Whitsett v Kershaw*, 4 Colo. 419, cited in notes, L. R. A. 1916B, 43, 81, 195, 250, 338, 5 A. L. R. 488, 23 A. L. R. 1504, 1524, 1538; *Graff v Portland Town, etc., Co.*, 12 Colo. App. 106, 54 P. 854; *Townsend v Petersen*, 12 Colo. 491, 21 P. 619, cited in notes, L. R. A. 1916B, 81, 195; *Armor v Spalding*, 14 Colo. 302, 23 P. 789, cited in notes, 31 Am. St. Rep. 265, L. R. A. 1916B, 81, 194, 324; *Perot v Cooper*, 17 Colo. 80, 28 P. 391, 31 Am. St. Rep. 258, cited in notes, 33 Am. St. Rep. 372, 35 Am. St. Rep. 872, 42 Am. St. Rep. 272, 317, 45 Am. St. Rep. 871, 53 Am. St. Rep. 891, 55 Am. St. Rep. 960, 65 Am. St. Rep. 186, 66 Am. St. Rep. 295, 67 Am. St. Rep. 19, 68 Am. St. Rep. 47, 91 Am. St. Rep. 310, 96 Am. St. Rep. 47, 48, 77, 100 Am. St. Rep. 903, 110 Am. St. Rep. 351, 117 Am. St. Rep. 417, 132 Am. St. Rep. 790, L. R. A. 1916B, 195; *Davis v Hopkins*, 18 Colo. 153, 32 P. 70, cited in note, L. R. A. 1916B, 195; *Butsch v Smith*, 40 Colo. 64, 90 P. 61, cited in notes, L. R. A. 1916B, 195, 408, 466, Ann. Cas. 1914A, 883, 90 A. L. R. 954; *Enos v Anderson*, 40 Colo. 395, 93 P. 475, 15 L. R. A. (N. S.) 1087, cited in notes, L. R. A. 1916B, 200, 31 A. L. R. 1062, 84 A. L. R. 1010.

And the burden of so establishing the fact rests upon the party who alleges the conveyance to be a mortgage. *Oppegard v. Oppegard*, 90 Colo. 483, 10 P. (2d) 333.

Illustrative cases.—In an action to have a deed absolute on its face declared a mortgage and to redeem therefrom, the complaint alleged that, contemporaneously with the deed, an agreement was executed providing that if, within six months, the land was sold for more than plaintiff's debt, the surplus should be paid to plaintiffs, and set forth the prior transactions between the parties, including plaintiffs' indebtedness to defendant, and the intention of the parties to make a new adjustment of it, and that the deed was delivered simply to secure payment of money due defendant "by reason of the transaction and circumstances above narrated." It was held, that oral evidence is admissible to show that the transaction was intended to be a mortgage. the phrase, "the transaction and circumstances above narrated," not being restricted to the deed and written agreement. *Blackstock v. Robertson*, 42 Colo. 472, 94 P. 336, cited in notes, L. R. A. 1916B, 81, 280.

Plaintiffs, who were indebted to defendant, executed to him a deed absolute on its face, a separate writing being contemporaneously executed, providing that, if the land conveyed by the deed was sold within six months and brought more than a prior incumbrance and the amount of plaintiff's debt, the surplus should be paid over to plaintiffs by defendant. It was held that under this section, oral evidence was admissible to show that the deed in effect was a mortgage, notwithstanding the contemporaneous written agreement. *Blackstock v. Robertson*, 42 Colo. 472, 94 P. 336, cited in notes, L. R. A. 1916B, 81, 280, citing *Townsend v. Petersen*, 12 Colo. 491, 24 P. 619, cited in notes, L. R. A. 1916B, 81, 195; *Armor v. Spalding*, 14 Colo. 302, 23 P. 789, cited in notes, 31 Am. St. Rep. 265, L. R. A. 1916B, 81, 194, 324; *Perot v. Cooper*, 17 Colo. 80, 28 P. 391, 31 Am. St. Rep. 258, cited in notes, 33 Am. St. Rep. 372, 35 Am.

St. Rep. 872, 42 Am. St. Rep. 272, 317, 45 Am. St. Rep. 871, 53 Am. St. Rep. 891, 55 Am. St. Rep. 960, 65 Am. St. Rep. 186, 66 Am. St. Rep. 295, 67 Am. St. Rep. 19, 68 Am. St. Rep. 47, 91 Am. St. Rep. 310, 96 Am. St. Rep. 47, 48, 77, 100 Am. St. Rep. 903, 110 Am. St. Rep. 351, 117 Am. St. Rep. 417, 132 Am. St. Rep. 790, L. R. A. 1916B, 195; *Davis v. Hopkins*, 18 Colo. 153, 32 P. 70, cited in note, L. R. A. 1916B, 195; *Butsch v. Smith*, 40 Colo. 64, 90 P. 61, cited in notes, L. R. A. 1916B, 195, 408, 466, Ann. Cas. 1914A, 883, 90 A. L. R. 954.

IV. FORECLOSURE AND SALE.

Mortgagee has no right to possession until after foreclosure and sale, and expiration of period of redemption. *Morris v. Cheney*, 81 Colo. 393, 255 P. 987, citing *Moncrieff v. Hare*, 38 Colo. 221, 87 P. 1082, 7 L. R. A. (N. S.) 1001, cited in notes, 4 A. L. R. 1408, 26 A. L. R. 41.

Lease given subsequent to mortgage can only be terminated by foreclosure.—A lease of premises given after the execution of a mortgage thereon is subject thereto; but the lease cannot be terminated, without the lessee's consent or for a breach of some condition of the lease, except by foreclosure sale and deed. *Fidelity Bond, etc., Co. v. Paul*, 90 Colo. 94, 6 P. (2d) 462.

Foreclosure is remedy of vendor under retain title contract.—Where the grantor of property retained the title as security for the payment of the agreed purchase price the relation is the same as if title had passed and was then reconveyed to the grantor as security. In such circumstances there being nothing in the transaction to indicate that time was of the essence of the contract or that a forfeiture was the penalty for default in payments, the vendor's remedy on default is not an action for recovery of possession, but the equitable remedy of foreclosure and sale as made necessary by this section. *Fairview Min. Corp. v. American Mines, etc., Co.*, 86 Colo. 77, 278 P. 800.

§ 13. **Who May Administer Oaths.** Every court of this state, every judge or clerk of any court, every justice of the peace, and every notary public, county clerk, and every officer authorized to take testimony or to decide upon the evidence in any proceeding, shall have the power to administer oaths or affirmations. [L. '87, p. 191, § 335; Code '08, § 369; § 370 of the Code of Civil Procedure.]

See generally "Oaths and Affirmations," vol. 4, ch. 115. As to form of oath, see vol. 4, ch. 115, § 1. As to who may take oaths and affirmations out of state, see vol. 4, ch. 115, § 6.

§ 14. **Affirmation; Form; Perjury.** A witness who desires it may, at his option, instead of taking an oath, make his solemn affirmation or declaration by assenting when addressed in the following form:

You do solemnly affirm that the evidence you shall give in this issue (or matter), pending between.....and.....shall be the truth, the whole truth, and nothing but the truth.

Assent to this affirmation shall be made by answer:

"I do."

A false affirmation or declaration shall be deemed perjury equally with a false oath. [L. '87, p. 191, § 336; Code '08, § 370; § 371 of the Code of Civil Procedure.]

See also vol. 4, ch. 115, § 2. As to penalty for perjury, see vol. 2, ch. 48, § 142.

§ 15. How Seal Attached. A seal of a court or public officer, when required to any writ, or process, or proceeding, or to authenticate a copy of any record or document, may be impressed with wax, wafer, or any other substance, and then attached to the writ, process or proceeding, or to the copy of the record or document, or it may be impressed on the paper alone. [L. '87, p. 198, § 362; Code '08, § 396; § 397 of the Code of Civil Procedure.]

See also, § 21, appx. B.

§ 16. Judges and Justices May Take Acknowledgments, etc. The judges of any court of record shall have power, in any part of the state, and the justices of the peace within their respective counties, shall have power to take and certify:

First—The proof and acknowledgment of a conveyance of real property, or any other instrument required to be proved or acknowledged.

Second—An affidavit to be used in any court of justice in this state. [L. '87, p. 212, § 409; Code '08, § 444; § 446 of the Code of Civil Procedure.]

As to who may take acknowledgments, see vol. 2, ch. 40, § 23.

§ 17. Action Not Affected by Vacancy. No action or proceeding in a court of justice in this state shall be affected by a vacancy in the office of all or any of the judges, or by a failure of a term thereof. [L. '87, p. 212, § 410; Code '08, § 445; § 447 of the Code of Civil Procedure.]

§ 18. Proceedings in English; Abbreviations. Every written proceeding in a court of justice in this state, or before a judicial officer, shall be in the English language, but such abbreviations as are now commonly used in that language, may be used, and numbers expressed by figures or numerals, in the customary manner. [L. '87, p. 212, § 411; Code '08, § 446; § 448 of the Code of Civil Procedure.]

The translation of instructions into Spanish for the use and instruction of a juror understanding that language alone, would not be inhibited by the spirit of this section. The object of the provision is to

secure a record in English, and this would in nowise be defeated. *Trinidad v. Simpson*, 5 Colo. 65, 70, cited in note, 34 A. L. R. 200.

§ 19. **Courts with Seal.** Each of the following courts shall have a seal and shall be courts of record:

First—The supreme court.

Second—The district courts.

Third—The county courts.

Fourth—Any court established by law and expressly denominated a court of record. [L. '87, p. 212, § 421; Code '08, § 447; § 449 of the Code of Civil Procedure.]

As to seal of supreme court, see vol. 2, ch. 46, § 32.

§ 20. **Clerk to Keep Seal.** The clerk of each court of record shall keep the seal thereof. [L. '87, p. 212, § 413; Code '08, § 448; § 450 of the Code of Civil Procedure.]

§ 21. **How Seal Affixed.** The seal may be fixed by impressing it upon the paper, or on a substance attached to the paper and capable of receiving the impression. [L. '87, p. 212, § 414; Code '08, § 449; § 451 of the Code of Civil Procedure.]

See also, § 15, appx. B.

§ 22. **Juridical Days.** The courts of justice may be held, and judicial business may be transacted, on any day except as provided in the next section. [L. '87, p. 213, § 415; Code '08, § 450; § 452 of the Code of Civil Procedure.]

§ 23. **Judicial Holidays.** No court shall be opened, nor shall any judicial business be transacted, on Sunday, New Year's day, Fourth of July, Christmas day, Washington's birthday, Thanksgiving day, Fast day, Decoration day or on the day of a general election except for the following purposes:

First—To give, upon their request, instruction to a jury then deliberating on their verdict.

Second—To receive a verdict or discharge a jury.

Third—For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature. * *

Fifth—* * When the day fixed for the opening of a court shall fall on any of the days mentioned in this section, the court shall stand adjourned until the next succeeding day. [L. '87, p. 213, § 416; Code '08, § 451; § 453 of the Code of Civil Procedure.]

Paragraph Fourth and first half of Fifth are found in Rule 102 (i).—Ed. note.

Receiving a verdict is a ministerial act performed for the jury in a judicial proceeding. The weight of authority is to the

end that verdicts, the result of trials started and concluded before Sunday, may be received on Sunday and statutory holidays. Carr v People, 99 Colo. 477, 481, 63 P. (2d) 1221.

§ 24. **Adjournment by Clerk in Absence of Judge.** When on the day appointed for the commencement of any term of the supreme, district, county or other court of record of this state, the judge of such court is not present

to hold the same, and whenever it shall happen, during any term of the court, that the judge thereof shall fail to appear to open said court in pursuance of any adjournment made at that term, the clerk of such court shall adjourn the same, from day to day, until the expiration of one week, noting such adjournment in the minutes each day, and if the judge or judges of such court be not present to hold such term on the day, one week from the day appointed for such term to commence, or at the time to which such adjournment was made, the clerk shall adjourn the court for the period of one week from that day to the hour of ten o'clock a. m. and shall immediately notify the governor, of the failure of the judge to appear, and it shall be the duty of the governor to forthwith appoint, in writing, one of the judges of the supreme court, to hold the remainder of said term unless the governor is satisfied that no real necessity exists requiring him so to do. If the judge or judges shall appear on any day to which the court has been adjourned by the clerk as above provided, the court shall proceed in the same manner and with the same effect as if the judge or judges had been present, and the court had been regularly opened, on the day appointed for the term to commence. [L. '91, p. 84, § 1; amending L. '87, p. 213, § 417; Code '08, § 452; § 454 of the Code of Civil Procedure.]

For a similar section, see vol. 2, ch. 46, § 95.

The provisions of this section are directory, and the object to be accomplished thereby is solely to prevent a lapse of the term of the court otherwise occasioned by the absence of the judge during the first week of such term. At the end of such week, if the judge be still absent, the statute makes it the duty of the clerk to adjourn the term, and if the clerk should fail to perform that duty, we think the term would nevertheless unquestionably lapse. *May v. People*, 8 Colo. 210, 213, 6 P. 816, cited in notes, 124 Am. St. Rep. 1027, L. R. A. 1915C, 307.

And no lapse would result from the clerk's failure to make the adjournments during the week in strict compliance with this section, however censurable or amenable the clerk might be held for such failure of his duty, for the gist of the provision is that if the judge appear before

the time for the authorized adjournment of the term, a lapse of the term is thereby avoided. *May v. People*, 8 Colo. 210, 214, 6 P. 816, cited in notes, 124 Am. St. Rep. 1027, L. R. A. 1915C, 307.

The opening of the court, by the judge, upon his appearing before the clerk had adjourned the term, and before the expiration of the time when the term would lapse without such adjournment, and the subsequent proceedings of the court, may be regarded as unaffected by the act of the clerk in failing to adjourn the court from day to day, each day during the first week. *Id.*

The judge may be absent the whole of the first week without causing a lapse of the term, if he thereafter appear and open court before the authorized adjournment, or before the time when such adjournment of the term is, by the statute, authorized to be made. *May v. People*, 8 Colo. 210, 215, 6 P. 816, cited in notes, 124 Am. St. Rep. 1027, L. R. A. 1915C, 307.

§ 25. Courts Sit at County Seat. Every court of record shall sit at the county seat of the county in which it is held, except as may be otherwise provided by law. [L. '87, p. 214, § 418; Code '08, § 453; § 455 of the Code of Civil Procedure.]

When the law has prescribed a time and place at which the judicial business of the county must be transacted, there can be no exception to the provision, unless it is ex-

pressly made by statute. *State Bank v. Plummer*, 46 Colo. 71, 77, 102 P. 1082; *Scott v. Stutheit*, 21 Colo. App. 28, 36, 121 P. 151.

§ 26. Actions Against Sheriff. In an action brought against a sheriff for an action done by virtue of his office, if he give written notice thereof to the

sureties on any bond of indemnity received by him, the judgment recovered therein shall be sufficient evidence of his right to recover against such sureties; and the court or judge in vacation, may, on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs. [L. '87, p. 214, § 419; Code '08, § 454; § 456 of the Code of Civil Procedure.]

This section of the code does not change the rule which exists in the absence of a statute except in so far as it provides for the entering of judgment upon the bond. In the absence of a statute the rule is that to entitle the obligee to maintain an action upon a general promise of indemnity against damages or liability, it is not necessary that he should have given notice of a suit against him in which the judgment upon which the breach is predicated was ren-

dered. If, however, no notice is given, the judgment is only prima facie evidence against the obligors and may be attacked on the ground that the obligee failed to avail himself of a good defense or that it was obtained by fraud or collusion. 10 Am. & Eng. Enc. of Law 417; Train v. Gold, 5 Pick. (Mass.) 380; Huzzard v. Nagle, 40 Penn. St. 178; Stewart v. Thomas, 45 Mo. 42; Whinnery v. Wiley, 38 Colo. 203, 206, 88 P. 171.

§ 27. Powers of Court.—Every court shall have power:

First—To preserve and enforce order in its immediate presence.

Second—To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority.

Third—To compel obedience to its lawful judgments, orders and process, and to the lawful orders of its judge out of court in action or proceeding pending therein.

Fourth—To control, in furtherance of justice, the conduct of its ministerial officers. [L. '87, p. 216, § 428; Code '08, § 463; § 464 of the Code of Civil Procedure.]

§ 28. When Judge Shall Not Act Unless by Consent. A judge shall not act as such in any of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity in the third degree; or when he has been attorney or counsel for either party in the action or proceeding, unless by consent of all parties to the action. [L. '87, p. 216, § 429; Code '08, § 464; § 465 of the Code of Civil Procedure.]

A judge, having been of counsel for either party in the previous trial of the action, is under this section clearly disqualified from acting as judge in the trial of the case, and where the disqualification is not waived by consent of the party he represented as counsel, has no authority to act judicially therein. O'Connell v. Gavett, 7 Colo. 40, 42, 1 P. 902, cited in note, 25 L. R. A. 115.

Under this section, a county judge who has acted as counsel in behalf of either litigant is not only disqualified from hearing motions to set aside judgments, but it is his duty of his own motion to certify the matters to the district court. People v. District Court, 26 Colo. 226, 228, 56 P. 1115, cited in notes, 111 Am. St. Rep. 945, Ann. Cas. 1917A, 1231, 8 A. L. R. 1238.

§ 29. Judge May Not Act as Attorney. A judge of a court of record shall not act as attorney or counsel in any court or any cause. [L. '87, p. 216, § 430; Code '08, § 465; § 466 of the Code of Civil Procedure.]

See also, vol. 2, ch. 14, §§ 17, 18.

Quoted in People v. Lindsey, 86 Colo. 458, 283 P. 539.

§ 30. **Judge or Justice Not to Have Law Partner.** A judge or justice of the peace shall not have a partner acting as attorney or counsel in any court in his judicial district, county or precinct, nor shall any county, district or supreme judge make out the papers in any action to be tried before his court. [L. '87, p. 216, § 431; Code '08, § 466; § 467 of the Code of Civil Procedure.]

§ 31. **Courts May Issue Proper Writs; Ne Exeat.** The courts and judges thereof shall have power to issue all writs necessary and proper to the complete exercise of the power conferred on them by the constitution and laws of this state. The district courts and judges thereof shall have authority in ne exeat proceedings according to the usual practice in such cases in courts of chancery. [L. '91, p. 85, § 1; amending L. '87, p. 217, § 434; Code '08, § 469; § 470 of the Code of Civil Procedure.]

The scope of the writ of ne exeat has section. In re Nash, 62 Colo. 101, 160 P. not, in this state, been enlarged by this 189.

§ 32. **Terms of Court; When and Where Held.** The terms shall be held at such times and places as provided by law. If a room for holding the court be not provided by the county, together with attendants, fuel, lights and stationery, suitable and sufficient for the transaction of business, the court may direct the sheriff to provide such room, attendants, fuel, lights and stationery, and the expense shall be a county charge. [L. '87, p. 217, § 435; Code '08, § 470; § 471 of the Code of Civil Procedure.]

As to terms of supreme court, see vol. 2, Quoted in Heberer v Board of County ch. 46, § 15; of district courts, see vol. 2, Com'rs, 88 Colo. 159, 293 P. 349. ch. 46, § 49 et seq.; of county courts, see vol. 2, ch. 46, § 123 et seq.

§ 33. **Judges to Conserve the Peace.** All judges of courts of record shall be conservators of the peace. [L. '87, p. 218, § 439; Code '08, § 474; § 475 of the Code of Civil Procedure.]

§ 34. **Powers of County Courts and Judges.** In all civil actions within their jurisdiction, the county courts and the judges thereof, shall have the same power to grant all orders, and writs, and process, which the district courts or the judges thereof, have power to grant within their jurisdiction, and to hear and determine all questions arising within their jurisdictions, as fully and completely as the district courts or the judges thereof have power to do under the laws of this state, except as otherwise provided in this act. [L. '87, p. 218, § 440; Code '08, § 475; § 476 of the Code of Civil Procedure.]

It is the province of the county judge, the evidence, and the law of the case. Shirley Garage v Douglas, 94 Colo. 489, 491, sitting without a jury, to determine the credibility of the witnesses, the weight of 30 P. (2d) 1115.

Appendix C*

Canons of Ethics.

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| <p>SEC.</p> <ol style="list-style-type: none"> 1. Duty of the Lawyer to the Courts. 2. Selection of Judges. 3. Attempts to Exert Personal Influence on the Court. 4. When Counsel for an Indigent Prisoner. 5. Defense or Prosecution of Those Accused of Crime. 6. Adverse Influences and Conflicting Interests. 7. Professional Colleagues and Conflicts of Opinion. 8. Advising upon the Merits of a Client's Cause. 9. Negotiations with Opposite Party. 10. Acquiring Interest in Litigation. 11. Dealing with Trust Property. 12. Fixing the Amount of the Fee. 13. Contingent Fees. 14. Suing a Client for a Fee. 15. How Far a Lawyer May Go in Supporting a Client's Cause. 16. Restraining Clients from Improperities. 17. Ill-feeling and Personalities between Advocates. | <p>SEC.</p> <ol style="list-style-type: none"> 18. Treatment of Witnesses and Litigants. 19. Appearance of Lawyer as Witness for His Client. 20. Newspaper Discussion of Pending Litigation. 21. Punctuality and Expedition. 22. Candor and Fairness. 23. Attitude Toward Jury. 24. Right of Lawyer to Control the Incidents of the Trial. 25. Taking Technical Advantage of Opposite Counsel; Agreements with Him. 26. Professional Advocacy Other than Before Courts. 27. Advertising, Direct or Indirect. 28. Stirring up Litigation, Directly or Through Agents. 29. Upholding the Honor of the Profession. 30. Justifiable and Unjustifiable Litigations. 31. Responsibility for Litigation. 32. Lawyer's Duty in Its Last Analysis. |
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1. Duty of the Lawyer to the Courts. It is the duty of the lawyer to maintain toward the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

2. Selection of Judges. It is the duty of the bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the bench; and it should strive to

*This appendix is published as provided by Rule 228.

have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial positions should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

3. **Attempts to Exert Personal Influence on the Court.** Marked attention and unusual hospitality on the part of a lawyer to a judge, uncalled for by the personal relations of the parties, subject both the judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due to the judge's station, is the only proper foundation for cordial personal and official relations between bench and bar.

4. **When Counsel for an Indigent Prisoner.** A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

5. **Defense or Prosecution of Those Accused of Crime.** It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

6. **Adverse Influences and Conflicting Interests.** It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of

retainers or employment from others in matters adversely affecting any interests of the client with respect to which confidence has been reposed.

Committee Note.

In *People v. Denver Banks*, 99 Colo. 54, a rule was adopted by the Supreme Court prohibiting practice of law by corporations. This was amended by the court April 21st [1941] and placed in the Canons of Ethics as an additional paragraph to section 6, as follows:

"Practicing law," forbidden to persons not thereto duly licensed, is not limited to practice before the courts. Corporations shall not practice law. The practice of drafting wills, living trust indentures and life insurance agreements is the practice of law and counsel for executors and trustees named therein may not act as counsel for their testators or creators, except upon full disclosure by such counsel of the conflicting interests growing out of such relationship, and upon first obtaining the written consent of such testators or creators, or their personal representatives.

7. Professional Colleagues and Conflicts of Opinion. A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to co-operate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the bar; but nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

8. Advising upon the Merits of a Client's Cause. A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

9. Negotiations with Opposite Party. A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a

party not represented by counsel, and he should not undertake to advise him as to the law.

10. **Acquiring Interest in Litigation.** The lawyer should not purchase any interest in the subject-matter of the litigation which he is conducting.

11. **Dealing with Trust Property.** Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him.

12. **Fixing the Amount of the Fee.** In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

13. **Contingent Fees.** Contingent fees, where sanctioned by law, should be under the supervision of the court, in order that clients may be protected from unjust charges.

14. **Suing a Client for a Fee.** Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

15. **How Far a Lawyer May Go in Supporting a Client's Cause.** Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public

esteem and confidence which belongs to the proper discharge of its duties, than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

16. Restraining Clients from Improprieties. A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct toward courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation.

17. Ill-Feeling and Personalities between Advocates. Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

18. Treatment of Witnesses and Litigants. A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

19. Appearance of Lawyer as Witness for His Client. When a lawyer is witness for his client, except as to merely formal matters, such as the attesta-

tion or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

20. Newspaper Discussion of Pending Litigation. Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any ex parte statement.

21. Punctuality and Expedition. It is the duty of the lawyer not only to his client, but also to the courts and to the public, to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

22. Candor and Fairness. The conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence, which he knows the courts should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

23. Attitude toward Jury. All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

24. **Right of Lawyer to Control the Incidents of the Trial.** As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

25. **Taking Technical Advantage of Opposite Counsel; Agreements with Him.** A lawyer should not ignore known customs or practice of the bar or of a particular court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of court.

26. **Professional Advocacy Other Than before Courts.** A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding to influence action.

27. **Advertising, Direct or Indirect.** The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not per se improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's position, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.

28. **Stirring up Litigation, Directly or Through Agents.** It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.

29. **Upholding the Honor of the Profession.** Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

30. **Justifiable and Unjustifiable Litigations.** The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and having accepted retainer, it becomes his duty to insist upon the judgment of the court as to the legal merits of his client's claim. His appearance in court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

31. **Responsibility for Litigation.** No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into court for plaintiffs, what cases he will contest in court for defendants. The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

32. Lawyer's Duty in Its Last Analysis. No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.



Appendix D

ADDRESSES BY THE MEMBERS OF THE REVISION COMMITTEE AT THE COLORADO INSTITUTES ON THE RULES OF CIVIL PROCEDURE

The following addresses on the new Rules were delivered by the members of the Rules Revision Committee of the Colorado Bar Association at Institutes held in Denver, Greeley, Pueblo and Grand Junction in March, 1941, and to the judges of the Colorado courts in a special judges' conference on March 7 and 8.

Five of the fifteen members of the Revision Committee were appointed by the Supreme Court of Colorado in January, 1941, as the members of the new Rules Committee of the Court.

Address No. 1.

The Colorado Institutes on the Rules of Civil Procedure.

INTRODUCTORY REMARKS BY COL. PHILIP S. VAN CISE,
Chairman of the Committee, District Attorney, Denver, 1921-25.

April 6, 1941, the new Rules of Civil Procedure for Colorado will become effective, and the old Code, and a large portion of the decisions based thereon, will be obsolete. In order that all sections of the state may inaugurate the Rules with uniformity, these institutes are being held.

In approaching the subject the background of the rules, the reasons for their adoption, and the methods used in drafting them may be helpful.

General dissatisfaction by the bar with the procedure in the federal courts, (with their equity rules for chancery cases and state procedure for law sections) led Congress in 1934 to authorize the United States Supreme Court to adopt rules of procedure in civil actions. In September, 1938, after years of study by the Court Committee, the federal procedure became effective. Many hundreds of decisions have now interpreted them.

With the hope that procedure might be adopted in Colorado following as far as practicable the new federal rules, so that a Colorado lawyer would be equally at home in the courts of the United States and those of Colorado, the Colorado Bar Association in September, 1938, authorized the appointment of a Committee to effectuate that reform.

The speaker was appointed chairman of the Committee. A new enabling act was presented to and passed by the 1939 General Assembly authorizing the

APPENDIX D

Supreme Court to adopt such rules. About 80 lawyers were selected for the initial committee and it prepared its first draft early in 1940. A smaller committee of 15 was then chosen and it submitted its second draft to all the lawyers in Colorado in July, 1940. This work with amendments was approved by the Association in September and then published by the committee and submitted as its third draft to the Supreme Court on November 6, 1940. Some changes were made in that draft by the committee and some by the court (parenthetically, of course, we prefer our changes to theirs, but theirs seem to be final) and the pamphlet which you now have represents the rules as finally adopted by the court to govern future procedure in civil actions. We believe that they accomplish their purpose in giving an almost uniform procedure in all courts in this state. Our only hope is that the bench and bar will cooperate so that their operation and construction will be uniform in all district and county courts.

In preparing these lectures we wish to acknowledge our indebtedness to James A. Pike, of the Washington, D. C., bar, for his pamphlets and valuable suggestions, many extracts from which we have used verbatim.

There are three groupings in the new Rules:

1. The Forms, and most of Rules 1 to 85 are the Federal Rules. In such cases, federal decisions will be applicable and Colorado citations valueless.
2. Eleven of the rules between 3 to 81, and Rules 97 to 110 are rewritten provisions of the Code. The Colorado decisions, in the main, will still apply to them. The eleven rules in the federal group all have a note at the top of the rule stating that the rule is entirely state practice, so they are readily distinguishable.
3. Rules 111 to 120 cover Supreme Court procedure. This is radically changed and the Supreme Court alone will construe most of them.

These rules, in the main, represent material changes in court procedure. They call for liberal construction to secure the just, speedy and inexpensive determination of every action; they do away with old fictions and permit all claims of litigants, whether in tort or contract, to be settled in one action; they require a speedy show-down of the facts, so that each party may know in advance the evidence possessed by his adversary. They provide the methods so that before trial side-issues may be disposed of, documentary matters be agreed upon, and the real controversy be blocked out.

Where the Federal Rules have been copied verbatim, the bar should examine the federal decisions thereon for interpretation. Where we have made changes, we will try to point them out, with the reasons, and then the federal or state decisions may or may not apply.

A few explanations about the editing of the rules may be of value. They will be called "Rules" instead of "Code". A rule is referred to by number as

ADDRESS No. 1

"Rule 1". If a rule has only one paragraph, it is not preceded by a small letter as it needs no further identification than "Rule 11". When the paragraphs of the rules are lettered they are not denominated "sections" as in the Code, but are known as "subdivisions". When the subdivisions are practically the same as the Federal Rules the lettering is the same as in the Federal Rules, viz., "(a)" or "(c)", etc.

Look at Rule 1. You will frequently note in the federal section of the rules still another letter, capital "C". This stands for "Colorado". When you see that, as Rule 1, C (a), you will know that it is the Federal Rule of the same letter, but modified for Colorado. However, when you cite a subdivision omit the "C" and cite it as Rule 1, (a) instead of Rule 1 C (a).

At the end of nearly every subdivision is a bracket containing the source of the rule. Look at Rule 3 (a). The source is Code Section 34 and Colorado Supreme Court Rule 1. The Code references are to Volume 1, C. S. A., and any other Code text will not aid you for ready reference.

Now for the Tables. Old Supreme Court Rule 8 covered motions for new trial, but you don't yet know where to find that old Rule 8 in the new rules. Turn to Table I. There you find that Supreme Court Rule 8 is new Rule 59 C (e). If you want to find old Code Section 2, look for it in Table II and you find that it is supplanted by new Rule 7 (a).

The Revision Committee believes that these rules supplant all except a few sections of the Code, as well as certain statutes. So the Code is out, except for three sections which the Committee believed affected the statute of limitations or rules of evidence, (such as Sections 50 (b), 74, 75 and 162) and some other sections which do not affect procedure and belong in the general statutes. All of these are itemized in the introductory portions of the book, under the heading "Statement by the Revision Committee," and are reprinted in full in the back of the Annotated Rules in Appendix B.

The entire group of rules is welded into one body, which must be studied by bench and bar so that after April 6th the new procedure may be expeditiously handled for the benefit of the public.

It will be the pleasure of the Revision Committee to do all in its power to acquaint the bar with its new tools, and to help explain their use.

The speaker, with Messrs. Breitenstein, Hodges, Keely and Morris, are the members of the newly appointed Supreme Court Committee on Rules. If you find any errors in these rules, and you undoubtedly will, or if you believe that they should be amended with benefit to the profession, please send your suggestions to the Supreme Court where they will receive every consideration.

My associates on the Revision Committee have worked on these rules for two years. They have been a grand team, are outstanding members of their profession, and to their untiring efforts and diligent service, without compensation of any kind, you owe these new rules.

APPENDIX D

Address No. 2.

Procedure vs. Substantive Law.

By PERCY S. MORRIS,

Second vice-chairman Revision Committee; member of the
Supreme Court Rules Committee.

Chapter 80 of the Colorado Session Laws of 1939, which is set out on one of the pages preceding the rules as printed, provides that the "rules shall neither abridge, enlarge nor modify the substantive rights of any litigants." The Act of Congress of June 19, 1934, which authorized the Supreme Court of the United States to adopt rules of civil procedure for the district courts of the United States, contained the same language as that which has been quoted from the Colorado statute.

So that, since the limitation upon the power of the Supreme Court of Colorado with respect to the adoption by it of rules which abridge, enlarge or modify substantive rights of litigants is identical with the limitation imposed upon the Supreme Court of the United States in the adoption of the federal rules, the same problems apply to the Colorado rules as apply to the federal rules with the one distinction that, even though a specific rule relates to substantive rights, nevertheless such rule, as a part of the Colorado rules, does not change substantive rights if the pre-existing Colorado substantive law was the same as the provisions of the rule, whereas the same rule, as a part of the federal rules, will change substantive rights if the law of the state, the substantive law of which controls, is different from the provisions of the rule. This distinction can be illustrated by the following: Rule 8 (c) of both the Colorado rules and the federal rules provides that a defendant in his answer must affirmatively set forth contributory negligence and this would imply that the defendant must also prove contributory negligence. The United States Supreme Court has held squarely that the burden of proof as to whether contributory negligence must be proved by the defendant as a part of his defense or whether the fact that plaintiff exercised due care must be proved by plaintiff as a part of his case is a matter of substantive law. *Central Vermont Railway Company v. White*, 238 U. S. 507. Therefore this rule involves a matter of substantive law. But the law is well settled in Colorado by numerous decisions of our Supreme Court that contributory negligence must be affirmatively pleaded by way of defense and that the burden of proving it is upon the party pleading it. This is in entire harmony with Rule 8 (c) and therefore Rule 8 (c) of the Colorado Rules does not change substantive law or rights. But let us assume that an action is brought in a federal court in Illinois to recover for injuries sustained in that state, the courts of which have held that the plaintiff must, as a part of his case, prove that he exercised due care and that the burden is not on the defendant to prove contributory negligence. This matter being one of substantive law, the law of Illinois upon this point will control, even though the case is tried in a federal court, under the doctrine recently established by the United States Supreme

ADDRESS No. 2

Court in *Erie Railroad Company v. Tompkins*, 304 U. S. 64. Therefore, it would seem that Federal Rule 8 (c) attempts to change the substantive law as to such a suit tried in Illinois. On the other hand, it would not change the substantive law as applied to a suit brought in a federal court in Colorado for injuries sustained in that state, because the Colorado law is in conformity with the provisions of the rule.

Therefore, the question whether any specific provision of the rules relates to a matter of substantive law as distinguished from procedure is a vital one. And, if it does relate to substantive law, there follows the equally vital question as to whether it changes substantive law.

The line between substantive law and matters relating to procedure is often a shadowy one. In most of the cases in which the question has arisen, the matters involved could be placed clearly and squarely either in the category of matters relating to substantive law or in the category of matters relating to procedure. However, there occasionally arises for determination a matter which might well be said to fall within substantive law and might, with equal force, be said to be a matter relating to procedure; and the question then is in which of the two classes is such matter to be placed. Charles E. Clark, formerly Dean of the Law School of Yale University, now Judge of the Circuit Court of Appeals for the Second Circuit, in a very able and interesting discussion of this question in 8 *George Washington Law Review* 1230, says at page 1234:

"Now we can emphasize the point that procedure is only a means to an end, that of achieving substantial justice, not an end in itself, and yet find values in it. That a case may progress steadily and expeditiously to its rational conclusion without mistakes at best wasteful of time and money, at worst preventing a just adjudication is of the utmost importance to the litigants. But the two parties to a case are not the only ones interested. All other litigants whose cases may be delayed by gluts in the court calendar, and the public which bears the ultimate cost of litigations, are most directly interested. Until therefore, we are shown that a specific state policy of substance is being thwarted, I submit that we should follow the carefully formulated principles of the new procedure.

"We are justified in taking this position because no abstract and formal differentiation between substance and procedure is possible. In fact almost any borderline case will necessarily present elements both substantive and procedural in nature. A wise teacher pointed this out some years ago with particular reference to a field where this problem had already caused much difficulty. In his famous article, '“Substance” and “Procedure” in the Conflict of Laws,' 42 *Yale Law Journal* 333, 336, Professor Walter Wheeler Cook demonstrated that no arbitrary line between the two concepts was possible, since the decisions treated the same matter at times as one, at times as the other, of the two, as the purposes for which definition is made may

APPENDIX D

vary. The problem, then, is not one of discovering the location of a preexisting 'line', but of deciding where on sound principles of policy a line is to be drawn."

The situation as to the validity of specific provisions of the rules as depending upon whether they relate to matters of substantive law or to matters of procedure has been clarified to a very substantial degree by the very recent decision of the United States Supreme Court handed down on January 13, 1941, in the case of *Sibbach v. Wilson & Company, Inc.*, 85 L. Ed. 349, 61 Sup. Ct. Rep. 422. That case involved the validity of Rule 35, which provides that, in an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The Illinois practice did not permit the court to order such an examination and the plaintiff contended that the rule was beyond the power of the supreme court to adopt because it abridged and modified her substantive rights. The supreme court held that the rule related to matters of procedure and did not affect substantive rights. The Court said:

"She insists, nevertheless, that by the prohibition against abridging substantive rights, Congress has banned the rules here challenged. In order to reach this result she translates 'substantive' into 'important' or 'substantial' rights. And she urges that if a rule affects such a right, albeit the rule is one of procedure merely, its prescription is not within the statutory grant of power embodied in the Act of June 19, 1934. * * *

"In the instant case we have a rule which, if within the power delegated to this court, has the force of a federal statute. * * *

"We are thrown back, then, to the arguments drawn from the language of the Act of June 19, 1934. Is the phrase 'substantive rights' confined to rights conferred by law to be protected and enforced in accordance with the adjective law of judicial procedure? It certainly embraces such rights. One of them is the right not to be injured in one's person by another's negligence, to redress infraction of which the present action was brought. The petitioner says the phrase connotes more; that by its use Congress intended that in regulating procedure this court should not deal with important and substantial rights theretofore recognized. * * *

"If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. *The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.* That the rules in question are such is admitted."

And, in discussing the policy envisaged in the new Rules, the Court said:

ADDRESS No. 2

"It is to be noted that the authorization of a comprehensive system of court rules was a departure in policy, and that the new policy envisaged in the enabling act of 1934 was that *the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth.*"

The sentence "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them" and the words "speedy, fair and exact determination of the truth" will echo through the courtrooms of our nation for years to come.

And the distinction made by the United States Supreme Court between "substantive rights" and "substantial rights" must always be kept in mind. It is the basic nature of the right and not its importance that controls the decision whether it is a substantive right or a matter of procedure.

The decision in the Sibbach case was a five-to-four decision. The dissenting opinion did not contend that the Rule did not relate to procedure but stated that the "inviolability of a person" has such historic roots in Anglo-American law that it is not to be curtailed "unless by clear and unquestioned authority of law."

The decision of the United States Supreme Court in *Vermont Railway Company v. White*, supra, that whether the burden of proving contributory negligence is upon the defendant is a matter of substantive law was followed in a decision of the same court in 1939 in *Cities Service Oil Company v. Dunlap*, 308 U. S. 208. The question there involved was whether the burden of proving that real estate was purchased in good faith for value was on the purchaser or the burden was on his adversary to disprove it, in an action in a federal district court in Texas. The law established in Texas by the decisions of the courts of that state was that the burden was on the adversary of the purchaser to disprove it. The district court and the circuit court of appeals held that the law as recognized generally and by the federal courts that the burden was on the purchaser to prove his purchase for value and in good faith should be applied rather than the Texas rule, on the ground that it was a matter of practice or procedure and not a matter of substantive law. But the supreme court reversed, holding that it related to a substantive right and saying: "In the absence of evidence showing it was not a bona fide purchaser its position was superior to a claimant asserting an equitable interest only. This was a valuable assurance in favor of its title."

The Colorado supreme court has held that it has inherent power to make rules with reference to procedural matters for the conduct of trials. *Kolkman v. The People*, 89 Colo. 8, 32-33. See also *Ernst v. Lamb*, 73 Colo. 132, 133 and *Walton v. Walton*, 86 Colo. 1, 20-21.

Our supreme court has said:

"The abolition of an old remedy, or the substitution of a new one, neither constitutes the impairment of a vested right nor the

APPENDIX D

imposition of a new duty, for there is no such thing as a vested right in remedies."

Moore v. Chalmers-Galloway Live Stock Company,
90 Colo. 548, 554-555.

Rule 4 "Process" makes a number of changes in the present practice in the service of summons; among these is subdivision (f) which provides for personal service outside the state upon a natural person over the age of 18 years in any action (whether in rem or in personam) where the person served is a resident of Colorado; the validity of a provision of this nature is upheld by the United States Supreme Court in its very recent decision in *Milliken v. Meyer*, 61 Sup. Ct. Rep. 339, 85 L. Ed. 269, which held valid a personal judgment rendered by a Wyoming court against a resident of that state on personal service of summons in Colorado under a Wyoming statute, the provisions of which were substantially the same as said subdivision (f) of our Rule 4; also among these changes is subdivision (g) (1) of Rule 4, which provides an entirely new method of service of summons in actions in rem, namely by mailing a copy of the summons by registered mail to the defendant with return receipt signed by addressee only requested. These changes raise the question whether they relate only to procedure or affect substantive rights of the person served by either of such new methods.

12 Corpus Juris 977, sec. 569 and 16 C. J. S. 683, sec. 263 state the rule in the following language:

"Statutes relating to the service of process, as, for example, providing a new, or more convenient, method of service, or making the return of the officer evidence of the service of a notice, relate to a mere matter of procedure, and may therefore be retroactive without disturbing vested rights."

And in *United States v. Union Pacific Railroad Company*, 98 U. S. 569, *Daniels v. Detroit, etc., Railway Company*, 163 Mich. 468, 128 N. W. 797 and *King v. Security Company of Pottstown*, 241 Pa. 547, 88 Atl. 789, it was held that statutes providing new methods of service regulated procedure only and did not affect any vested rights of the defendant, even as to a cause of action which arose before the new method of service was created.

Rule 9 C (c) provides that in pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred and that a denial of performance or occurrence shall be made specifically and with particularity and, when so made, the party pleading the performance or occurrence shall establish at the trial the facts showing such performance or occurrence. In the note following this subdivision it is stated that the last clause reading: "and, when so made, the party pleading the performance or occurrence shall establish on the trial the facts showing such performance or occurrence" was added to the federal subdivision to avoid shifting of the burden of proof, and it is then stated: "*See Home Insurance Co. v. Taylor*, 94 Colo. 446."

ADDRESS No. 2

Reference to the opinion in *Home Insurance Co. v. Taylor* shows that on pages 451 and 452 the Court said: "And if a defendant desires to negative the performance thereof, the breach of such condition relied upon by the defendant must be specifically pleaded *and affirmatively proved by him.*" If it has been the law in Colorado that the failure of plaintiff to perform must not only be specifically pleaded by defendant but also affirmatively proved by him, as stated in the foregoing quotation from the *Home Insurance Company* decision, then it would seem that the last clause which has been added to subdivision C (c) of Rule 9, which provides that the plaintiff must prove his performance, attempts to change the substantive rights of the parties under the rule laid down in the two decisions of the United States Supreme Court that the burden of proof is a matter of substantive law and not of mere procedure.

But a further examination of the decision in the *Home Insurance Company* case will show clearly that the question of who has the burden of proof as to performance was in no way involved in that case, as is shown by the facts that there was, in conformity with section 72 of the Code, a general allegation in the complaint that plaintiffs had done and performed everything requisite or necessary to be done by them under the terms of the policy and that defendant denied this allegation by generally denying that plaintiffs had done all that they were required to do under the terms of the policy, instead of, as the court said, "by specifically alleging plaintiffs' breach of the particular condition upon which it relied." This is true also of the two Colorado decisions cited by the court. The *Home Insurance Company* case therefore involved only the question of the pleading required to make an issue of whether plaintiff had performed and not the question of the burden of proof upon that issue, if it had been made.

So that the language of the court that breach of the condition which constituted failure of plaintiffs to perform must be affirmatively proved by defendant was clearly dictum. And, in view of that fact and the fact that there is no Colorado decision which supports such dictum and the further and all-important fact that section 72 of the Code then provided that "if such allegations be controverted, the party pleading shall establish on the trial the facts showing such performance," which is to the same effect as the language added to the subdivision in the Rule, it is clear that the language so added to the subdivision in the Rule makes no change in the law, either substantive or procedural.

An interesting question as to procedure v. substantive rights will arise in actions for damages caused by negligence in the operation of motor vehicles where the defendant attempts under Rule 14 (a) to bring in his insurer as a third-party defendant or the plaintiff makes such insurer defendant under Rule 18 (b). Rule 14 (a) provides that defendant may, as a third-party plaintiff, serve a summons and complaint upon "a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him." This language covers the insurer of defendant who would be liable to him for all or a part of the amount which might be

APPENDIX D

recovered by plaintiff. And Rule 18 (b) provides that whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action, but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. This language would cover the insurer of defendant where the policy, instead of providing for indemnity of the defendant, provides that the insurer will pay any judgment which may be recovered against him. And Rule 20 (a) provides that all persons may be joined in one action as defendants if there is asserted against them jointly, severally or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.

In *Gray v. Hartford Accident & Indemnity Company*, 31 Fed. Supp. 299, a suit was brought against the driver of one of the automobiles involved in a collision and against his insurer and the federal district court for the Western District of Louisiana held that the insurer who had been so sued had the right under Rule 18 (b) to file a third party complaint against the driver of the other automobile and against the insurer of the latter driver, in which third party complaint it was alleged that the negligence of the latter driver caused or concurred in causing the injury.

But, in the only other cases which, so far as can be learned, have been decided on this question, federal district courts in Michigan, Pennsylvania and Massachusetts have denied the right of the plaintiff to make defendant, under Rule 18 (b), the insurer or indemnitor of the principal defendant. In the Michigan case, which is *Pitcairn v. Rumsey*, 32 Fed. Supp. 146, the automobile liability policy provided that no action shall lie against the insurer unless the amount of insured's obligation to pay shall have been finally determined either by judgment against him after actual trial or by written agreement of the insured, the claimant and the insurer. In the Pennsylvania case, which is *Allegheny County v. Maryland Casualty Company*, 32 Fed. Supp. 297, the bond which was given to plaintiff and which was conditioned upon performance of a certain contract provided that no actions or proceedings against the surety in such bond could be commenced until the amount of another and previous bond executed by another surety for a smaller amount was paid or judgment procured therefor. In each case the court held that the provision in the contract conferred upon the insurer or surety a substantive right not to be sued until a judgment had been secured against the insured or the obligee and that this right could not be impaired by the federal rules. In addition to this, the Michigan court held that the fact that the Michigan courts had held (as have the courts in Colorado) that the defendant in an action to recover damages for injuries to person or property has a right to have the fact that he is indemnified by insurance withheld from the jury and the further fact that such right had been recognized by the enactment of a statute constituted further ground for dismissing without prejudice the insurer.

In the Massachusetts case which is *Jennings v. Beach*, 1 Fed. Rules Dec. 442, the court held that under Rule 18 (b) the insurer of the driver of an auto-

ADDRESS No. 2

mobile cannot be joined by plaintiff as defendant with such driver, even where the policy did not contain a "no action" clause because: "It is well settled that in the State courts of Massachusetts it is improper to join the insurance company as a co-defendant of the insured, and it has been held to be grounds for declaring a mistrial to allow the jury to receive evidence that the defendant was insured or that under a policy of insurance the plaintiff's judgment could be collected from the insurance company."

It is still too early to be able to determine what will be the ultimate conclusion on this point by the majority of the courts.

Rule 23 (b), both Colorado and federal, requires that in a stockholder's action brought to enforce a right which the corporation refuses to enforce the complaint must allege that plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved upon him by operation of law. This appears to be a matter of substantive law because it goes to the very existence of the cause of action of a plaintiff who purchased his stock after the transaction of which he complains. However, the Colorado rule does not change substantive law because our supreme court as far back as 1907 in *Boldenweck v. Bullis*, 40 Colo. 253, 259, held that plaintiff could not maintain the suit because "his ownership of the stock in both companies was not vested in him at the time of the transactions which he now seeks to avoid, and such ownership did not result by operation of law" which is almost the exact wording of the rule.

Rule 98, relating to venue or place of trial, makes few changes in the meaning and effect of the Code provisions. Such changes as are made are valid as relating to matters of procedure and not affecting substantive rights. In 12 *Corpus Juris* 977, sec. 571 and in 16 *C. J. S.* 683, sec. 262, the rule is stated as follows:

"Laws affecting the venue of actions, whether allowing a change not previously permitted or withdrawing a permission to change what had previously been in force, relate merely to the remedy, and, as furnishing a new rule of practice, are sustained, although affecting existing cases."

The rule so stated in the text is supported by authorities cited in the footnotes.

In conclusion, attention is called to the fact that the 1913 Colorado statute provides that the rules of practice and procedure prescribed by the Supreme Court shall supersede any statute in conflict therewith and that the 1939 Act provides that from the time such rules take effect all laws in conflict therewith shall be of no further force or effect.

Therefore, any of these rules which relates to practice and procedure in courts of record and which does not affect substantive rights and which does not violate any provision in the Constitution has all the force and effect of a statute, and, insofar as it may be inconsistent with any existing statute, it supersedes the statute; and this is true irrespective of whether such statute be a part of what was the Code of Civil Procedure or was not a part of such Code.

APPENDIX D

Address No. 3.

Rules 1 to 6, Inclusive.

By W. C. CARPENTER,
Member Revision Committee.

Rule 1. Scope of Rules.

The two paragraphs of this rule cover the same subject matter as is contained in Federal Rules 1 and 86, namely: a statement that the rules govern procedure; a definition of the courts to which the rules apply; the general rule of construction to be applied in the use of the rules; the date on which the rules become effective; and the causes to which the rules apply.

C (a) Procedure Governed.

The opening sentence of this rule limiting the application of the rules to procedure raises the first question which we have to consider in the study of any of these rules, namely, whether or not the rule affects a matter of procedure or substantive law. This topic has already been covered by another member of this Committee and I therefore omit any discussion thereof at this point. [See Address no. 2.]

The rule next enumerates the courts to which the rules apply.

The Enabling Act, which confirmed the right of the Supreme Court of Colorado to make these rules, expressly refers to "the courts of record in the State of Colorado."

The courts of record of the State of Colorado as fixed by law are:

The Supreme Court

The District Courts

The County Courts

The Juvenile Courts

Any Court established by law and expressly denominated a court of record

(Session Laws 1939, Chap. 80, p. 264; Code of Civil Procedure, Secs. 444, 449; 1935 Colorado Statutes Annotated, Chap. 46, Sec. 201.)

Therefore, in drafting these rules, the Committee enumerated all of the courts above named as courts of record.

The rule also provides that the rules shall apply to all special statutory proceedings except as stated in Rule 81.

It was the hope of the Committee to make uniform, so far as possible, all of the procedure in special statutory proceedings carried on in the courts of record of Colorado. A rather extensive preliminary survey of the various statutes creating special proceedings was made, and it soon became evident that to make provision in the rules for special statutory proceedings would be difficult, if not impossible, without at the same time recommending substantial changes in the statutory provisions regarding such proceedings. For that

ADDRESS No. 3

reason, it was finally determined to make reference to special statutory proceedings in Rule 1, and to cover the subject further by a special paragraph in Rule 81.

The second sentence of Subdivision C (a) of Rule 1 is almost identical with the corresponding sentence in the federal rule, except that the word "liberally" is inserted before the word "construed." This addition is not out of harmony with the spirit of the federal rules, but emphasizes the same, and the rule as now drawn complies with and summarizes at this point a number of similar statements now scattered through the Code of Civil Procedure. An examination of the code sections cited at the end of the first paragraph of Rule 1 will show that this same rule of construction has been set up for Colorado in the past. Further specific reference is made to this liberal rule of construction in Rule 8 (f), which reiterates the requirement that all pleadings shall be construed to do substantial justice, and Rule 110 (a), requiring the courts to be liberal in permitting amendments.

C (b) Effective Date.

The first sentence of Subdivision C (b) of Rule 1 needs no explanation, because it merely states the effective date of the rules, three months after their adoption by the court on January 6, 1941, as prescribed by the Enabling Act.

The second sentence of this subdivision is identical with the corresponding provision of the federal rules, and provides that the rules shall apply to cases pending on April 6, 1941, unless their application would not be feasible or would work injustice. This particular provision in the federal rules is contained in Rule 86, but the Committee thought it naturally belonged in Rule 1, and transferred it to that position.

It is obvious that the question as to whether the application of the rules will be feasible or work injustice will depend upon the facts and character of each of the pending cases. Mr. William D. Mitchell, in discussing the federal rules, said:

"You will note from the language of that rule that it does not authorize the district judge to make a general rule to the effect that these rules shall affect no pending action. He has to take each particular case by itself, and he is bound to follow these rules unless some injustice would result if applied to a pending action."

(Institute on Federal Rules, Cleveland, 1938, p. 188.)

There have been a few federal cases in which this point was considered.

In the case of *Thermex Co. v. Lawson* (Eastern District of Illinois, 1938, 25 Fed. Supp. 414), where a complaint had been filed in equity and a motion made to dismiss on the ground that there was an adequate remedy at law, prior to the new rules, the court applied the new rules "since the case is still in the pleading stage," and refused to dismiss.

In the case of *Nieman v. Soltis*, 24 Fed. Supp. 1014, a contrary decision was reached because the argument on the motion had been made before the new rules became effective.

APPENDIX D

In some cases motions to dismiss and demurrers filed before the new rules have been decided under the old rules.

New York Life Ins. Co. v. Morris, Department of Justice Bulletin No. 15;

Brennan v. Lumberman's Mutual Casualty Co., 26 Fed. Supp. 305.

In other cases the motions have been considered as equivalent to motions allowable under the new rules and heard and disposed of under those rules.

Shell Petroleum Corp. v. Stueve, 25 Fed. Supp. 879;

Ashman v. Coleman, 25 Fed. Supp. 388;

Equitable Life Assur. Society v. Kit, 26 Fed. Supp. 880.

In determining the question of sufficiency of pleadings already filed, the new rules will probably be applied.

D'Allesandro v. Bechtol, 104 Fed. (2d) 845;

Shultz v. Manufacturers and Traders Trust Co., (Western Dist. N. Y., 1939);

McPherson v. Pacific Indemnity Co., Department of Justice Bulletin No. 2.

In the case of Town of Lantana v. Hooper (Dept. of Justice Bulletin No. 21), upon the granting of new trial it was held that the court could compel the pleadings to be recast in accordance with the new rules.

The new rules were applied in a case of joinder of new parties.

Boysell Co. v. Franco, 26 Fed. Supp. 421.

Where the same cause of action had been twice previously dismissed prior to the effective date of the new rules, the court held that the provisions of Rule 41 could not be applied so as to hold the second dismissal with prejudice because there had also been a voluntary dismissal prior to that.

Cleveland Trust Co. v. Osher & Reiss, Inc. (Eastern Dist. of New York, 1939), 31 Fed. Supp. 985.

While it is probable that the new rules will govern generally procedure regarding depositions and discovery in pending actions (Clair v. Philadelphia Storage Battery Co., 27 Fed. Supp. 777), there have been two decisions where the particular facts led the courts to decide that the rules were not applicable. In the case of C. F. Simonin's Sons, Inc. v. American Can Co. (26 Fed. Supp. 420), the action had been commenced under Pennsylvania practice by the issuance of summons only and the court refused, prior to the filing of the complaint, to permit the service of interrogatories on the ground that no action was pending under the new rules. In Martin v. Manufacturers Aircraft Assn., Inc. (Department of Justice Bulletin No. 17) the court refused to apply the new rules because action in the case had been deliberately delayed for the purpose of obtaining the benefit of the new rules.

In each case, however, it will be noted that the court considered the facts and held that it either was or was not feasible to apply the new rules in the interest of justice.

Rule 2. One Form of Action.

This rule is identical with the federal rule and of course merely restates the existing Colorado rule.

Rule 3. Commencement of Action.

(a) How Commenced.

This rule is different from the federal rule, which provides that a civil action shall be commenced by filing the complaint with the court. The new Colorado rule preserves the existing procedure by which an action is commenced either by the filing of the complaint or the service of summons, and in the latter case, followed by the filing of the complaint within ten days after the service.

(b) Time of Jurisdiction.

This paragraph of the rule merely follows existing Colorado procedure, and confers jurisdiction from the time of filing the complaint or service of the summons.

The old code provision requiring the issuance of the summons within one month after the filing of the complaint, is not contained in the new rules, and there is no requirement that the summons must be returned within a given time. The question has arisen under the federal rules as to how long a summons can remain outstanding before being served and it has been held that service might be made within fifteen months where it was shown that the plaintiff had been diligent in trying to locate a defendant (*Schram v. Koppin*, decided Sept. 17, 1940, Department of Justice Bulletin No. 90). There is an obvious limit to the life of a summons, because it would cease to be effective if the case were dismissed under some local rule for failure to prosecute.

Rule 4. Process.

This rule is former Colorado procedure, modified, and very little of it follows the federal rules.

It was the desire of the Committee to simplify, consolidate, and modernize all of the provisions of the Code, and rules relating to process. The arrangement of this rule is clear and logical. It deals with nine different aspects of process: Scope or applicability of rule; method of issuing summons; contents of summons; by whom served; how personal service is made within the state; how personal service is made without the state; other types of service; procedure to obtain service by publication; and method of proving service.

(a) To What Applicable.

Subdivision (a) is new, and provides that the rule shall apply to all process except as otherwise provided in the rules. No such provision appears in the federal rules. Those provided for elsewhere are subpoenas and writs of attachment. (Rules 45 and 102.)

(b) Issuance of Summons by Attorney or Clerk; All Other Process by Clerk.

Subdivision (b) follows the state practice, authorizing the signature and issuance of the summons, either by the clerk or by the attorney for the

APPENDIX D

plaintiff. Under the federal rule, the clerk alone can issue and sign the summons.

Both the new Colorado and the federal rules provide for the issuance of separate or additional summons, and the Colorado rule also provides for issuing an amended summons.

All other process must be signed by the clerk except the writ of garnishment, which must be signed by the sheriff, (Rule 103 (d)), and subpoenas which may also be signed by persons authorized to take depositions. (Rule 45 C (d) (1).)

(c) Contents of Summons.

Subdivision (c), while using some of the phraseology of the federal rule, is substantially different from it, and attempts to consolidate and simplify the provisions of the existing Colorado Code and statutes. It is no longer necessary to describe the sum of money or other relief demanded in the summons, except when a copy of the complaint is not served with it. The rule properly brings into this section the provision of the statutes (3 C. S. A., Chap. 93, Secs. 73 and 74) requiring a statement in the summons that the action is founded upon tort, if body judgment is desired. New forms of summons, as set out in Form No. 1, should be printed for all counties, with the footnote on them.

(d) By Whom Served.

Subdivision (d) (1) differs, of course, from the federal rule by providing that service shall be made by the sheriff or his deputy instead of by the United States marshal. Where service is made by some other person, the federal rule provides that such person shall be specially appointed by the court, whereas, the Colorado rule provides that such service may be made by any person over 18 not a party to the action. This differs from the present state practice by definitely fixing an age limit of 18.

At this point, it might be well to call attention to the fact that the new Colorado rules adopt the age of 18 as indicative of the attainment of the age of discretion. To be qualified to serve a summons, a person must be over 18; where service is made on a defendant by leaving a copy with a member of the family, such member must be over 18; and personal service can be made upon a natural person over 18 without also serving his parent, guardian, or custodian. In the federal rule, no age limit is fixed for the person who serves the summons; service upon a member of the family must be made upon "some person of suitable age and discretion;" and service upon an "infant" is to be made in the same manner as in the courts of the state in which service is made.

Subdivision (d) (2), regarding service in another state or United States territory follows former Colorado procedure.

Subdivision (d) (3), regarding service in a foreign country, follows existing law except that it substitutes "over 18" for "of legal age."

(e) Personal Service in State.

Subdivision (e) (1), regarding personal service within the state, follows existing practice except (1) that the new rule provides that such service may

ADDRESS No. 3

be made on any person over 18, while the present code provision fixes no age limit; (2) that if served upon a member of the family, such member must be over 18 instead of over 15, as at present; (3) if left at defendant's place of business, the copy must be left with his stenographer, bookkeeper, or chief clerk instead of with his clerk or bookkeeper, as now provided; and (4) service may be made on the agent of the defendant, authorized either by appointment or by law, for service of process, if there be one. The last provision is copied from the federal rule. The federal rule also contains a general provision that service on a natural person in accordance with the state law where service is made shall be good. An example of a statutory agent for service is contained in the statutes [Sec. 48(1), Chap. 16, 2 C. S. A., Cumulative Supplement], where the Secretary of State is made such an agent for non-resident operators of automobiles.

Subdivision (e) (2) provides for service upon a natural person under 18 instead of under 15, as under the present law, but otherwise follows present Colorado procedure. The corresponding provision of the federal rule refers merely to an "infant."

Subdivision (e) (3) provides for service upon the conservator alone where one has been appointed. The Code is substantially the same, although more elaborately phrased. The federal rules authorize service upon minors and incompetents in the manner provided by the law of the state where service is made.

Subdivision (e) (4) provides for service upon a partnership or unincorporated association by serving one or more of the partners or associates, or a managing or general agent, thereof. The Colorado Code provided for service upon a partner or associate. The Committee added from the federal rules "a managing or general agent." The federal rule also contains a provision permitting service in accordance with the state law.

Subdivision (e) (5) provides for service upon a private corporation by delivering a copy to any officer, manager, general agent, or agent for process, which is substantially the federal rule. The old Colorado provision specified "president or other chief officer, or secretary, treasurer, cashier, or other general agent." By using the word "officer," the new rule includes most of those named in the old rule, and substitutes for the words "other general agent," the words "manager, general agent, or agent for process." Where none of these could be found in the county, the old rule permitted service upon a stockholder in the county; the new rule also permits service in such case upon any "agent, member, or principal employee found in the county." The new rule then adds a provision not found in the Code, namely, that if service be made upon a person other than an executive officer, secretary, general agent, or agent for process, the clerk must mail a copy to the corporation at its last known address at least fifteen days before default is entered. The Code provided for service within the state on foreign and domestic corporations in separate paragraphs, but this subdivision of the new rules covers both types of corporations in the same paragraph, although to obtain service under this paragraph on a foreign corporation, it must be doing business in the State of

APPENDIX D

Colorado. The Committee at first thought of including such a statement in the rule because Code Section 40, Subdivision Ninth, so provided. However, upon studying the decisions regarding personal service upon a foreign corporation it seemed to be the established law that such service could not constitutionally be made unless the corporation was doing business within the state and the Committee therefore concluded that it was unnecessary to include the statement in this rule. The federal rule also contains a provision providing that service on corporations is good if made in accordance with the law of the state where made.

Subdivision (e) (6) regarding service on a municipal corporation repeats the existing procedure. The corresponding federal rule provides for service upon the chief executive officer or by serving summons as provided by state law.

Subdivision (e) (7) provides for service upon a county by delivery to the county clerk, but adds to the existing law the provision "or his chief deputy." The federal rule covers this under the rule relating to municipal corporations.

Subdivision (e) (8), providing for service on a school district, repeats existing procedure, and the federal rule is the same as in the case of municipal corporations.

Subdivision (e) (9) is entirely new, and apparently would govern service upon any improvement district, conservancy district, etc. Service must be made upon the principal officer, chief clerk, or other executive employee.

(f) Personal Service Outside the State.

Subdivision (f) covers personal service outside the state. Part of this rule comes from Wyoming, and the balance has been restated. Under the old law, personal service was permitted outside the state in actions in rem, without regard to the place of residence of the person served, and this provision is retained in the second portion of the new rule. In addition thereto, however, the rule provides that personal service may be made upon a resident of Colorado outside of the State of Colorado, even in actions in personam. This clause was adopted after the decision of the United States Supreme Court in the case of *Milliken v. Meyer*, 85 L. Ed. 269, upholding a similar provision in the statutes of Wyoming. It will be noted that in the case of personal service outside the state, copies of both the process and the complaint must be served, and this is the only case in which the rules require the service of a copy of the complaint, except in the case of third-party practice provided for in Rule 14. Service is made in the same way as provided for service outside the state under Subdivision (d) and proof of the service will be made as provided under Subdivision (i) of this rule. If the question of the residence of the party served is raised in the case in which he is served, the burden of proving his residence will obviously rest upon the party asserting it. If, however, the party so served does not raise the question and judgment is entered against him and he later attempts to attack the judgment as void on the ground that he was a non-resident of the state, then he will have the burden of proving such non-residence.

ADDRESS NO. 3

(g) Other Service.

Subdivision (g) covers the subject of service by mail or publication in actions in rem, and follows substantially the old law as to service by publication, but introduces (subdivision (1)) a new method providing for service by mail. Since this method of service is new, it should be noted that in order to obtain leave to use the same, a verified motion must be filed, stating why this method of service is advisable, and giving the name and address of the person to be served. The court may hear the motion ex parte, and if satisfied as to the advisability of using this method, it may enter an order permitting such service. The rule requires the mailing of the process and a copy of the complaint, directed to the person to be served, requesting a return receipt "signed by addressee only." This is to take advantage of the present practice of the Post Office Department providing for securing the receipt of the addressee himself, if the sender so desires. Service is complete when the clerk files the proof of service with the return receipt attached.

Sub-paragraph (2) provides for service by publication, and adds to the Code a provision that such service can be had when a foreign corporation has not appointed a statutory agent for process, or when the agent appointed cannot be found at the address stated in the appointment.

(h) Publication.

Subdivision (h) follows substantially the Code as to service by publication, except: (1) it dispenses with the useless expense and waste of time under the Code which required that the summons should first be returned "not found;" (2) the clerk is required to mail a copy of the process only within ten days instead of forthwith; and (3) service is complete on the last day of publication, not ten days thereafter. The new rule still requires publication for four successive weeks as did the Code. The existing statute regarding publication of legal notices will still apply, so that it will require five publications to comply with the new rule, as it did under the Code. (1935 Colo. Stat. Ann., Chap. 130, Sec. 6.)

Publication is required in a newspaper in the county, or if there be none in the county, then in a newspaper published in an adjoining county to be designated by the court.

The Federal Rules do not provide for substituted service.

(i) Manner of Proof.

Subdivision (i), providing the method of proof of service, follows substantially the Code, except that it adds a provision as to the method of proof where service by registered mail is made as heretofore described.

(j) Amendment.

Subdivision (j), regarding amendment of process and proof of service, is federal subdivision (h) and replaces Code Section 41, which was more limited in its phraseology.

APPENDIX D

(k) Refusal of Copy.

Subdivision (k) is the same as the Code, except that it is broadened to include all process instead of summons alone.

In making service of summons in the future, therefore, it will be necessary to carefully examine the provisions of Rule 4, for while in many respects they are identical with the Code, you will note from the previous summary that there are also many variations.

Rule 5. Service and Filing of Pleadings and Other Papers.

This rule deals with the service and filing of pleadings and other papers after the original complaint and summons.

(a) Service, When Required.

Subdivision (a) is more comprehensive than the old Code provisions which it replaces, and is the same as the federal rule, except that it omits any reference to filing and serving the "designation of record on appeal," which of course would be inapplicable to Colorado practice. The corresponding requirement in the case of writs of error under the new Colorado practice is contained in Rule 112 (a).

(b) Service.

(1) How Made.

Subdivision (b) (1) is so complete a restatement of the whole subject of service that it should be carefully studied. It follows substantially the federal rule, with one exception: the new Colorado rules require the addresses of both the party and his attorney to be given in the pleadings; hence, service by mail to the addresses so given is one of the methods of service. This provision does not exist in the federal rule, but the Committee was impressed with the necessity of having some method of determining the address of a party for purposes of service, particularly in the case of a summons to hear errors, because in some cases where the writ of error was not sued out for nearly a year after the decision of the lower court, the names and addresses of both parties and their attorneys had been lost. By providing that the addresses of both the parties and their attorneys must be placed in the pleadings in the lower court, and also providing for service on the parties or their attorneys at the addresses so given, the rules now provide against such a contingency (Rule 111 (e)).

Again, under this rule, as in the case of Rule 4, where service is made by leaving a copy at the residence of the party served, it may be left with a member of the family over 18 years of age. In the case of service by mail, it should be noted that service is complete upon mailing, and registered mail is not required. No method of proof of service is provided, and presumably the affidavit of the attorney or person mailing the paper would be sufficient. Where service is made upon a person at his office, and the office is open, although there is no one in charge, service may be made by leaving the document in a conspicuous position therein, as is the case under existing law, but it is no longer required that the document shall be so served between eight

ADDRESS No. 3

o'clock in the morning and six o'clock in the afternoon. Service is made in the same manner whether on a party or his attorney.

C (2) Resident Attorney.

Subdivision C (2) is a new rule requiring the appointment of a Colorado attorney upon whom papers may be served in addition to any foreign attorney who may be appearing in the case. This follows the practice in the federal district courts.

(c) Same: Numerous Defendants.

Subdivision (c) is the federal rule, and enables the court to enter an order limiting the requirements as to service where there are numerous defendants. For example, the court may enter an order that the service of the pleadings of the defendants and replies thereto need not be made as between the defendants.

C (d) Filing and Serving.

Subdivision C (d) then requires that any paper subsequent to the original complaint must, in addition to being filed, be served either before filing or within forty-eight hours thereafter; and any papers served must be filed either before serving or within a reasonable time thereafter.

(e) Filing with Court Defined.

Subdivision (e) is the federal rule. It requires pleadings and papers to be filed with the clerk of the court, unless the judge permits the same to be filed with him, in which event he is to note the filing date thereon and forthwith transmit the papers to the clerk.

It should be noted that the federal rules (12 and 15) contemplate service of a paper as the essential act both to stop the running of the time limit against the party filing the paper, and to start the time limit running against the party who has to move or reply thereto, whereas, under the new Colorado rules, the filing of the paper is essential to stop the running of a time limit and service is essential to start the time running against the opposing party.

Rule 6. Time.

(a) Computation.

Subdivision (a) is the federal rule and restates substantially the present practice in Colorado, except that the new rule provides that where the period of time prescribed or allowed is less than seven days, intermediate Sundays and holidays shall be excluded in the computation.

C (b) Enlargement.

Subdivision (b) covers the power of the court to extend the time within which any act may be done, and is substantially the same as the federal rule. It is broader than the Code, and differs from the federal rule in that it permits extension of time for filing the motion for new trial and affidavits in support thereof, whereas the federal rule expressly prohibits this. This permission should be used sparingly, however, so as not unduly to delay writs of error. This subdivision expressly prohibits any enlargement of the time

APPENDIX D

within which a writ of error may be sued out, namely, one year under Rule 111 (b).

(c) Unaffected by Expiration of Term.

Subdivision (c) provides that the expiration of a term of court shall in no way affect the power of the court in pending cases, and is the Federal Rule.

C (d) Notice, Motion, Affidavits.

Subdivision C (d) is new, follows the federal rule in part, and replaces some of the old Code provisions. If the person making the service and the person to be served live in the same county, service must be not later than twenty-four hours before the time specified in the notice; in other cases, service must be not later than three days before such time.

If affidavits are to be filed in support of a motion, they must be served with the notice, and opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

This subdivision destroys the old provision for additional time of one day for each twenty-five miles in distance.

C (e) Additional Time on Service by Mail.

Subdivision C (e) is new, and provides for an additional three days where notice or other paper (other than process under Rule 4) is served by mail. Therefore, if an attorney is about to file an answer in any cause, and the plaintiff's attorney resides in the same city, the defendant's attorney may either mail the answer or serve it on the opposing attorney personally. If the answer contains a counterclaim, the plaintiff is obligated to file his reply within twenty days after the service. Service is complete upon mailing. But under the above rule, the plaintiff's attorney will have three additional days in which to file his reply to the counterclaim if the defendant's attorney chooses to mail the answer instead of delivering it to the opposing attorney personally on the day on which it is mailed.

ADDRESS NO. 4

CHAPTER II.

Address No. 4.

Pleadings and Motions—Rules 7 to 15.

By THOMAS KEELY,

First vice-chairman, the Revision Committee; associate editor Columbia Law Review, 1920-1922; member Colorado Supreme Court Rules Committee.

Pleadings and motions are embraced within Rules 7 to 15. Perhaps these particular rules constitute as great a departure from present state practice as can be found in all of the new rules.

The declaration of policy found in Rule 1, that the rules are to be "liberally construed to secure the just, speedy and inexpensive determination of every action" must lay the foundation upon which the pleading rules are to be interpreted, for otherwise there will be little advancement over our present state practice.

There are certain cardinal principles upon which the pleading rules were formulated which must always be kept within the active contemplation of the judges called upon to administer justice under them; and numerous obligations rest upon attorneys who must cooperate if these rules are to be as beneficial as they were intended to be by those drafting them.

In the first place:

A complaint is considered as a claim made by a plaintiff against a defendant. As the original pleading it is designed only to give the defendant such information as is necessary for the defendant to know the nature of the claim which is being made. Primarily it is intended as a notice to the defendant that a claim is made. For example, Form 9, Appx. A, the complaint for negligence, reads as follows:

"1. On June 1, 1939, in a public highway called Broadway Street in Denver, Colorado, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

"2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of.....dollars.

"Wherefore, etc. * * *"

That complaint is complete. It is not objectionable, by which term as the rules use the word we mean it is not subject to motion for a more definite statement, or bill of particulars under Rule 12.

In the second place:

The rules use the word "claim" as distinguished from "cause of action." Unlike the present Code there is no requirement that the "facts" should be stated. Thus, conclusions may be pleaded as well as "facts" and so long as the defendant is adequately apprised of the nature of the claim that is made, the pleading meets the requirements of the rules.

APPENDIX D

Heretofore under the Code practice every complaint has been critically examined to ascertain what the theory of the cause of action pleaded might be. Does this complaint state a cause of action based upon an express trust or an implied trust? Is that complaint framed upon a theory of a cause of action based upon tort or contract? Which theory do the facts pleaded fit into? And all too frequently the plaintiff, or the defendant asserting a counterclaim, has found himself out of court because the theory of the cause of action he has been forced to adopt was erroneous; it was tort instead of contract, an implied trust instead of an express trust; and the unfortunate litigant has not been able to amend his pleading because he would then be changing the cause of action. If the spirit of the new rules is to be observed, such technicalities will henceforth be disregarded. There are a few of the federal district courts which refuse to recognize what may be termed "notice pleadings" and they still insist upon requirements coming close to former standards under the old codes, but the great majority of the federal decisions approach the interpretation and application of the rules as they were intended to be interpreted and applied. Fundamentally the action should proceed speedily when the defendant knows what the plaintiff's claim is; the plaintiff should recover if the evidence shows that recovery should be permitted upon any ground. The proof is the important consideration, not what the plaintiff's theory of the case may be.

(See *White v. Holland Furnace Co.*, 31 Fed Supp. P. 32. Change from tort to contract.)

In the third place:

The rules relating to depositions and discovery (26 to 37) are so framed that information can be elicited, which, under the older practice, was customarily procured through motions for more definite statements and bills of particulars. The liberal use of these discovery rules should be encouraged by denying motions which do not seek essential information.

If the judges will bear these elementary principles in mind in construing the pleading rules, they will approach the goal which the drafters were seeking to reach. If these principles are lost sight of, the new rules will fail to accomplish all that they were designed for.

It is undoubtedly true that a good pleading under present practice is a good pleading under the new rules. We do not wish to encourage sloppy pleadings, but on the other hand we aim to discourage the delay and expense incident to unnecessary motions and similar dilatory tactics.

Notice in this connection the statement in Rule 11. The signature of an attorney to a pleading constitutes a certificate that there is good ground to support it, and that the pleading was not interposed for purposes of delay. Under Rule 7 (b) (2) the provisions of Rule 11 apply to motions. Our judges are charged with the duty of seeing that the rules are complied with, if the attorneys indicate any disposition to disregard their provisions.

With these general thoughts in mind we proceed to examine the rules relating to pleadings, endeavoring to emphasize the points of divergence between the practice under the code and under the rules.

Rule 7. Pleadings Allowed; Form of Motions.

7 (a). Only the following are pleadings:

The complaint

The answer

A reply to a counterclaim denominated as such; a reply to any answer when ordered

The answer to a cross claim

The third party complaint

The third party answer

Motions are not pleadings.

A reply is neither required nor is it permitted except by order of court, unless the previous pleading contains a counter claim denominated as such, in which event a reply is required. Any party may ask leave to file a reply, or one may be required by the court, where the previous pleading contains no counterclaim denominated as such and the facts are such as to warrant the filing of a reply. The correct way to procure such an order from the court is by application to the court embraced in a written motion, unless the application is made at a hearing before the court, or the court on its own motion orders a reply.

7 (b). All applications to the court are by motions in writing unless made at a hearing or on trial. Generally speaking, under the new rules, the words "petition," "bill of complaint," "demurrer" and similar terminology are eliminated by Rule 7.

7 (b) C (1). Observe that this subdivision requires all motions to state **with particularity** the grounds therefor. This is more explicit than the other rules which relate to pleadings generally with the exception of Rule 9, which requires fraud or mistake to be specially pleaded, and Rule 12 (e), which states that a motion to separate or for a more definite statement or bill of particulars shall point out the defects complained of and the details desired.

Motions follow Rule 11 as to form, signing, caption, etc. Each motion should have a caption bearing a designation. The grounds should be numbered separately and the specific items of relief set out. Statements from pleadings may be incorporated by reference.

A motion must be signed by an attorney, who thereby asserts that there is ground for it, and that it is not filed for purposes of delay.

7 (c). Demurrers, pleas and exceptions for insufficiency of a pleading cannot be used. Demurrers are abolished.

What disposition has been made under the rules of the old grounds for demurrer under the code?

A demurrer for insufficient facts becomes a motion to dismiss under Rule 12.

Under Rule 21, mis-joinder of parties is not a ground for a motion to dismiss. While there is no definite statement in the rules, if indispensable parties are not joined a motion to dismiss should lie only if the indispensable parties cannot be brought in.

APPENDIX D

Lack of jurisdiction, either of the subject matter or of parties, can be raised at the option of the pleader by motion to dismiss under Rule 12, or in the answer.

Lack of capacity to sue is raised by answer.

The former tests of what was proper union of causes of action have been considerably modified, as will be observed from Rule 10 (b) later commented upon and from the rules relating to parties, but a motion for a statement in separate counts or defenses may be made under Rule 12 provided the requirements found in Rule 10 (b) have not been met.

That the complaint is ambiguous, unintelligible and uncertain may be ground for a motion to dismiss only if the pleading fails to state a claim on which relief can be granted.

If another action is pending between the same parties, it would seem the point should be raised by answer. Practically this is so at the present time as the fact of another pending action between the same parties rarely, if ever, appears upon the face of the complaint.

Perhaps it will be helpful to observe that in the federal courts some attorneys who were unfamiliar with the new rules continued to file demurrers. These were treated as motions to dismiss. Other papers not correctly described under the rules were considered as if correctly described. Some liberality in interpretation will undoubtedly be advisable until most practitioners are (I don't suppose all practitioners ever will be) familiar with the rules.

7 C (d). Follows present code sections 310, 311 and 312 as to procedure in an agreed case.

Rule 8. General Rules of Pleading.

8 C (a). We have already discussed in a general way the nature of the complaint. We think it is well worth while to point out again that the theory of a cause of action has no place in the new rules, and that all that should be required is a sufficient statement to apprise the defendant of what the plaintiff claims. As one case points out, "A generalized summary of the case that affords fair notice is all that is required"—*Securities and Exchange Comm. vs. Timetrust, Inc.*, 28 F. Supp. 34.

Of course, the same comment is true of defenses under Rule 8 (b). A theory of a defense is as out of place as a theory of a cause of action. Courts should decide ultimately whether the facts proven entitle a plaintiff to relief, a defendant to recover on a counterclaim, or if the defendant has in law a valid defense, irrespective of legal theories pressed upon the court by the parties, as distinguished from the law actually applicable to any given situation.

We have already referred to form 9, Appx. A, as illustrative of the type of complaint contemplated by Rule 8 C (a). Examine now some of the other forms of complaint, and notice the simplicity of allegations which meet the new requirements. Look at Forms 3 to 8 and Forms 11 to 14 following the rules in Appx. A. Notice that in Forms 5 to 8, the complaints for goods sold and delivered, for money lent, for money paid by mistake, and for money had

ADDRESS NO. 4

and received fix only the date of the transaction and state that the defendant owes the plaintiff a certain sum as the result of the transaction. As is stated in Rule 9 (f), the allegation as to the time of the transaction is material. Attention is called to the fact that all of these types of complaint found in the forms are not objectionable, that is, they are not subject to a motion for more definite statement or bill of particulars because of indefiniteness, or a motion to strike or motion to dismiss because they contain conclusions of law.

Under 8 C (a) there is the present requirement that a claim filed in a court of limited jurisdiction, which means the county court, must contain a statement showing that the court has jurisdiction. Such an allegation is illustrated by Form 2, Appx. A.

8 (b). Notice the proper way to plead lack of knowledge, "The defendant is without knowledge or information sufficient to form a belief." This is a modification of present practice in that our present statement "and cannot obtain sufficient knowledge or information" is eliminated.

General denials are not proper unless a defendant wishes to deny everything in his opponent's pleading. The pleader should make specific denials of designated allegations or paragraphs or deny all averments except such designated averments or paragraphs as the pleader expressly admits.

8 (c). Under this rule all affirmative defenses must be affirmatively pleaded, whether specifically mentioned in the rule or not. Notice that the statute of limitations and statute of frauds are made affirmative defenses. They can no longer be raised by special demurrer even if appearing on the face of the complaint, and several federal cases indicate a motion to dismiss is improper to raise them, but if the bar of either statute is satisfactorily established and it is clear a party is not entitled to the relief sought because of the statute of limitations or statute of frauds, it would appear to be proper to raise the question by motion for summary judgment under Rule 56. Mitigating circumstances in actions for slander and libel are affirmatively pleaded as under old Code Sections 74 and 75 [§§ 2, 3, Appx. B].

8 (d). Follows our old practice in providing that allegations which are not denied in a responsive pleading are deemed to be admitted unless no responsive pleading is permitted or required; if no responsive pleading is permitted or required, all allegations of the previous pleading are taken as denied or avoided.

8 (e) C (1). Notice that conclusions of law are no longer objectionable, if the pleading otherwise conforms to the rules. Allegations may still be made upon information and belief.

8 (e) 2. Hypothetical or alternate statements are permitted. If fact "A" is so, then a particular legal result assertedly follows, or if fact "B" is so, then another legal result may follow. This is hypothetical pleading. As an example of alternate pleading, Form 10, Appx. A, is in part as follows:

"1. On June 1, 1939, in a public highway called Broadway Street, in Denver, Colorado, defendant C.D. or defendant E.F., or both defendants C.D. and E.F. wilfully or recklessly or negligently drove or

APPENDIX D

caused to be driven a motor vehicle against plaintiff who was then crossing said highway.

"2. As a result plaintiff was thrown down and had his leg broken
* * *"

Of course, in every instance the pleader must in good faith believe that there is good grounds for the statement.

Rule 9. Pleading Special Matters.

C (a) 1. Capacity to sue need not be alleged. Thus, in pleadings, the mere statement that the plaintiff is a corporation, a trustee, or an executor suffices to plead the plaintiff's capacity to bring the suit. If the defendant wishes to raise the question of lack of capacity to sue, it is done by answer and the burden of proof is then placed upon the party asserting such capacity.

The rule also covers the pleading of:

C (2). Identification of an unknown party, who should be referred to in the caption as "John Doe" or "Richard Roe," "whose true name is unknown." The pleader should set out all identifying matter within his knowledge and describe the connection of the unknown defendant with the claim set forth.

C (3). The interest of unknown parties which should be described and coupled with a statement as to how such interest was derived, and

C (4). Where unknown parties claim under a **named** defendant, it is sufficient to describe their interest by stating that their interest is derived through the named defendant. This provision is new, and modifies old Code Section 50.

(b) Fraud or mistake and the circumstances constituting them which must be specially pleaded. Malice and other conditions of the mind may be averred generally.

C (c). The performance of conditions precedent in a contract by general averment, which suffices, but if denied specifically the burden of proof of performance remains upon the party alleging it.

(d). The method of pleading official documents or acts.

C (e). The method of pleading a judgment. A denial of jurisdiction must be made specifically and with particularity.

(f). Allegations as to time and place which are material.

(g). Special damage which must be pleaded as at present, for example, as in libel cases.

C (h). Pleading a Colorado or United States statute by reference to official or recognized compilation which is still permitted.

Rule 10. Form of Pleadings.

This rule requires little comment as its provisions are self-explanatory.

10 (b). Notice that all averments of claim or defense must be made in numbered paragraphs, the contents of each of which shall be limited to a

single set of circumstances. Each claim should be separately stated as should each defense; but notice the rule says each claim or defense arising out of a separate transaction shall be separately stated. If the same facts give rise to what we now refer to as several causes of action or several defenses, they need not be separated, but they should be separated if they did not arise out of the same transaction or occurrence. Forms 10 and 13, in Appx. A, for example, embrace separate causes of action under our old code practice and yet, because all of the allegations relate to the same transaction or occurrence, the joinder of the different causes of action is undoubtedly proper. No motion to separately state such claims should be entertained by the court under Rule 12 (e).

Rule 11. Signing of Pleadings.

Every pleading must be signed by an attorney of record. Notice particularly that every pleading must have on it the attorney's address and also the party's address. One of the reasons for this requirement is that under Rule 111 (e) in Supreme Court proceedings the summons to hear errors is to be served upon the defendant in error at the address given in the pleadings.

A pleading need not be verified unless the particular statute makes it necessary. The note to this rule gives the instances where verification is required. There is no longer a requirement that if the original pleading is verified, subsequent pleadings must also be verified. The signature of the attorney is itself tantamount to a verification.

We have already pointed out that the signature of the attorney amounts to a certificate by him that he believes there is good ground to support the pleading or motion and that it is not filed for delay. Observe particularly that the court is given power to subject an attorney to disciplinary action for a wilful violation of the rule.

Rule 12. Defenses and Objections; When and How Presented—By Pleading or Motion; Motion for Judgment on Pleadings.

Before commenting upon this rule, we wish to refer again to the shifting of emphasis under the rules from the pleadings to the different methods by which facts may be developed before trial.

We now have:

Pre-trial Procedure under Rule 16

Depositions upon oral examination—Rule 30

Depositions upon written interrogatories—Rule 31

Interrogatories to Parties—Rule 33

Discovery and Production of Documents for inspection and copying
—Rule 34

Physical Examinations—Rule 35

Request for admission of Facts and Authenticity of Documents—
Rule 36

Under all of these the attorney has been given almost unlimited power to ascertain any pertinent fact. These rules were intended to be used, and they

APPENDIX D

indicate the desire to eliminate technical matters by developing a means to uncover any relevant and important information. Besides, they afford remedies which are much more effective than motions for more definite statements or bills of particulars, etc.

A statement of general policy under the rules can be framed in this way: Encourage the use of discovery provisions; limit the use of motions; and in so far as possible, tell a defendant that he should "put everything he has in one document (the answer) jurisdictional, legal and fact defenses all in one".

The original committee which drafted the Federal Rules started with the theory that only an answer should be permitted in order to end delay. The provisions of Rule 12, permitting certain motions, thus represented a compromise; but, the underlying thought in the minds of the committee was: motions should be used sparingly—you can put everything in the answer, but you are given the option to a certain extent of making the motions referred to in Rule 12.

(See Edmunds—4 John Marshall L. R. 291)

At all events it can be said that if the spirit of the rules is followed, it is no longer possible to entrap your opponent by any motion. Technicalities are to be overlooked and relief granted on the basis of substance.

12 C (a): This subdivision definitely fixes the time for filing pleadings or motions. It follows generally present practice except that the defendant is given no additional time to appear even though he is served outside the county where the suit is brought, and that 20 days is given for a reply instead of 10. Periods are computed from time of service of a pleading upon the opposite party. Notice that under 12 C (a) the court may postpone the determination of any motion until trial.

12 (b): Every defense must be set up in the answer except the six defenses mentioned, which can be raised by motion under this subdivision: those defenses broadly being "lack of jurisdiction" and "failure to state a claim upon which relief can be granted". The first five defenses, "lack of jurisdiction" may be raised by affidavit or deposition if they do not appear from the papers in the case. On the other hand as to defense 6, some federal courts adopt the view that a motion to dismiss is essentially the same as a demurer and they will not dismiss a case on the merits upon such a motion when supported by affidavits or depositions. These courts say use the motion for summary judgment under Rule 56; other federal courts permit stipulations, affidavits and depositions to be considered in connection with a motion to dismiss, and on the basis of such stipulations affidavits and depositions have dismissed the action on the merits. Since a motion for summary judgment under Rule 56 is adequate, the writer prefers the former decisions. Forms 15 and 16 indicate the way to plead these 6 defenses and other defenses generally under the rule.

Notice that any one of the first five numbered defenses may be raised at the same time that any other motion permitted under Rule 12 is filed. A motion attacking jurisdiction filed in the trial court saves the point in the Supreme

ADDRESS No. 4

Court, even if such a motion is overruled. Supreme Court Rule 4 is abolished. Now a motion attacking jurisdiction may be filed with a motion attacking the merits of a pleading and there is no waiver of the former. While special appearances are proper the former necessity for separately entering a special appearance in support of a motion attacking jurisdiction over the person no longer exists.

As we have said, the bar of the statute of frauds or statute of limitations should now be raised in the answer. There is no such thing as a special demurrer, and under several federal decisions a motion to dismiss will not lie to raise the point. But, if the bar is established by admissions, or affidavits, or depositions, a motion for summary judgment under Rule 56, it seems to us, should be sustained to avoid the unnecessary expense incident to going to trial.

12 (c): The motion for judgment on the pleadings, as interpreted by the federal courts, we believe, conforms to present state practice. So long as any fact material to the determination of the rights of the parties is in dispute it will not lie, and it should not be entertained where the pleadings can be amended under Rule 15 in such a way as to indicate that a party is entitled to relief.

12 (d): Preliminary hearing may be had on the enumerated 6 defenses raised under 12 (b), but ruling thereon may be deferred until trial.

12 C (e): We have already discussed at length the use of a motion for a more definite statement or bill of particulars. Under this rule, the motion for a more definite statement or for a bill of particulars is the same. The use of such a motion should be discouraged. Generally a party should be compelled to resort to interrogatories under Rule 33, or to other discovery rules to obtain the information heretofore customarily sought by a motion for a more definite statement or bill of particulars.

We have added to the federal subdivision a motion to separate, the use of which should be limited to cases where different claims arising out of different transactions are improperly joined which is in sharp contrast to the present practice of requiring the separation of so-called causes of action even though they arise from the same transaction or occurrence, and courts should not entertain such a motion unless it is necessary to protect the parties.

Neither of these motions nor any other should ever be used for purposes of delay only.

The federal courts have practically read out of Rule 12 (e) the words "to prepare for trial" in passing upon motions for a bill of particulars. Our committee modified the language of the Federal Rule slightly to indicate our approval of the federal decisions in this particular. Generally, we repeat, the parties should be made to use the discovery provisions. It should never be the purpose of a bill of particulars to narrow the issues as so frequently occurs under present practice.

We have noticed that under Rule 7 (b) C (1) motions must specify with particularity the grounds therefor. Similarly, Rule 12 (e) requires that a

APPENDIX D

motion for more definite statement or bill of particulars, or one for a separate statement must point out the defects complained of and the details desired. General allegations that the complaint is too indefinite should not suffice. To meet the requirements of subdivision (e), definite reasons should be assigned in a motion as to why the complaint is too indefinite or why a motion to separate should be allowed. In other words, courts should require that such motions be more carefully drawn than under present practice, and if the requirements mentioned have not been observed, motions imperfect in form should, as a general rule, be denied.

12 (f): Enlightened federal courts only entertain a motion to strike when the allegations sought to be stricken are actually harmful. They do not grant such a motion based on trivialities.

The second sentence of Rule 12 (f), which states that the objection that a pleading fails to state a legal defense may be raised by motion under this subdivision, permits an entire defense to be stricken. A motion to strike is the correct way to raise the question of the sufficiency of a defense rather than a motion to dismiss. The federal court decisions are not in harmony on this point and the second sentence was added by the Colorado Committee to clarify it. This is a change in practice, as heretofore it was not considered proper to "strike" an entire defense. A demurrer was the correct way to eliminate an entire defense.

12 (g): All motions should be filed together except that the 5 numbered defenses under 12 (b) raising the question of jurisdiction may be raised by motion filed first, and disposed of, if the court wishes, and then the other motions can be filed. If one or more motions are filed and there are other objections which might also have been raised by motion, such other objections are waived. If you don't move at all you can raise the point in the answer; but if you do move and fail to include all objections or any of the defenses of "lack of jurisdiction" under 12 (b), which you might have raised, such objections or defenses as are not presented are waived.

12 (h): Defenses not presented by motion or answer are waived, except that the defense of failure to state a claim upon which relief can be granted, or failure to state a legal defense or lack of jurisdiction in the court over the subject matter, can be raised at any time before or during the trial.

Rule 13. Counterclaim and Cross Claim.

13 (a): This subdivision deals with compulsory counterclaims of a defendant.

Notice that all claims of a defendant arising out of the transaction or occurrence of which the plaintiff complains must be raised by a counterclaim. If not so raised, they are waived. This applies to replevin actions, which is also a change in present practice. Now if "A" sues "B" to replevin a car because of failure to pay installments, and "B" thinks he has grounds for a claim for damages because of false statements made by "A" in selling the car to "B", "B" must raise the claim by counterclaim or it is waived. The only qualification in the rule which relieves a party from filing a counterclaim

ADDRESS No. 4

arising from the same transaction referred to in the complaint is where it cannot be determined in the absence of a third party who cannot be served.

13 (b): This subdivision permits the filing of a counterclaim whether it arises out of the same transaction or not, and by clear implication whether it be in connection with a tort or a contract, irrespective of the nature of the claim set forth in the complaint. Thus, in a suit involving a contract, a counterclaim based on a tort is proper. For example, "A" sues "B" on a contract. "B" counterclaims that he was injured by "A's" negligence in an automobile accident, and then "A" replies that in the accident about which "B" counterclaims, he, "A", was injured because of "B's" negligence. Thus, we have a counterclaim to a counterclaim, which is not only a possibility, but under different facts, has actually occurred under the federal rules.

13 (c): A counterclaim may or may not diminish or defeat recovery, or give rise to a positive judgment in the defendant's favor, as in present practice.

13 (e): Under this subdivision a counterclaim maturing or acquired after the pleader serves his pleading may be asserted with the court's permission. As in other similar instances the court's permission should be obtained by an application presented in a written motion. By inference, this subdivision construed with subdivisions (a) and (b) permits the assertion of all counterclaims which mature or are acquired before the pleader serves his pleading, even though they matured or were acquired after suit was brought. Whether or not the court has any discretion under 13 (b) in allowing counterclaims acquired by assignment between the time suit is brought and the time the pleader files his pleading, which discretion was formerly recognized by the federal courts under old Federal Equity Rule 30, may be a debatable question; but the interpretation of this rule should not, we believe, permit the privilege of asserting such assigned claims as counterclaims to be abused to the extent of violating the spirit and purpose of the rules.

13 (f): Under this subdivision if a counterclaim has been omitted, it may be asserted upon leave of court.

13 (g): This subdivision covers an entirely new procedure in this state, the subject of cross claims which may be asserted by one co-party against another co-party—Form 16 in appx. A contains a suggestion as to the proper method of pleading a cross claim.

Cross claims which are allowed by this subdivision can best be illustrated by examples: "A" sues "B" and "C" as co-sureties on a contract of suretyship. "B" holds an indemnity agreement from "C," and while "B" and "C" are both liable to "A," "C" is under a duty to indemnify "B"; and so "B" files a cross claim against "C." Judgment may be entered in "B's" favor against "C" on the cross claim.

"M" sues to foreclose a mortgage given by "X" and asks for judgment on the note thus secured. "M" joins "Y" with "X" as "Y" bought the property from "X," and at the time of the sale by "X" to "Y," "Y" assumed and agreed to pay the mortgage. "X" then files a cross claim against "Y" asking for indemnity as to the note and mortgage and for judgment accordingly. "X" is entitled to this relief.

APPENDIX D

13 (h): The court can order additional parties brought in if their presence is necessary to the granting of complete relief in the determination of a counterclaim or cross claim.

13 C (i): Separate judgments may be entered on a counterclaim or cross claim even if the claims of opposing parties are dismissed.

13 C (j): Embodies the substance of Code Section 4, and with

13 C (k), embraces the provisions heretofore found in that Code Section and Code Section 64.

13 C (l): Is purely a matter of state practice and was inserted as a direction to county courts to certify a case to the district court in the event their jurisdiction is ousted because the amount involved through the filing of a counterclaim, cross claim or third party claim exceeds two thousand dollars.

Rule 14. Third Party Practice.

14 (a): This is entirely new practice for Colorado. In many essentials it is an innovation in all courts except courts of admiralty. New York, Pennsylvania and Wisconsin have had third party practice and have permitted third parties to be brought in where there was a liability of the third party over from the defendant to the plaintiff. But Rule 14, it will be seen, permits a defendant before filing his answer to move ex parte and after filing his answer upon notice, upon leave of court, to bring in a third party defendant who is or may be liable either to the plaintiff or to the defendant for all or part of the plaintiff's claim. This is accomplished by serving a third party complaint. Under Rule 14 the third party complaint must be served with the third party summons. Claims to be asserted under the rule must be *in personam*. Generally speaking "a surety may bring in his principal; an agent may bring in his principal; a lessee sued by a lessor on a covenant may bring in his sub-lessee; a covenantor sued for breach of warranty of title may bring in his own covenantor; a city sued for injury caused by a defective sidewalk may bring in an abutting owner; a contractor sued for a wrongful act of a subcontractor may bring in the latter; a joint obligor who owes contribution may be brought in, and a joint tortfeasor may be brought in if there is contribution."

From an article by Prof. (now Judge) Dobie, 25 Va. L. Rev. 261.

Perhaps in proper cases insurance companies can be brought in, whether the insurance company is liable to the plaintiff on a policy held by him, or to the defendant on a policy held by him. The federal decisions are not harmonious, however, in this regard, and the problem will undoubtedly require solution by our Supreme Court.

The third party defendant can assert any defenses which the third party plaintiff may have to the plaintiff's claim.

Once the court or jury determines the liability of the third party defendant to the plaintiff, or to the third party plaintiff, he is bound by that determination. The plaintiff may amend his pleadings to assert a liability against the third party defendant as if the latter had been originally joined as a party. The third party defendant, in turn, may bring in still another person who

may be liable to the third party defendant, or third party plaintiff, for all or part of the claim asserted against the third party defendant.

14 (b): If a counterclaim is asserted against a plaintiff he is permitted to bring in a third party defendant under the same circumstances that would entitle a defendant to do so.

Rule 15. Amended and Supplemental Pleadings.

15 (a): Amendments of pleadings are liberally allowed; once as a matter of course before a responsive pleading is filed, or if no responsive pleading is permitted, the pleading may be amended within 20 days after it is filed, unless the case has been set for trial. All pleadings can be amended under leave of court or by stipulation. The rule also fixes the time to file a responsive pleading to all amended pleadings and at least 10 days is given from the time the amended pleading is served.

Remember that causes of action or, perhaps more properly referred to, definite theories of causes of action, should have no proper place in applying the rules. If a pleader wishes to change a pleading which sounds in tort to one sounding in contract, or vice versa, it should be permitted, so long, of course, as the facts are germane to the transaction or occurrence which is the basis of the claim.

15 (b): The force of our last comment is illustrated by Rule 15 (b). When issues not raised by the pleadings are tried by express or implied consent, amendments in the pleadings may be made to conform to the evidence either before or during the trial, or even after judgment, but the failure to amend does not affect the result of the trial of the issues. Issues not raised by the pleadings can be presented, and even over objection, the court should allow proper amendments liberally when a presentation of the merits of the action will be thus subserved. The court may grant a continuance to enable a party objecting to evidence as not being within the issues to meet such evidence.

It seems fairly evident that the idea that any party should be held to a theory of a cause of action or defense is out of place under Rule 15 (b). The judges in interpreting and applying the rules should see that it remains out of place.

Academically, of course, our comment about eliminating theories of causes of action and defenses brings us into troubled waters. For the benefit of those who are inclined to be critical, or perhaps we can say for the benefit of those who prefer to discuss all legal subjects philosophically, it must be admitted that we appreciate the impossibility of eliminating from legal proceedings theories of causes of action and theories of defenses all together. But in the initial stages of litigation, at least, and even down to and during the trial, courts can reserve their decisions as to what relief a party is entitled to until all of the surrounding facts are known. Courts can grant or deny relief based upon substance rather than grant or deny relief because some attorney has made a mistake in applying legal principles to facts susceptible of proof, and by liberally permitting amendments to pleadings, courts can see that a party ultimately receives the measure of justice the facts entitle

APPENDIX D

him to. Whatever may be the price in time and effort for a judge to educate willy nilly an uneducated attorney who isn't able to procure for his client the relief that the client is entitled to, it seems to us will not be too high.

Of course, the form of action and the distinction between law and equity is still important in (1) determining the applicable statute of limitations; (2) the application of the substantive law and the propriety of certain remedies to proven facts; (3) the determination of the right to jury trial; (See Pike, *Some Current Trends in the Construction of the Federal Rules.*) (4) it will also be important in questions of venue, the provisions as to which, found in Rule 98, unfortunately smack too strongly of the cause of action idea to be entirely consistent with our present suggestions, as do the statutory provisions requiring different docket fees in different types of actions, and (5) where body execution is sought and the summons must state the action is founded upon tort. But at least the committee recognizes these inconsistencies.

15 (c): When amendments are made they relate back to the date of the original pleading, provided the pleader "stays within the general subject matter dealt with in the original pleading." Notice the language does not limit the amendment to the same claim or defense, but it says the amendment is proper and relates back whenever the claim or defense arose out of the same transaction. Again a party is not held to his theory of the cause of action or of the defense. Under this provision a party's earlier theory may be abandoned or modified upon the condition only that such party bases his amended claim or defense upon the same transaction or occurrence referred to in the earlier pleadings. There are some federal decisions, however, which so limit this doctrine of relation back in amended pleadings that a claim which would be barred by the statute of limitations, except for such amendment, cannot be revived by the amendment. The committee has not even attempted to consider whether those decisions are wise or unwise.

15 (d): Supplemental pleadings are permitted under this rule. A familiar illustration is:

The plaintiff sues to recover a mare belonging to him. Pending the litigation the mare has a colt. By supplemental pleading the plaintiff should be entitled to seek recovery of the colt.

(See Dobie—25 Va. L. Rev. 261.)

In conclusion, we hope it has been made perfectly clear that the important consideration, indeed we may say the only important consideration, in applying the rules is that a party should receive such relief as the facts of, and justice relating to, a particular transaction or occurrence entitle him to; and that pleadings and motions, as provided for in the rules, are only useful tools to aid the attorneys and the court in arriving at a scientific and accurate appraisal of the legal rights of the parties involved.

For a helpful discussion of these rules see:

Manual of Federal Procedure, West Publishing Co.
James A. Pike, Various Publications and Articles.

ADDRESS No. 5

Address No. 5.

Pre-Trial Procedure; Formulating Issues—Rule 16.

By PERCY S. MORRIS,

Second vice-chairman Revision Committee; member of the
Supreme Court Rules Committee.

This rule prescribes an innovation in our practice which, if put into effect by the judges and wisely administered by them, will prove to be one of the most beneficial changes in procedure made by the rules.

The rule itself is comparatively short and simple, but the benefits to be derived from it are practically unlimited. Its provisions are that in any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider: the simplification of the issues; the necessity or desirability of amendments to the pleadings; the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof; the limitation of the number of expert witnesses; the advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury; and such other matters as may aid in the disposition of the action.

The rule then provides that the court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings and the agreements made by the parties as to any of the matters considered and which limits the issues for trial to those not disposed of by admission or agreement by counsel and that such order when entered controls the subsequent course of the action unless modified at the trial to prevent manifest injustice. And, in the way of mechanics, the rule concludes with the provision that the court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration under the rule and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

The history of pre-trial procedure is interesting. Before the adoption of the federal rule, it had proved exceedingly helpful in state courts in Detroit and Boston in promoting the settlement of cases without trial, the shortening of the time of the court, the jury, the litigants and the witnesses in the actual trial, the saving of time to the attorneys, both in the preparation for trial and in the trial itself, and relieving congestion in the trial calendars.

The experience of Detroit is particularly illuminating. The pre-trial conference was put into practice there in 1932 and it was not, as in the federal rules and the Colorado rules, left to the discretion of the court as to whether a conference was to be had in any case, but it was made compulsory that before trial the court hold the conference. In 1932, when the procedure was inaugurated there, there was so much congestion in the courts that it required about four years for a case to be tried to a jury. This time has now been reduced to ten months. We are indebted to Hon. Joseph A. Moynihan, one of the judges of the Circuit Court in Detroit, who is considered the father of pre-trial pro-

APPENDIX D

cedure in this country, for the following statistics: in 1935 out of 4,965 cases ready for trial, 2,016 or about 40% were finally disposed of on the pre-trial hearing without any trial; in 1936 the number was 2,886 out of 5,834, which is 49%; in 1937 the number was 3,198 out of 5,798, or 55%; and in 1938, out of 5,839 cases ready for trial, 3,533 or 60% were finally disposed of on the pre-trial hearing without any trial.

The practice in Boston produced similar results. When it was instituted there in 1935, the courts were trying cases four and one-half years old. Three years later, in spite of a tremendous increase in litigation caused by the State Compulsory Automobile Insurance Law, the waiting time had been cut in half.

Whether the pre-trial procedure is to be put into practice at all is dependent entirely upon the trial court. And the effectiveness of the practice, when put into effect, will depend both upon the manner in which the judge handles the conference and upon the attitude adopted by the attorneys. It is to be noted that the Colorado rule provides, as does the federal rule, that the court may in its discretion direct the attorneys to appear before it for the conference. The attorney for either side may suggest to the court the advisability of calling a conference, but, even if such suggestion is made, it is still in the discretion of the judge as to whether he should call it. Practical experience has shown that, if the practice is to be effective, it should not be left to the attorneys to suggest or request the conference, but that it should be called by the judge on his own initiative.

It has been found that the best time for holding the conference is about two weeks before the trial. That period is close enough to the time of trial to enable counsel to have investigated thoroughly their sources of evidence and to determine whether their witnesses will be able to attend the trial and, if the same judge holds the conference and presides at the trial, to enable him to retain the knowledge of the issues which he secured from the conference; and such two weeks should give counsel sufficient time to complete the preparation of their evidence on issues that after the conference remain to be tried.

The conference should be as informal as possible. Some judges hold the conferences at the bench in the court room, but the best results are secured through the informality of the conference being held in chambers. The judge takes the pleadings and mentions each point upon which an issue has been made on the face of the pleadings and asks the attorney making the allegation what evidence he has in support of his allegation and then asks the opposing attorney whether he really disputes the truth of such allegation and desires to compel his adversary to put in his proof on it. Particularly under our system where general denials are permitted to create issues as to most of the allegations, it is found that very often attorneys deny allegations upon which at the time of the trial there is no actual dispute and compel the party making them to go to considerable trouble and expense to secure evidence to support them; in such cases, where one attorney states the proof that he would furnish if required to, his adversary realizes that it would take up the time of the judge, the jury, the litigants, the witnesses and the attorneys if he were to insist

ADDRESS No. 5

upon the evidence upon such issue being introduced, without changing the result in the slightest; he therefore usually says that he admits the allegation and the judge makes a note of that fact. Of course, if an attorney says that he will not admit the allegation and desires his adversary to put on proof thereof, that ends the question of that issue so far as the conference is concerned, as he cannot be compelled to admit in the conference anything he does not care to. But most attorneys will hesitate before placing themselves in the eyes of the judge in a position of refusing to admit obvious facts and of forcing the time of the court and perhaps of the jurors to be taken up at the trial in the introduction of evidence of facts, the truth of which should have been admitted by him.

In many cases the trial can be simplified and shortened by the judge in the conference securing agreements of counsel upon detailed facts which do not appear in the pleadings but which otherwise would have to be proved by evidence at the trial to support the issues made by the pleadings; examples of these are stated in the Report of the Committee on Pre-Trial Procedure of the American Bar Association as: the width of a street; the situation of motor vehicles; the amount of expense of medical care; the amount and reasonableness of the cost of the repair of an automobile; weather conditions; contents of a document which is a matter of public record; and the correctness or the payment or non-payment of certain items in a disputed bill for merchandise. To this list may be added the correctness of photographs, and whether a party to the action is a corporation. And similar results can be accomplished by the judge securing agreement of counsel as to the amount that is to be recovered by plaintiff if he proves liability of the defendant or agreement of counsel that liability exists and that the only question to be determined is the amount of recovery.

Very often the time of the court in the trial, which otherwise would be taken up in the formal proof of the genuineness of an instrument or a record, can be saved by admission at the conference of the authenticity of the document or record. And often the time of the keeper of records, such as hospital records, weather bureau records, records of conveyances, books of account, etc., in coming to court, waiting until his turn is reached and then giving purely formal testimony identifying the record, can be saved by the admission at the pre-trial conference of the authenticity of the record. And, in preparing for the trial, counsel will know whether he must have the witness come to court to identify the record or whether that is rendered unnecessary by the admission at the conference.

After the issues have been discussed, the attorney for one side often finds that it is desirable or necessary that he amend his pleading in some respect and it is for this reason that the rule specifies, as one of the matters to be considered in the conference, the necessity or desirability of amendments to the pleadings. In such a case, counsel can request leave to amend and be given time for doing so. If it were not for the conference, the desirability or necessity of amending would not become apparent to him until the actual trial was under way. Therefore by this practice there is saved the time of the

APPENDIX D

court at the trial that would otherwise be taken up in a hearing upon the application for leave to amend. There is also avoided the element of surprise through the amendment being made at the trial with perhaps the necessity of continuing the trial, either in order to allow the amendment to be made or to allow either side time to secure evidence with respect to the amendment.

Another matter which may be taken up at the conference is the question of whether there is to be a limitation upon the number of expert witnesses and, if so, what the limitation is to be; if there is to be a limitation, it is certainly to the advantage of the parties and their attorneys that they know it in advance of the trial, rather than that they employ more than the number of expert witnesses which at the time of the trial the judge may fix as the limit and find they have wasted the fees of the excess witnesses and the time spent in conference with them.

Another matter is the advisability of preliminary reference of issues to a master. It may be found at the pre-trial conference that the nature of the evidence required to be given in a case is such that it can be best handled through reference to a master and it is better to determine this fact at the conference than after the trial is under way.

The remaining matters to be considered at the conference are such as are included in the general phrase "such other matters as may aid in the disposition of the action" and action taken under this provision, of course, will be such as will simplify and expedite the trial of the case, the determination of the truth and the administration of justice.

During the course of the conference the judge makes notes of the facts agreed upon, the issues eliminated by admissions or agreements and those remaining to be tried, the amendments to be made in the pleadings and any other matters which were settled in the conference and, at the close of the conference, he enters an order embodying these matters. Such order controls the subsequent course of the action except as it may be modified at the trial to prevent manifest injustice.

The settlement of the case is not one of the matters specified in the rule as being the objects of consideration at the conference, but it very often results indirectly from the matters that are considered at the conference; in the course of the conference, disclosure is made of the evidence that is to be offered and each attorney sees just what he is up against and is able to determine his chances of success at the trial much more definitely than he could if the conference had not been held and the result is that the attorneys on each side are better able to determine upon what kind of a settlement is for the best interests of their respective clients and come to an agreement of settlement. Also the conference often results in the disclosure of facts and testimony which were unknown to the attorney against whose client they would be used and he therefore is likely, as the result of the conference, to persuade his client to agree to a settlement which the client would not have agreed to if such facts and evidence had not been disclosed.

ADDRESS No. 5

Where the pre-trial procedure has been put into practice, the judges like it because it saves their time in the actual trial and saves the time as well of witnesses and jurors and avoids expense and enables them better and more efficiently to administer justice. And attorneys like it because it provides a means of their becoming better informed and therefore better able to advise their clients as to what kind of a settlement should be made, rather than making a guess in the dark, and, particularly, because it minimizes the element of surprise at the trial. With reference to this latter point, it often occurs that a client does not fully inform his or her lawyer as to the facts and it is not until the actual trial is on for some time that the attorney learns of the existence of the facts which had not been disclosed to him by his client; an illustration of this is the existence of a letter written by one of the parties making statements absolutely contrary to the facts which he has stated to his attorney; in such a case the attorney, in the utmost of good faith, would spend much time in looking up law and talking to witnesses in preparation for the trial and would spend considerable time in the conduct of the trial before the stage is reached where the letter can be offered in evidence by his adversary, to say nothing of the time of the judge, the jury, the witnesses and opposing counsel in the portion of the trial up to that point; when the letter is flashed and the writer of it does not or cannot deny its authenticity, his attorney is placed in a most uncomfortable and embarrassing position. The attorney having this interesting bit of evidence may not like the idea of disclosing it at the conference and might prefer to keep its existence hidden until the dramatic moment when he can hand it to its writer and ask him if that is not in his handwriting, but its disclosure in the conference brings about the same result as the withholding of it until some time during the trial. It also results in a tremendous saving of the time of those participating in the trial and in a saving of expense. No lawyer should require the wasting of the time of himself, his opposing counsel, the judge, the jury and the witnesses and the expense merely to gratify his vanity and his liking for the dramatics. And, if the letter or other similar writing should be a forgery, the opposing attorney will be able under Rule 34 to secure a photographic copy of it and will have opportunity to secure testimony as to its being spurious. Surprise has well been termed "the natural foe of justice" and such foe of justice can to a great extent be thwarted by a pre-trial conference efficiently conducted.

There is only one Colorado judge who has had actual experience in carrying on this pre-trial procedure and that is Judge J. Foster Symes of the United States District Court for the District of Colorado. Judge Symes states that he has found it to be very helpful, both in facilitating the settlement of cases and in saving time in the actual trial of those cases that are not settled. He says that approximately half of the cases upon which pre-trial conferences are held by him are settled after the conferences and before trial. He says also that it aids in the trial of the case because it renders unnecessary a great deal of evidence on formal matters and on matters that are not actually controverted and it boils the issues down to the very essentials in those cases that are

APPENDIX D

tried and that it enables him to have at the time of the commencement of the trial a clear understanding of the case and of the questions involved.

Pre-trial conferences may also result in it appearing that, even though on the face of the pleadings there seem to be issues of fact, there are actually no substantial facts which are controverted and that it is therefore a case which is to be determined solely as a matter of law. In such case a motion for summary judgment under Rule 56 can be made and the entire case determined upon hearing on such motion without any trial and without the necessity of bringing in witnesses.

In the large cities where pre-trial procedure has been put into effect in the state courts, the practice has been to have one judge hold all pre-trial conferences and to have the trial before another judge. The advantage of this is that attorneys may feel more free to make an offer of settlement before a judge who will have nothing to do with the trial than they would if the conference were held by the same judge who would preside over the trial. Because of the fact that there is but one judge for each county court and because of the small number of district judges in each district, it will be impossible in any state court of record in Colorado, aside from the district court in Denver, to have the conference conducted by a judge other than the one who presides over the trial; and in Denver, with only five district judges handling civil matters, it may be found difficult in non-jury cases. However, the advantage already mentioned of having the conference held before a judge who will not preside at the trial is balanced by the fact that, where the same judge holds the conference and then tries the case, he, because he did preside over the conference, is familiar with the nature of the case and its issues and enabled thereby to expedite the trial of the case.

The principal disadvantage in a pre-trial conference being held by the judge who will try the case is that the attorney may feel that, by making an offer of settlement in the presence of the judge, he prejudices his client's case, either by evidencing a willingness to pay any amount whatsoever or by evidencing a willingness to accept a much smaller amount than that claimed by his client. But, as has been said, settlement is not one of the direct objects of the pre-trial conference, but rather one of the results from the pre-trial conference and the actual negotiations for settlement can well be conducted by the attorneys after the conference is over. The judge should not attempt to take the matter of settling the case into his hands or to force either side to make or accept an offer of settlement.

Pre-trial procedure has been tried out in courts in Massachusetts in which there was only one judge and the results have been very satisfactory. And, necessarily, in a federal district in which there is only one judge each conference is conducted by the judge who tries the case.

The benefits of this practice are more pronounced with respect to jury cases because of the saving of time of jurors in the trial and the expense of their fees. But the practice has been found to be very successful as to non-jury cases in the way of exposing unfounded claims and sham and frivolous defenses, cut-

ADDRESS No. 5

ting away the underbrush and leaving exposed only the vital issues, saving time in the actual trial and laying the ground work for a settlement.

Because of this practice being entirely new in all of the courts in Colorado, except the Federal Court, few of you will have had actual experience in it. Some suggestions have been made in this paper as to the mechanics of the conferences, but of course it is entirely in the discretion of the judge as to the manner in which the conference is conducted. The procedure referred to in this paper of the judge mentioning each issue raised on the face of the pleadings and asking the attorney making the allegation what evidence he has to support it is the practice which Judge Symes states he follows. Judge Laws of the District of Columbia, in the paper which he read and which I shall refer to later, says that his practice is to require counsel for both sides to make a full and complete opening statement precisely as he would at the final trial as to what he expects to prove and that, when these statements have been made, he asks questions about them.

A number of papers and articles have been published which will prove of help to you in familiarizing yourself with the actual practice under Rule 16 and the results which may be accomplished from it. Among these is the report of the committee on Pre-Trial Procedure made to the American Bar Association at its meeting in Cleveland on July 27, 1938, the paper, "Theory and Practice of Pre-Trial Procedure," by Professor Edson R. Sunderland which appeared in the Journal of the American Judicature Society of December, 1937, the paper entitled "Pre-Trial Procedure—Some Practical Considerations" by Hon. Alfred P. Murrah, United States District Judge of Oklahoma, in the American Bar Association Journal of July, 1940, and the paper on Pre-Trial Procedure by Hon. Bolitha J. Laws, one of the Judges in the United States District Court for the District of Columbia, which appears in Volume 1, No. 10 (being the October, 1940 issue) of Federal Rules Decisions at page 397. Those of you who practice in rural districts will be particularly interested in the article entitled, "Pre-Trial Practice Succeeds in One-Judge County," which appeared in the April, 1937 issue of the Journal of the American Judicature Society, which reports the experiences of Judge Cox of Suffolk County, Massachusetts, and in the paper entitled "Use of Pre-Trial Practice in Rural Districts" by Federal Judge Armistead M. Dobie, which appeared in Volume 1, No. 9, which is the September, 1940 issue, of Federal Rules Decisions at page 371.

As will be seen from what has been said, this practice, if wisely administered, will do more than any other rule in the new procedure to accomplish the purpose of the rules as stated by the Supreme Court of the United States in its recent decision in *Sibbach v. Wilson & Company, Inc.*, 85 L. Ed. 349, 61 Sup. Ct. Rep. 422, namely: "that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth."

APPENDIX D

Address No. 6.

Parties—Rules 17 to 25.

By CHARLES H. HAINES,

Assistant City Attorney Denver, 1927-31; Professor of Real Property and Contracts, Westminster Law School, 1918-41; member Revision Committee.

In this chapter there are no radical departures from the Federal Rules, the few changes which have been made being mainly those which were necessary to make the federal rules applicable to state practice.

The spirit of the entire body of rules, both state and federal, is to bring about a just settlement of all controversies which are submitted to the courts as quickly as possible with a minimum of expense and with the elimination of technicalities so far as that may be done without sacrificing substantive rights. In no part of the rules is this spirit more plainly indicated than in the chapter dealing with the subject "Parties."

Rule 17. Parties Plaintiff and Defendant; Capacity.

(a) Real Party in Interest.

This subdivision opens with the familiar statement from Code Section 3, "Every action shall be prosecuted in the name of the real party in interest." The wording of the rule is identical with the federal except that "conservator" has been added, as that term is used by our Colorado statutes but is omitted from the list of representatives mentioned in the federal rule.

C (b) Capacity to Sue or Be Sued.

The federal subdivisions under this letter and caption in the main apply to federal jurisdiction and are not applicable to state practice. The committee therefore inserted under this heading appropriate parts of sections 5, 6, 9 and 14 of the Code with reference to suits by married women, partnerships and parents or guardians suing for injury to or death of a minor child or ward.

C (c) Infants or Incompetent Persons.

This subdivision is taken almost verbatim from the federal rule. However, the state rule contains a provision declaring that it shall not be necessary in an action in rem to have a guardian ad litem appointed for an unknown party who may be an infant or incompetent person. Our slight departures from the federal rule in other respects require no explanation.

Rule 18. Joinder of Claims and Remedies.

(a) Joinder of Claims.

This subdivision follows the wording of the federal rule exactly and is a radical departure from code practice. If the plaintiff has more than one claim against the defendant he has his option to sue on one, or part, or all of those claims, regardless of their nature or origin. That is to say, he may join legal demands both in tort and in contract and equitable demands of a different nature in one complaint, although no two of the claims arise out of the same transaction or occurrence. Moreover, he may make alternate claims; for

ADDRESS No. 6

example, asking for either the return of specific goods or their value. The defendant, in his answer, may likewise join either as independent or as alternate claims as many claims, either legal, or equitable, or both, as he may have against the plaintiff; and the plaintiff in his reply, may state counterclaims against the defendant based on the transactions or occurrences giving rise to defendant's counterclaims against him. Similar liberality is granted to multiple parties to present their counterclaims against opposite parties to the suit and all such other parties have a right to present their counterclaims against such opposite multiple parties. However, the right to present cross-claims against co-parties is limited to the presentation of claims arising out of transactions or occurrences which have been made the basis of a complaint or counterclaim. Independent controversies cannot be brought into the action by cross-claims.

(b) Joinder of Remedies; Fraudulent Conveyances.

This subdivision is also taken verbatim from the Federal Rule and is an innovation in our state practice. Whenever by former practice it was necessary to prosecute one action to a final conclusion before instituting a second action, both claims may now be joined in one action and the court will grant relief in that action in accordance with the relative substantive rights of the parties. Example: B, who is indebted to A, has made a conveyance to C in fraud of creditors. A may sue B and C in one action and immediately upon obtaining judgment against B proceed to prove that the conveyance to C was in fraud of creditors and have it set aside if his claim is not paid forthwith. (See Form 13, appx. A.)

Another interesting question will arise under this rule which remains for the Supreme Court to settle. May a plaintiff join as a defendant in an automobile accident case, the insurer of the driver who is charged with negligence. By the plain wording of the rule, he may, but of course the claims would be tried separately. The advantage of the joinder would be that all issues would be joined before trial of the main case and judgment against the insurance company would follow promptly after judgment against the principal defendant. In case of review the two judgments would go through the Supreme Court together and thus save loss of time without prejudice to the substantive rights of any party.

Rule 19. Necessary Joinder of Parties.

(a) Necessary Joinder.

The substance of this subdivision is that persons having a joint interest should be joined on the same side as plaintiffs or defendants, but when a person who should join as a plaintiff refuses to do so, or his consent cannot be obtained, he may be made a defendant or, under certain circumstances, an involuntary plaintiff. The wording is the same as in the Federal Rule except that the committee has inserted the words "or his consent cannot be obtained."

C (b) Effect of Failure to Join.

It was necessary to change this subdivision of the Federal Rules slightly to adapt it to Colorado practice as the Federal Rule involved certain federal juris-

APPENDIX D

dictional difficulties relating to diversity of citizenship which have no application to state practice. Only such necessary changes were made in adapting the subdivision to state practice. The subdivision gives the court discretionary power to bring in new parties either on its own initiative or on motion of a party where the court deems such action advisable.

(c) Same: Names of Omitted Persons and Reasons for Nonjoinder to be Plead.

This subdivision is identical with the Federal Rule and is self-explanatory. (See Form 22, appx. A.)

Rule 20. Permissive Joinder of Parties.

(a) Permissive Joinder.

(Joinder of plaintiffs.) This subdivision also follows the Federal Rule exactly and institutes a radical change in Colorado practice. All persons who assert a right jointly, severally, or in the alternative in respect of or arising out of the same transaction or occurrence, or series of transactions or occurrences may join in one action as plaintiffs if any question of law or fact common to all of them will arise in the action. Example: By reason of ambiguous language in a life insurance policy, uncertainty exists as to whether suit on the policy should be brought in the name of the widow or of the administrator of the estate of the decedent. Under the rule they may join as plaintiffs, averring that one or the other has a right to recover in the action.

(Joinder of defendants). The plaintiff may join in one action as defendants all persons against whom he asserts a claim jointly, severally or in the alternative, or any right to relief in respect of, or arising out of the same transaction, occurrence, or series of transactions or occurrences if any question of law or fact common to all of them will arise in the action. A good example of this kind of a case is a multiple automobile accident. The plaintiff knows that his car has been wrecked and that he has been injured and that several other cars were involved in the same occurrence but he is unable to determine who was at fault. He may bring all the parties before the court averring that one or more of the defendants was negligent and let the court or jury fix the responsibility. (See Form 10, appx. A.)

A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. The final judgment shall be according to the respective rights and liabilities of the parties.

(b) Separate Trials.

Another case of adoption of federal wording. This subdivision is the safety device that prevents the complication of parties and issues permitted by Rule 18 (a) and Rule 20 (a) from getting out of hand. The trial court is directed to make such orders as will prevent a party from being embarrassed, delayed or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him and may order separate trials or make other orders to prevent delay or prejudice. It is in the handling of such

ADDRESS No. 6

problems as this that the trial judge will find his administrative ability subjected to the greatest strain.

C (c) Parties Jointly or Severally Liable.

Out of abundance of caution the committee has retained this provision from Code Section 13. It does not appear in the Federal Rule and perhaps was not necessary here but the committee thought best to retain it.

Rule 21. Misjoinder and Non-Joinder of Parties.

No action will be dismissed for non-joinder of parties if the court can obtain jurisdiction of all necessary parties; nor for misjoinder of parties, as the court can dismiss those who are not concerned with the proceeding, or may sever the claims and try them independently.

Rule 22. Interpleader.

This is the same as subdivision 1 of the Federal Rule. Subdivision 2 of the Federal Rule is omitted because not applicable to state practice.

This rule gives a right to any person who is the object of double or multiple demands to file a complaint against the persons making such demands requiring them to come into court and state their claims against him and have them adjudicated. He has this right regardless of whether he admits full liability, partial liability, or denies all liability. A defendant may obtain similar relief by counterclaim. (See Forms 14 and 17, appx. A.)

Rule 23. Class Actions.

(a) Representation.

This subdivision is merely a restatement of the procedure heretofore existing in Colorado and briefly prescribed in the last few lines of Code Section 12. Whenever a class is so numerous that it is impractical to join all members of the class, one or more members may prosecute or defend an action on behalf of the entire class and if the procedure is fair in all respects the entire class will be bound by the judgment. The subdivision classifies the cases in which class representation may be allowed. An example of a case covered by subdivision (1) is: A suit by one or more stockholders on behalf of all stockholders based upon the fact that the board of directors is not protecting the interests of the corporation in good faith. In such action all members of the class have a common interest in the same property which a few members of the class are seeking to protect for the benefit of all.

An example of subdivision (2) is: An action brought by a stockholder of a dissolved corporation on behalf of himself and all other stockholders in his class for an adjudication of the rights of the several classes of stockholders in the assets of the corporation and to require the trustees to distribute the assets accordingly.

An example of subdivision (3) is: An action by a lot owner on behalf of all lot owners in an improvement district to have a special tax on all property in the district declared void. In this instance no two persons in the class are interested in the same property but the menace of the tax is common to all.

APPENDIX D

(b) Secondary Action by Shareholders.

This subdivision is substantially the same as the corresponding federal subdivision except that certain provisions peculiar to federal practice were omitted and the committee eliminated the requirement that the complaint should be verified.

Mr. William D. Mitchell, who was a member of the committee that drafted the Federal Rules, states that this subdivision was inserted in the Federal Rules to meet the requirements of *Hawes v. Oakland*, 104 U. S. 450; 26 L. Ed. 827; that the *Hawes* case was an instance of a declaration of federal common law under the authority of *Swift v. Tyson*, 16 Pet. 1; 10 L. Ed., 865; that the case of *Erie v. Tompkins*, 304 U. S. 64; 58 S. Ct. 817; 82 L. Ed. 787; 114 A. L. R. 1487 was decided after the rules were adopted and he implies that this subdivision might not have appeared in the rules if the decision in *Erie v. Tompkins* had come down a little earlier. However, the decision in *Hawes v. Oakland* has been followed by the Supreme Court of Colorado in *Majors v. Taussig*, 20 Colo., 44; and *Jones v. Pearl Mining Company*, 20 Colo., 417, as well as in other cases, and the committee thought best to include the subdivision as a rule of practice here.

(c) Dismissal or Compromise.

This is the federal subdivision verbatim and is new to our practice as a requirement, although it was doubtless in the discretionary power of the court before. This subdivision forbids the dismissal or compromise of a class action without the approval of the court and requires that before approval is given in cases coming within paragraph (1) of subdivision (a) of this rule, notice must be given to all members of the class in such manner as the court directs. In cases coming within paragraphs (2) and (3) of subdivision (a) notice shall be given only if the court requires it.

Rule 24. Intervention.

(a) Intervention of Right.

Again the federal language is adopted with slight necessary modification. The absolute right of intervention exists when conferred by statute, or when a member of a class complains that his interests are not being properly represented by the members of the class who have appeared, or where he claims an interest in specific property in the custody of the court.

(b) Permissive Intervention.

This rule is clear and requires no comment.

C (c) Procedure.

Again the Federal Rule was adopted verbatim except that those portions peculiar to federal practice were omitted. The practice is simple. The intervenor merely files a motion asking for permission to intervene and tenders the pleading which he wishes to file. (See Form 19, appx. A.)

ADDRESS No. 6

Rule 25. Substitution of Parties.

- (a) Death. (b) Incompetency. (c) Transfer of Interest.
(d) Public Officers; Death or Separation from Office.

Subdivisions (a), (b), (c) and (d) of this rule closely follow the language of the corresponding federal subdivisions and conform to the practice which has heretofore prevailed in Colorado.

C (e) Substitution at Any Stage.

This is new and permits substitution of parties by the trial court either before or after judgment and by the Supreme Court during the pendency of proceedings on error.

Address No. 7.

The Real Estate Provisions—Rules 27, 105 and 120.

By GOLDING FAIRFIELD,

Member Colorado House of Representatives, 1919-21; State Senator, 1921-33;
Professor of Real Property, University of Denver Law School, 1929-41;
member Revision Committee.

Rule 27 concerns perpetuation of testimony and also depositions after judgment.

Rule 105 provides a form of action wherein a complete adjudication of rights in real property may be obtained.

And Rule 120 prescribes a comparatively simple and concise method whereby an order of court may be obtained authorizing the exercise of a power of sale.

Rule 27.

In many situations it is either necessary or quite expedient to secure and perpetuate the testimony of some individual for possible use later in a court action. It is also a customary practice to record a certified copy of such testimony when necessary to show facts to establish a complete chain of title to a parcel of real estate.

The present procedure to perpetuate testimony is contained in Chapter 82 of the 1939 Session Laws. Rule 27 sets forth a similar procedure, differing only in a few details.

Under Rule 27 a person may perpetuate his own or another person's testimony by filing a verified petition which must contain certain facts and allegations. This is the only instance in the new rules that permits an appearance in court by petition. The rule should be carefully referred to in the drawing of such a petition to be sure all of the essential allegations are set forth. These include a brief outline of the facts expected to be proved, the names and residences of the witnesses, and if the petitioner expects to be a party to some action in which the testimony is to be used, the names, if known, of the expected parties.

APPENDIX D

The court thereupon enters an order allowing the examination and directing notice to be given. Personal service shall be made on expected adverse parties, but if the petition states that these are unknown, service shall be made on the County Clerk and Recorder or his deputy. The notice shall also be published for not less than two weeks. If the expected adverse parties are named but personal service cannot be obtained, regular service by publication shall be made upon them.

The rule prescribes what the notice shall contain and careful reference to the rule should be made in drawing up the notice. The requirements include a statement of the time and place of the examination and either a brief outline of the facts expected to be proved or a description of the property to be affected.

The testimony shall be taken on question and answer unless the court otherwise direct, and provision is made for the taking of testimony of a witness absent from the county in which the proceedings are pending.

The papers on file, indicating compliance with the required procedure (or certified copies thereof), shall be prima facie evidence of the facts therein stated.

The testimony may be used in any trial in which it becomes material to establish the facts which such testimony proves, provided the witness is not available.

Subdivision C (b) of the rule provides a method for perpetuating the testimony of witnesses after judgment, for use in the event of further proceedings in the court which renders the judgment. Such depositions may be taken and used in the same manner and under the same conditions as are prescribed in the rules for depositions taken in actions pending in trial courts.

Rule 105.

After preliminary discussion, a sub-committee decided that a rule should be formulated providing for one form of real property action in which there could be obtained a complete adjudication of the rights of all parties.

Many authorities and statutes were studied; the members of the committee held many conferences; suggestions were received from lawyers throughout the state and the proposed rule was re-written many times. Rule 105, now in final form, was the result of this work.

The rule concerns real property and provides that the rights of all parties may be adjudicated in one action, including the determining of damages, if any, for the withholding of possession. At any time after the entry of a decree, additional orders may be entered in aid of the decree.

It is contemplated that only those persons need be made parties whose interests appear of record in the recorder's office of the county where the real estate is situated, except that if recovery of possession be sought the party in actual possession shall be made a party.

Ordinarily, costs may not be recovered against a party filing a disclaimer unless such party be primarily liable on any indebtedness sought to be

ADDRESS No. 7

foreclosed or established as a lien. If, however, a person is requested to execute a quit claim deed upon the tender of \$2.00 and refuses to execute the deed, and if that person is thereafter made a party and files a disclaimer, costs against such party may be imposed. It is to be noted that the present provision in the law for attorney's fees in such cases has been eliminated.

In case of a judgment for possession or for damages, the value of improvements made in good faith shall be allowed as a set-off or counterclaim. This provision, however, does not apply to mining property.

Provision is made for the filing of lis pendens and the notice thereof shall remain in effect for thirty days after the time of entry of final judgment in the trial court. On writ of error a lis pendens must be filed in order to constitute notice of such writ.

It is required in any proceeding for the recovery of real property that such property shall be designated by legal description.

The rule is not complicated and reference to it should be had for further details.

Some of the considerations that influenced the committee in presenting this rule are as follows:

(a) A few of the states now have but one form of real property action. It seems to be the modern practice. There seems to be no good reason for continuing separate actions for quiet title suits, mortgage foreclosures, bills to remove clouds, bills to reform deeds, ejectment or other similar actions.

(b) We felt we should have a simplified real property action predicated on the principles of the recording statute. The recording system, as we know it, has existed in this country for approximately 150 years. The principle involved in this system contemplates that if one has an interest in real estate, he should make that interest a matter of public record; otherwise, he stands a chance to lose that interest by reason of some innocent person relying on the public records. General knowledge now exists of the workings of our recording system and the penalties that may ensue by failure to record a deed. Everyone claiming an interest in real estate has abundant opportunity, at a small expense, to make that interest constructive notice to the entire world. Consequently, it is not too much of a burden to require that only those persons whose interests appear of record need be made parties in this new form of action. It is similar in that respect to our present code provision on mortgage foreclosures and to our present procedure on public trustee foreclosures.

(c) If we had required in all cases that the person in possession be made a party, the adjudicated title would not be entirely settled as there would always remain the question, outside the record, as to who, in fact, was in possession.

When it becomes necessary to make unknown persons parties defendant, you may proceed under Rule 9 (2), C (3) and C (4), which solve some of the difficulties that formerly existed in describing the interests of unknown parties. It is there provided that where unknown parties claim some interest through some one or more of the named defendants, it shall be a sufficient

APPENDIX D

description of their interests and how derived to state that the interests of the unknown parties are derived through some one or more of the named defendants. The proceeding is further simplified under Rule 4 (9) (g), and Rule 4 (9) (g) (2) (h), which no longer require the sheriff's non est return.

Another reference to Rule 105 (b) is now in order. A few members of the bar thought that this section might contain substantive law. In order to eliminate any question, the Legislature was asked to enact this section as a law. Senate Bill No. 712, containing this section, has passed both houses of the General Assembly with an emergency clause, and has been signed by the Governor. It will appear in the 1941 Session Laws.

Rule 120.

This was an emergency rule. A federal act, usually referred to as the Soldiers' and Sailors' Civil Relief Act of 1940, provides, in effect, that no power of sale shall be valid if exercised against persons in the military service unless an order of sale is previously granted by a court and a return of the sale made and approved by the court.

The federal act particularly affects sales by our public trustees. It seemed necessary to have a rule that could be uniformly followed in the procuring of such an order of court. Manifestly no existing code provision covered the situation and the federal act was silent as to any method of procedure except that the federal act provides that when any application is required to be made to a court, such application may be made to any court.

Under Rule 120 the party seeking the order files a verified motion containing certain required information. The court then fixes a time and place for the hearing of the motion. The clerk issues a prescribed form of notice and serves the same by mailing and posting not less than ten (10) days before the time of the hearing. Details are given in the rule as to whom the notices shall be mailed. With respect to public trustee's sales, the attempt was made to follow as nearly as possible the present requirements of the Public Trustee Act concerning mailing of notices. At the time and place of the hearing the court shall summarily determine the motion and grant or deny the same. The court, if it desires, may require additional notice to be given.

If the sale is authorized, a return of such sale shall be made to the court for its approval. A docket fee of \$5.00 is required.

In this proceeding no military affidavit need be filed nor is it required that any attorney be appointed.

Address No. 8.

Depositions and Discovery—Rules 26, 28 to 37.

By COL. PHILIP S. VAN CISE.

Few members of the bar realize the fact finding advantages of depositions and discovery. Many fear that a disclosure of their case will result in unfair advantages being taken by the other side. But if we really study discovery, committed only to the one principle of getting all the facts, we will settle a large percentage of our cases out of court; in many instances we will reduce the trial time by one-half; and we will not be stunned by unheard of witnesses or surprise testimony. Further, we will facilitate the obtaining of summary judgments under Rule 56, and rapidly dispose of many cases in that way. But we will have to work a great deal harder before trial in thorough preparation therefor.

Rule 26. Deposition After Action Is Instituted.

The entire method of taking depositions is covered by the rules, and their wording is exclusive.

(a) When Depositions May be Taken.

Once jurisdiction is acquired over any defendant or over property which is the subject of the action, depositions may be taken by any party to the action. When does the court get such jurisdiction? Under Rule 3 (b) this starts from the time of filing the complaint or the service of summons. So you can serve your summons and a subpoena and a notice to take depositions all at the same time.

Notice you can now take the deposition of "any person." It is no longer confined to parties, or to the sick, or to persons about to be absent. You may now call in all witnesses, and you can compel their attendance by subpoena under Rule 45. The field is yours in which to search for facts because, except in the case of prisoners, no leave of court is required in deposition procedure. The federal rule requires such leave before answer, but in many cases the plaintiff should take the deposition at once, so we struck out that requirement.

You can take a deposition for discovery—to find relevant facts of any kind—and as said by Judge Moscovitz of New York, in one of the early decisions on the new rules, "It will not avail a party to raise the familiar cry of 'fishing expedition.'"

· *Laverett v. Continental Briar Pipe Co.*, 25 F. Supp. 80 (E. D. N. Y. 1938).

You can also take a deposition for use as evidence, or you can take it for both discovery and evidence. Finally, after judgment, under Rule 69 (h) you may also take the deposition of any person, as well as that of the judgment creditor.

APPENDIX D

(b) Scope of Examination.

"The deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter."

This phrase places two limitations on deposition. (1) privilege, and (2) relevancy.

(1) Privilege.

The privilege of refusing to answer is an option of refusal and not a prohibition of inquiry. The question can be, and for trial effect should be, asked in the presence of the jury and the refusal to answer must then be given before the jury.

O'Chiato v. People, 73 Colo. 192, 194.

(i) Incrimination.

While the witness can refuse to answer questions which might tend to incriminate, he, and he alone, and not his counsel, can claim the privilege on such ground. But he cannot refuse to be sworn.

Lothrop v. Roberts, 16 Colo. 250, 254.

O'Chiato v. People, 73 Colo. 192, 195.

A frequent place where this claim of privilege arises is in tort actions when exemplary damages or a body judgment is sought. As long as either claim is made, a penalty is demanded. Colorado holds that both exemplary damages and body judgments are highly penal.

Ristine v. Blocker, 15 C. A. 224, 230.

French v. Deane, 19 Colo. 504, 511.

Jahl v. Lewis, 57 Colo. 109, 112, 115.

Hence, when such damages are demanded the defendant may absolutely refuse to testify at all and may claim his constitutional privilege.

28 R. C. L. 425.

Gadsen v. Woodward (N. Y.) 8 N. E. 653.

Fries v. Burgher, 21 Am. Dec. 52, case note.

However, the defendant's attorney should carefully consider the effect upon the jury of such refusal to answer before he gives such advice to his client.

(ii) Confidential Communications.

Whereas privilege because of incrimination can only be claimed by the witness, any other privilege may be claimed by the attorney.

Now let us examine another kind of privilege in personal injury cases—that of the insurance company.

Suppose you represent the plaintiff in an automobile accident case, and desire to take the deposition of the defendant's casualty company so that you can see the statements which it has obtained from the defendant and other witnesses. Can you compel their production at a deposition, or can the insurance company claim privilege?

Under this subdivision, in all of the adjudicated cases to date it has been held that the matter is not privileged, there being no insurer-insured privilege

ADDRESS No. 8

as the reports are not intended as a communication to an attorney for a party.

Bough v. Lee, 26 F. Supp. 1000.

Kulich v. Murray, 28 F. Supp. 675.

Price v. Levitt, 29 F. Supp. 164.

In the Bough case the insurance company sent the witness statements taken by it all around the country to dodge their production. Finally the attorney for the insurance company was called as a deponent, and when his claim for privileges was denied in rather strong terms the statements were produced. Possibly time and expense might have been saved by complaint to the Insurance Commissioner of the State. So much for denial of that claim of privilege as confidential.

Now let us examine a different claim of privilege, and examine into an attorney's position and see whether or not by deposition you can obtain the other party's trial preparation.

What is the scope of the attorney-client privilege? The federal decisions seem in accord with Dean Wigmore's statement (5 Wigmore, Evidence, sec. 2318, 2d Ed. 1923), that only direct communications from client to attorney are privileged, such as a document written to the attorney by the client, but if the document was already in existence and simply turned over to the attorney, it was not privileged. In the Bough case it was held "an attorney is obliged to produce * such documents as his client could have been compelled to produce."

However, James A. Pike in the University of Chicago Law Review (Feb. 1940) states:

"The federal cases * do not give a party carte blanche to inspect the files of his opponent or his opponent's insurance carrier hoping that he may turn up some material evidence that he has not been able to acquire by his own exertions. In the cases just cited [Bough v. Lee, etc.] the discoverer was able to show quite clearly just what documents he was after. Otherwise his exploration would probably have been regarded as 'oppression'. Judge Moscowitz in passing on this point said:

"The rules * were not intended to be made the vehicle through which one litigant could make use of his opponent's preparation of his case. To use them in such a manner would penalize the diligent and place a premium on laziness. * Except in the most unusual circumstances, no such result was intended."

McCarthy v. Palmer, 29 F. Supp. 585.

(2) Relevancy.

While the material sought must be relevant, it is not always easy in advance of issue to make that determination with accuracy. Two methods of approach are suggested; first, if the deposition is taken before answer then anything is material which would be admissible under any possible answer to

APPENDIX D

the complaint, or stated another way, the test is not whether the matter inquired of will be competent at the trial, but whether it may be; and second, relevancy should be liberally construed.

A federal court construed relevancy in the Air Lines case and held that this subdivision does not limit examination to matters relevant to the precise issue, but allows any inquiry relevant to the general subject matter of the action. It said:

"To the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible."

Lewis v. United Air Lines, 27 F. Supp. 946.

As the names of witnesses are relevant, you can ask plaintiff or defendant who any of their witnesses are, and subpoena these and take their depositions. This practice effectuates an 1887 decision of William Howard Taft, "witnesses do not belong to one party more than to another."

Shaw v. Ohio Edison Co., 9 Ohio Dec. 809, 812 (Super. Ct.)

(c) Examination and Cross-Examination.

There is no change in former practice on this, except that instead of calling a party for cross-examination under the statute, you ask him leading questions. See Rule 43 C (b).

(d) Use of Depositions.

If the deposition is admissible under the rules of evidence, either at the trial or upon the hearing of a motion or interlocutory proceeding, you can use the deposition—either part of it or all of it—against any party who participated in the deposition or had notice of its taking.

If your deposition contains evidence about different matters, and you only introduce part of it, the adverse party can require you to read all that is relevant to the part introduced, but he cannot require you to introduce the balance. But any adverse party may introduce any other portions, if relevant to the issues.

Any party may use any deposition to contradict or impeach the testimony of deponent as a witness.

If a corporation, partnership, body politic, or association is a party, the deposition of an officer, director or managing agent may be taken. Rule 110 defines "managing agent." The words "body politic" were inserted by the Committee to cover any action against the State of Colorado, or any agency thereof, which the statutes might permit.

Rule 26 (d) (2) as submitted to the Supreme Court had at the end of the subdivision the federal clause "for any purpose." This was probably eliminated by it on the ground that it was superfluous. In any event, as adopted, there is no limitation on the use of the deposition at any time or any place, so the change seems meaningless.

ADDRESS No. 8

Ordinarily a deposition cannot be used if the witness is available. If he is not present the court must make a finding before it can be used. The conditions for this use are described in detail in the rule.

Later Use.

Substitution of parties makes no change in the use of the deposition.

You can also use depositions taken in previous actions in state or federal courts in Colorado if they involve the same subject matter between the same parties or their representatives or successors in interest.

C (f) Competency of Witnesses.

Subdivisions (a) to (e) just discussed, are, except as noted, the Federal Rules verbatim. However, subdivision (f) has been modified by us so that you may take the deposition of an incompetent witness in perfect safety. You neither make him competent by so doing, nor do you waive your objection to this competency, nor do you make him your own witness. For instance, you may make the beneficiary of a will a deponent—yet he cannot testify in a will contest by reason thereof. This will be of material aid in quickly determining the facts in will and estate contests, and should be welcomed by our county judge. Such procedure will, in many cases, put an end to weak contests.

However, if you use the deposition of an otherwise incompetent witness, except to impeach or contradict the deponent, you waive your objection to his competency and make him your own witness. But if he is an officer of a corporation, or group, as described in subdivision (d) (2), you do not in any manner make the deponent your witness by using his deposition.

The last sentence in this rule is very interesting and must be carefully examined. It states "At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or any other party." The reason for this rule is that the discovery value of a deposition is emphasized over the evidentiary use, and the result is that you may introduce all or part of a deposition and then turn around and rebut it, and thus impeach your own deponent at will.

At this time we wish to call your attention to the Colorado statutes on depositions in divorce (Laws 1937, Chap. 111, Sec. 8). We did not include them in the rules. They provide that no question shall be asked of any witness which will disclose the name or identity of any third person charged with misconduct nor shall any witness name or identify such person. However, it vests discretion in the court, by order, to allow a limited cross-examination, and states that the section shall not be construed to impair the substantive rights of the parties.

As far as we know this section has not been passed upon by any court. When it is, we anticipate that the argument will occasion a lot of constitutional fireworks about due process and free speech.

APPENDIX D

Rule 27.

This comes under the real estate provisions, and has been covered by Senator Fairfield. [See Address no. 7.]

Rule 28. Before Whom Taken.

Anywhere in the United States or its possessions a deposition may be taken before any person who is there authorized to administer oaths. In the rare cases where you wish to take a deposition in a foreign country study the subdivision carefully, and inquire at the state department and from the consul of the foreign country as to their requirements. However the rule conforms to the acts of Congress defining the powers of diplomatic and consular officers.

The rule specifically provides that no deposition "shall be taken before a person who is a relative or employee or attorney of any of the parties, or financially interested in the outcome." While this says "shall" it may be waived if all parties so agree.

While on that subject, if the stenographer-notary is incompetent you can refuse to submit to examination before him under Rules 30 (b) and 31 (d).

If you desire to take a deposition outside the state of Colorado you must prove to the clerk that proper notice has been given. You should secure from the state where the deposition is to be taken the form there recognized for a commission or letters rogatory. Then the clerk will issue them for you. "Letters rogatory" are seldom used, as they are a request from the judge of one court to the foreign court that the latter take the deposition. We used the words "letters rogatory" because some other state might require them.

If there is any error in the form or commission or letters, the error is waived unless you file or serve objections on or before the time fixed for the application.

Rule 29. Stipulations.

By stipulation you can disregard all technical requirements, and take depositions before any person, at any time or place, and in any manner. We advise the use of stipulations as time savers. Courteous attorneys will always make them—bores will require notice, and in such cases all you can do is to demand complete adherence to the rules.

Rule 30. Oral Depositions.

These are usually preferable to written interrogatories.

(a) Notice.

"Reasonable" notice must be given to all parties not in default. What is "reasonable notice" should give little difficulty, as the taking of depositions is usually a matter of arrangements between attorneys and if they cannot agree, on 24 hours notice and motion you can secure the court's order enlarging or shortening the time.

(b) (d) Orders Limiting Deposition.

Up to this time you may be saying—why there is no limit on who can be interrogated, what he can be asked, how much he can be abused, and how the rich can harass the poor! We have now arrived at the answer to those objections, which is the control exercised by the court over deposition procedure. The court had that power under the old code, but it wasn't defined and few lawyers knew how to invoke it, but these rules now give it in full.

Suppose you are served with notice to take a deposition, and you want to object to all or part of the proceedings. You prepare a motion and notice and take it to the court. For good cause the court may absolutely forbid the taking of the deposition. This is very drastic and should only be used in extreme cases—and even then the court, if possible, should take that particular deposition. Or the court may change the place, or require written interrogatories, or exclude certain matters from inquiry, or limit its scope to particular facts, or exclude the public, or require that the deposition be sealed (these two last will protect the co-respondent). Secret processes, developments or research can be protected. An interesting provision where one party fears that another will manufacture documentary evidence is that the court may require that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

However, if it is not intended that these subdivisions should be made the basis of an application to the court in every case (*Laverett v. Pipe Co.*) and such motions are not regarded with much favor, especially when made before the deposition has commenced. In practice they have been generally denied.

See Pike, *University of Chicago Law Review*, page 302 and cases cited. (Vol. 7, No. 2, Feb. 1940.)

The court may also make any order which justice requires to protect the witness or party from annoyance, embarrassment or oppression. An instance occurs when an attorney attempts to bullyrag a deponent. If this is carried to extreme, you may interrupt the deposition and notify counsel that his conduct will cease at once, and that if it does not that you will discontinue the hearing and report his conduct to the court for action. This should be effective, as there is no occasion for anything but gentlemanly conduct by counsel, both in the taking of depositions and in court trials.

When bad faith occurs, and you so demand, the officer must suspend the deposition, and then you file a motion with the court asking for relief. It may order the deposition terminated, or that it be resumed only on its order. And the court may require either party, or the witness, to pay such costs or expenses as the court may deem reasonable.

However, you don't want to be too captious with your objection. Don't invoke the aid of the court unless you are clearly entitled to it. Then, and then only should the court act. And when it does act a penalty should be quickly imposed. And don't forget that the party, the client, is the one who is penalized for the conduct of his attorney. This should not be very healthy for the lawyer, either.

APPENDIX D

If a party does not desire to examine orally, he may submit written interrogatories, which are propounded by the officer.

(e) (f) Signing the Deposition.

The deposition is read to or by the witness, and he states the changes which he desires to have made. But note this new practice: When he desires to make changes the officer and not the witness makes them, and the officer must state the reasons given by the witness for the change. The deponent should sign it, but the signing may be waived, under the circumstances stated in the rule.

The last step is that the attorney who takes the deposition must give prompt notice to all parties that the deposition has been filed in court.

(g) Failure to Attend.

If you give notice to take a deposition and fail to attend it yourself and the other party does, the court may order your client to pay the other party's expense for such attendance, including his attorney fees—but in only a reasonable amount, however. Also, if the witness does not attend because you neglect to subpoena him, the court may order the same payment to be made.

C (h) Notice to Absent or Unknown Parties.

Subdivision C (h) is original with the committee, and is not based on either Code or Rules.

As notice of the taking of the deposition must be given to all parties, some provision had to be made for serving it on non-residents, or parties who could not be found in the state. In such case you must make a proper showing to the court, on motion, and then it may order that notice be given to such party by registered mail at the last known address, or if none such is known, then by the delivery of a copy thereof to the clerk.

Rule 31. Written Interrogatories.

This rule applies to actions pending in Colorado courts. It applies to any witness, and must be distinguished from Rule 33 which only applies to parties. Further it in no manner governs the procedure at depositions taken in Colorado for use in actions instituted in the courts of other states. Such proceedings are covered by the statutes (4 C. S. A. Chap. 177, Secs. 11 and 12) which empower the district court to compel attendance and enforce testimony.

If written interrogatories are desired, serve them on every party not in default, with the notice described in the rule. Cross-interrogatories are served in ten days, re-direct in five, and re-cross in three. There was no provision in the Code for re-direct or re-cross interrogatories.

The deposition is taken in the same manner as oral ones. Any objections thereto should be made by motion prior to the date set.

ADDRESS No. 8

Rule 32. Errors and Irregularities.

This rule tells when errors are waived or not waived. Check it carefully before taking a deposition, or you may waive something by inaction.

Rule 33. Interrogatories to Parties.

This is a short cut to avoid depositions, and if you draft proper questions you will save a lot of time. At any time after the service of the summons, you can serve written interrogatories on the adverse party, and he must answer them under oath in 15 days. If the questions are faulty you have 10 days to object to them. These periods, of course, may be extended by the court. But you must ask all your questions at one time, because a second set cannot be served without leave of court. This method is not exclusive of depositions, both may be used, though there are some limitations against duplication of the same data in depositions after interrogatories or vice versa.

This rule only involves parties and does not apply to any other witnesses. In many cases this is preferable to a motion for a bill of particulars, and the court may often refuse to grant such motion on the ground that the facts can better be obtained by written interrogatories. As an example instead of moving that the plaintiff state in the complaint whether the contract is oral or written, you serve your interrogatories and ask him to state (a) that the contract was written and that exhibit (1) is a true copy thereof, or (b) that it was oral, and the terms thereof.

Rule 34. Documents.

This provides the machinery for inspecting, copying or photographing all tangible things, and for inspecting, surveying and measuring land. It covers a lot of the old mining provisions of the code.

Note that inspection under this rule is only on motion and good cause therefor. It is inadvisable to demand the written statements of witnesses under this rule, as one federal court has denied the motion on the ground that such statements would not be admissible in evidence except as a means of contradicting the witness who made them.

Slydell v. Capital Co., 2 Fed. Rules Ser. 34, 411.

The motion for discovery under this rule should follow Form No. 20.

Rule 35. Physical and Mental Examinations.

This rule, and Rule 37, were held to be constitutional by the United States Supreme Court on January 13, 1941, in *Sibbach v. Wilson & Co.*, 86 L. Ed. 349. That was a personal injury case in which a motion was made to require the plaintiff to appear for a physical examination to determine the nature of her injuries. The plaintiff refused to submit to such examination and the court ordered her so to do. She claimed that this was an interference with her personal rights, and was a substantive matter which could only be covered by statute and not by court rule. But the Supreme Court of the United States held that this was a matter of procedure only, and that by rule a person could be forced to submit to physical examination in proper cases.

APPENDIX D

This, of course, is in line with previous decisions of the Supreme Court of Colorado.

Soden v. Murphy, 42 Colo. 352.

Denver Co. v. Roberts, 43 Colo. 522.

The Federal Rule has an additional paragraph under (b) which reads as follows:

"By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition."

This subdivision was stricken by the Colorado Supreme Court, before the Sibbach decision, and we suspect on the theory that it might be unconstitutional. We feel that the paragraph should be restored to the rule, so that such privilege can be waived. We would like to hear from you as to whether or not this paragraph should be restored.

This rule gives the trial court unqualified right, where a party's mental or physical condition is in controversy, to order him to submit to a physical or mental examination by a physician. The rule then does the fair thing and entitles the examined party, upon request, to a copy of the complete report of the examining physician.

But if he wants that medical report he must, on request, produce all reports of the same mental or physical condition, made about him by his physician. And if any doctor fails or refuses to give such report his testimony may be excluded at the trial.

Rule 36. Admissions.

This rule is one of the big trial time savers, and is used only after the pleadings are closed and the case is at issue. It is very valuable, and should be invoked in almost every case. Like Rule 33, it is limited to parties.

A written request, Form No. 21, is served upon a party to admit the genuineness of certain documents or the truth of certain facts contained in the request. If he remains silent the fact is taken as admitted, unless within the time fixed he makes a sworn statement denying the matters or setting out his reasons why he cannot admit or deny them. Any admission, however, is limited to the suit where used, and cannot be used against him in any other proceedings.

But woe be to the party who makes a false sworn denial of a document or of the truth of certain facts. Under Rule 37 (c) if the document is proven to be genuine or if the facts are proven to be true the court "shall" order the offending party to pay the reasonable expenses and attorney's fees of making such proof. And the rules say "shall," and not "may."

Some confusion has arisen in the federal decisions as to whether the "facts" mentioned in the rule are contained in the documents or outside them. The

ADDRESS No. 8.

committee clarified that point by changing the last word of the first sentence from "therein" to "in the request." So admissions of either "facts" or "documents," or both, are required in Colorado.

As illustrative of some of the admissions demanded and ordered, are the following:

"Does the drawing forming part of the patent in suit correctly illustrate the fabric described and claimed as your invention?"

The court held "The plaintiff's objections to answering this interrogatory seem to me to be the last word in technicality and entirely out of touch with the spirit of the new rules."

Schwartz v. Howard Hosiery Co., 27 F. Supp. 443.

These questions were sustained, when the plaintiff was asked to admit that

"The death of Samuel A. Walsh resulted, directly or indirectly, from various causes, including (a) alcoholism, (b) acute alcoholic poisoning, (c) chronic alcoholic poisoning, (d) delirium tremens, (e) pneumonia."

Walsh v. Conn. Mutual Life Ins. Co., 26 F. Supp. 566.

Rule 37. Refusal to Make Discovery.

Depositions are serious matters under the rules and advantage is not to be taken of the notary's lack of power to compel answers. If a deponent refuses to answer a question, application may be made to the court to compel the answer. Here is where the district courts forthwith should start to prevent the horse-play which so often mars deposition procedure. If the court finds that the refusal to answer was without substantial justification, it may require the party or the deponent or the attorney to pay the expenses incurred, including reasonable attorney's fees. On the other hand, if there was no substantial justification for the questions, the other party or his attorney may have to pay similar sums. The Federal Rule made this penalty mandatory, but our court changed "shall" to "may" so that it is discretionary with the trial judges. But we hope that they will carefully scrutinize deposition procedure and inflict penalties where needed.

Failure to comply with the order of the court is contempt, and severe penalties can be inflicted for refusal to make discovery. Among these are, adjudging that documents or property are as claimed; refusing to allow the disobedient party to make certain claims or defenses, or to introduce certain evidence; striking out pleadings or portions thereof, or dismissing the action, or rendering judgment against the offenders. In other words, discovery means just what it says—make complete disclosure to the other party or abide the consequences:

The tendency of the federal courts on these penalties is not to inflict them if the parties, in good faith, seek a construction of the rules, or where they are clearly unfamiliar with their operation. However, denial of motions for penalties has been conditioned on the party's compliance with the request.

Dann v. Compagnie General, 29 F. Supp. 330.

APPENDIX D

To summarize, in general start your discovery with written interrogatories to parties under Rule 33, then if necessary use depositions, under either Rules 30 or 31, and finish with requests for admissions of documents and facts under Rule 36. In damage cases get your medical reports under Rule 35. Then settle the issues at the pre-trial procedure. If these tools are properly used either the case will be settled out of court, or the trial time may be reduced as much as fifty per cent. Discovery is here—invoke its use!

Address No. 9.

Trials—Rules 38 to 46.

By CHARLES C. SACKMANN,

Member Colorado House of Representatives, 1921-24; Judge Denver District Court, 1925-37; member Revision Committee.

Rule 38. Jury Trial.

This chapter changes a good deal of our former practice and should be carefully analyzed before trial.

C (a) Where Jury Right Exists.

The federal subdivision provided that the right of trial under the Seventh Amendment to the Constitution of the United States should be preserved inviolate. That was inapplicable to Colorado, because our Supreme Court has decided (*Parker v. Plympton*, 85 Colo. 87), that "under our constitution, trial by jury in a civil action or proceeding is not a matter of right." Code Section 191 was substantive law, and provided that in the actions specified in this subdivision—those for the recovery of property, or for money due on contract, or for injuries to person or property—an issue of fact must be tried by a jury, unless waived. So we used that Code section.

However, note that while under these conditions there must be a jury, you only get one if demand is made therefor, and unless you make such demand you waive it.

(b) Demand.

This subdivision must be followed by the bar when a jury is wanted. The time of making demand for a jury is any time after the commencement of the action and not later than ten days after the service of the last pleading directed to such issue. The best place to put this demand is to endorse it on the pleading. And you must also serve the demand.

Notice the language—"service of the last pleading directed to such issue." To the complaint or to a cross-claim or to third-party claim the issue is made by answer. To a counterclaim denominated as such and to an answer, when so ordered, the issue is made by reply.

ADDRESS No. 9

(c) Specification of Issues.

Under this provision you can demand a jury trial on a single issue or on all issues.

(d) Waiver.

Unless you both "serve" and "file" the demand for jury, you waive it. And once you make such demand for jury you cannot withdraw it without consent of all parties. The filing of the demand is covered by Rule 5, C (d), which states that where the service alone is required it shall also be filed.

Rule 39. Trial by Jury or by the Court.

(a) By Jury.

After a jury has been demanded the trial is to a jury unless the parties stipulate to the contrary, or the court finds that a right to trial by jury does not exist on all the issues. For instance, a mechanic's lien case coupled with a claim for damages on a building contract. The last sentence is the saving clause, if either party fails to appear the court, and not a jury, will try the issue.

(b) By the Court.

Even though a jury is not demanded, the court in its own discretion has the right to order a jury for such issues as it desires to refer to it.

(c) Advisory Jury and Trial by Consent.

If the court desires an advisory jury it may order one, but of course, not be bound by its verdict. Also, if both parties consent a jury trial may be ordered in those cases in which a jury is not a matter of right under Rule 38 C (a).

C (d) Issue of Law Disposed of First.

There is no corresponding federal subdivision under this heading. The committee believed that old Code Section 192 was salutary and should be preserved so as first to clear up the legal issues.

Rule 40. Assignment of Cases for Trial.

This rule gives the trial courts full power to arrange their calendar as they see fit. The "master calendar" used in Denver is an example of this power.

The sentence "precedence shall be given to actions entitled thereto" gave the committee a lot of trouble. Under the old practice (Code Sections 328, 329) actions of quo warranto were given priority on the docket both in the district and Supreme Courts, and some similar provisions have been made in some statutes in special proceedings. It was finally decided that the trial court was the best judge of the urgency of its docket, and so precedence and calendar is entirely up to it, except that motions for temporary injunctions under Rule 65 (b) are given precedence where a temporary restraining order has been entered without notice.

APPENDIX D

Rule 41. Dismissal of Action.

(a) Voluntary Dismissal; Effect Thereof.

(1) By Plaintiff.

We inserted in the Federal Rule the words "upon payment of costs" as a requirement before the plaintiff could dismiss voluntarily.

Note that under the new practice voluntary dismissals are "without prejudice" while under former Rule 5 of the Colorado Supreme Court they were "with prejudice."

The operations of this rule were very aptly described by former Attorney General Mitchell, chairman of the United States Supreme Court Rules Committee, in his lectures in New York in 1938, as follows:

"Dismissals are classified in two ways. First, voluntary and second, involuntary. Voluntary dismissals are of two types; (1) made by the plaintiff or by stipulation, and (2) by permission of the court. Plaintiff may at any time before service of the answer file a notice of dismissal or a stipulation of dismissal signed by all the parties who have appeared, without any order of the court. Then, except for these two kinds of dismissal, every dismissal must be made on order of the court, and the court may allow dismissal of the case after all the evidence is in, before the case is finally submitted, and it is in its discretion then to say whether that dismissal is with prejudice or without.

"Involuntary dismissals. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that the facts and the law have shown no right to relief. Voluntary dismissals are without prejudice, unless the stipulation or order otherwise provides. Involuntary dismissals are with prejudice, unless the order otherwise provides."

C (2) Involuntary Dismissal by the Court.

To enable the trial courts to adopt rules to dismiss cases for inaction this subdivision was inserted by the committee. It does not appear in the Federal Rules.

Rule 42. Consolidation and Separate Trials.

(a) and (b) Consolidation and Separate Trials.

This rule allows consolidation of any or all actions that relate to the same subject matter, and separate trials where two different claims are included in the same action and ought to be tried separately.

C (c) This is a Colorado provision, from the Code, for closed sessions when public morals or orderly procedure are involved.

ADDRESS No. 9

Rule 43. Evidence.

Evidence is a procedural matter.

(a) Form and Admissibility.

This is essentially the same as the federal subdivision. Note that evidence is governed by the statute or rule which favors its reception—in other words liberality—and it shall be presented according to the most convenient method.

C (b) Scope of Examination and Cross-Examination.

This subdivision is a wide departure from present practice. Note that under this subdivision when you call an adverse party, you no longer call him for cross-examination under the statute. You simply interrogate him by leading questions, and you are not bound by his answers. The same holds good for a hostile or unwilling witness after you develop that fact. Also, see what wide scope the rule gives you in reaching corporate officers.

Here is another change in Colorado practice: After you interrogate such witness the adverse party can then cross-examine him, but only on the matters inquired into by you.

(c) Record of Excluded Evidence.

Offers of proof must be specific, and general offers will not be considered, and the court, if it so desires, may clarify the offer and its ruling. Also, in non-jury actions, on request, the court "shall" take, and have reported, the evidence in full, unless it is clearly inadmissible on any ground or the witness is privileged.

(d) Affirmation in Lieu of Oath.

This is former practice.

C (e) Evidence on Motions.

All motions based on matters outside the record may be heard on affidavits or evidence, or both.

C (f) Secondary Evidence.

As paragraphs (1) to (5) are Code Section 391 verbatim there is nothing new in them. Paragraph (6) was added by the committee to enable secondary evidence to be produced when the original is without the state.

C (g) Explaining Alterations in Documents.

This is Code Section 392 verbatim.

Rule 44. Proof of Official Record.

(a) Authentication of Copy.

This broadens our code practice, which was limited to judicial records, so that it covers an official record of any kind.

(b) Proof of Lack of Record.

This gives the means of proving that there is no official record.

APPENDIX D

(c) Other Proof.

This prevents subdivisions (a) and (b) from limiting the evidence to official certificates, and allows any other kind of proper proof.

Subdivisions C (d) and C (e) are former code sections, boiled down.

C (f) Statutes and Laws of Other States and Countries.

Code Section 396 was limited to printed copies of the written laws of other states. New York had an excellent and much broader statute, so that was selected by the committee. This enables you to introduce written official pronouncements of the state executives, and prove by oral evidence the common law of a state.

Note that in such cases the law of such state is to be determined by the court in its findings or instructions. Also note that both the trial and Supreme Court may go outside such evidence and consult any of the written authorities.

Rule 45. Subpoena.

C (a) Attendance of Witness; Form; Issuance.

Under the Federal Rule only the clerk can issue subpoenas. We preferred the Colorado practice that other officers might do so for depositions, and hence inserted the exception.

Note that an order of court is no longer needed for a subpoena duces tecum for use in court, but the clerk issues it in blank to the party who is authorized to fill it in. But see C (d) *infra*.

(b) For Production of Documentary Evidence.

While the clerk issues the subpoena for the production of documents, the court can promptly quash or qualify it if a motion is made at or before the time for compliance therewith. One very salutary provision is the requirement which the court can make that the party first advance the cost of producing the documents.

(c) Service.

Because our justice statutes (3 C. S. A., Chap. 96, Sec. 40) require the service of a subpoena by reading it to a witness, many lawyers have thought the same requirement affected a subpoena from a court of record. However, there was no such requirement and the code and statutes were silent as to the manner of such service.

This subdivision now specifies that service of a subpoena is made by delivery in the same manner as the service of a summons. But note, you now must tender the witness fees and mileage when service of a subpoena is made, so get those costs in advance from your clients or you may not have your witnesses.

C (d) Subpoenas for Taking Deposition; Place of Examination.

(1) Before a notary or other officer can issue a subpoena to take a deposition, the notice to take the deposition, as provided in Rules 30 (a) and 31 (a).

ADDRESS No. 9

or a stipulation, must be presented to him. If you want documentary evidence for a deposition the subpoena for that will only issue on an order of court, with the result that it will nearly always be issued by the clerk as the easiest method.

(2) A resident of Colorado can only be required to attend a deposition in the county where he resides or is employed, or personally transacts his business. When you come to a non-resident you have more leeway, you can take his deposition in the county where he is served, or within 40 miles of the place of service, or at such other place as the court may order.

C (e) Subpoena for a Hearing or Trial.

This is the same as the old practice, except you still advance witness fees and mileage.

Rule 46. Exceptions Unnecessary.

This rule should delight both bench and bar. No longer do you say "exception" or "note an exception." You state at the time to the court what you want, or make your objection to its ruling, and have it in the record and the point is preserved. Also, if you have no opportunity at the time of the ruling to state your objection, you are not prejudiced thereby. But you want to make sure that you later are able to show why you had no such opportunity.

Address No. 10.

Rules 47 to 53.

By IRA L. QUIAT,

State Senator, 1926-34; State Counsel H. O. L. C., 1933-36;
member Revision Committee.

Rule 47. Jurors.

Federal Rule 47 contains only two subdivisions. Our Rule 47 covers four pages and has nineteen subdivisions, from (a) to (s), inclusive.

Since the object of the adoption of the Colorado rules was to make our procedure conform to the federal one, naturally one wonders why this difference between our rule and the federal rule.

Chapter 11 of Title 28, U. S. C. A., contains the federal provisions fixing the qualifications and exemptions, the manner of drawing both the grand and petit jury, the qualifications of the jurors, the challenges and provisions for the entire system concerning jurors.

There are many things which are part of the federal system which could not be applied to the state practice concerning jurors.

No part of the federal statutory provisions concerning juries was incorporated in the federal rules, and the adoption of the federal rules in no way affected the federal statutory machinery for selection of the jury.

APPENDIX D

But the situation in Colorado was different. Chapter 13 of the code provided for the formation of the jury and Chapter 14 thereof provided for trials by jury and since the Code was about to be repealed the Committee felt that the Colorado system should be retained and should be written into and made a part of the rules.

The Committee believed that the Code provisions were loosely drawn and that they could be more clearly and concisely expressed.

As a matter of fact, these rules contain very few actual changes in our old set-up. As rewritten, we believe the rules are a great improvement over the Code.

(a) Examination of Jurors.

Subdivision (a) of the Federal Rule 47 deals with the examination of the jury. The Federal Rule does not permit the attorneys to examine the jury without the permission of the court. The court may grant such right to the attorneys or it may deny the privilege and examine the jurors itself, and in most cases the judge of the federal court examines the jurors. There may be some lawyers who prefer the federal practice, but if there were any on the Committee they were strangely silent. The Committee wanted the Colorado practice which permitted the attorneys to examine the jurors so that is what our rule provides. The court may under our rule also ask the juror such questions as it deems proper.

(b) Alternate Jurors.

In 1921 the legislature, to prevent mistrials in cases of death, accident or sickness of one of the jurors passed the alternate juror act. There was no such provision in the federal statutes. So a similar procedure was incorporated in the Federal Rules as subdivision (b) of Rule 47.

Your Committee favored the language of the Federal Rule and subdivision (b) of Rule 47 was adopted omitting one sentence which fixed the qualifications and the manner of selecting the extra jurors. These provisions were covered by the Colorado statutes hereinafter referred to, and by other provisions of this rule hereinafter commented on.

The new rule makes only two changes in the Colorado alternate juror set-up.

1. Instead of one alternate juror under these rules two alternate jurors may be selected.
2. The new rule grants one additional peremptory challenge to each side if one or two alternate jurors are selected. The challenge, however, is confined solely to the selection of the alternate jurors.

Section 197 of the Code dealt with the drawing and the number of jurors. That part of this section dealing with the drawing of the jurors was supplanted in 1910 by a legislative act providing a complete system for selection of jurors. It may be found in Sections 10 to 14, inclusive, Chapter 95, Volume 3, 1935 C. S. A. The Committee felt that it did not want to make any changes in these statutes.

ADDRESS No. 10

There is, therefore, nothing in the rules concerning the drawing of jurors. The number of the jurors is provided for by Rule 48 hereinafter discussed.

(c) Challenge to Array.

This subdivision is substantially the same as Section 204 of the Code, except that the language of the Code has been improved and made more concise.

(d) Challenge to Individual Jurors.

The rules label this subdivision as new. It is really not new. It is contained inferentially in the Code, but the Committee thought it best to set forth expressly that a challenge to an individual juror could be for cause or could be peremptory.

(e) Challenges for Cause.

This subdivision is Section 200 of the Code rewritten.

(f) Order and Determination of Challenges for Cause.

This subdivision provides for the order of the determination of challenges for cause, and is a combination of several portions of different sections of the Code.

(g) Order of Selecting Jury.

This subdivision contains all the essential provisions of Section 203 of the Code.

(h) Peremptory Challenges.

This subdivision is a recodification of Section 199 of the Code permitting four peremptory challenges.

(i) Oath of Jurors.

This subdivision is Section 198 of the Code.

(j) When Juror Discharged.

This subdivision is a recodification of Section 209 of the Code, but in our opinion is more aptly and clearly expressed.

(k) Examination of Premises by Jury.

This subdivision allows the jurors to examine any premises, property or place. It combines Sections 206 and 207 of the Code. No radical change has been made.

The rest of the subdivisions of Rule 47 incorporate all of the essential provisions contained in the sections of the Code which they replace, but in our opinion the English is better and the language is concise and clear.

Rule 48. Juries of Less Than Twelve—Majority Verdict.

The Federal Rule provides that the parties may stipulate that the jury shall consist of any number less than twelve. The Committee felt that it could not adopt this part of the Federal Rule permitting the parties to agree to any

APPENDIX D

number less than twelve because of the provision of our laws which fixes the five dollar jury fee for six jurors or less, and requires a deposit on the part of the party who desires to increase the jurors to twelve. The Code provision, therefore, was adopted as this part of the rule.

The balance of Federal Rule 48 providing that the parties may agree that the finding of a majority of the jurors may be taken as the verdict of the jury was made a part of the Colorado Rule.

Rule 49. Special Verdicts and Interrogatories.

(a) Special Verdicts.

Subdivision (a) is copied verbatim from the Federal Rule.

Sections 218 and 219 of the Code provided for special verdicts but the provisions of these sections were general. The Federal Rule expressed it much better and was, therefore, adopted.

Under this rule the court may request a special verdict or a special written finding upon each issue of fact. The court may require categorical answers to questions or may submit written forms for special findings and must properly instruct the jury as to these special matters so submitted. After this subdivision was adopted the Committee realized that the choice of the word "categorical" was an unhappy one, even though it appears in the Federal Rule. Either the word "explicit" or "direct" would have been much better.

If the court fails to submit any issue of fact to the jury the parties waive a trial by jury as to that fact unless the party demands the submission thereof to the jury. If it is not submitted to the jury the court may make a special finding thereon.

(b) General Verdict Accompanied by Answer to Interrogatories.

This subdivision provides that the court may submit to the jury with the form of general verdict written interrogatories on one or more issues of fact, the decision of which is necessary to a verdict.

The court is required properly to explain and instruct the jury concerning the interrogatories submitted.

It also contains the proviso that when the answers are consistent with each other, but one or more is inconsistent with the general verdict that the court can direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may require the jury to further consider its answers and verdict.

However, when the answers are inconsistent with each other and one or more are also inconsistent with the general verdict, the court may direct the jury to further consider the matter, or may order a new trial. This is a great improvement over that part of Section 219 of the Code which provided when the special findings were inconsistent with the general verdict that the special finding should control, but there was no provision in the Code concerning special findings which were inconsistent with each other.

ADDRESS No. 10

Rule 50. Motion for a Directed Verdict.

(a) When Made: Effect.

The first sentence of this subdivision is copied verbatim from the Federal Rule, and provides nothing new but is merely a repetition of the practice which has always been in effect in this state; that is, that a party making a motion for a directed verdict does not waive his right to proceed and offer his evidence if the motion is denied.

The second sentence of this rule is also copied from the Federal Rule and does provide for an innovation. It has always been the practice in this state that if one party moved for a directed verdict and the opposing party joined in the motion that a jury was waived and that the matter stood submitted to the trial court if the motion for a directed verdict were denied.

This is no longer true. If the motion is denied the case is still submitted to the jury.

(b) Reservation of Decision on Motion.

This is entirely new to the Colorado practice. When a motion for a directed verdict is made at the close of all the evidence, even though the court denies it, nevertheless it is deemed that the case was submitted to the jury subject to a later determination of the legal questions raised by the motion.

We all know that sometimes in jury trials the courts do not like to hear the arguments at length on points of law involved in the motion for a directed verdict, and unless the party making the motion for a new trial can establish clearly and quickly that he is entitled to the granting of the motion, his motion is often denied, without the full consideration it may merit.

Under the new procedure the party who has moved for a directed verdict may within ten days after the receiving of the verdict, if a verdict shall be rendered or if no verdict is returned within ten days after the jury has been discharged, move for judgment in accordance with his motion for a directed verdict.

This motion may be joined with a motion for a new trial and the prayer may be in the alternative either for a directed verdict or for a new trial, and the court may grant the motion and may either order a new trial or direct the entry of judgment in accordance with the motion for a directed verdict.

Rule 51. Instructions to Jury.

The Committee felt that the Colorado system should be retained. It did not favor the federal procedure. Therefore, this rule contains the procedure provided for by old Rule 7 of the Supreme Court and Code Section 205, and the Colorado practice of instructing juries has not been changed.

APPENDIX D

Rule 52. Finding of the Court.

C (a) Effect.

The Committee took this part of the Federal Rule, but omitted one sentence which provided that findings of fact should not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. This omission was made because of the decisions of our Supreme Court which hold that the appellate court is as well qualified as a trial court to pass upon records which consist entirely of documentary evidence and that the findings of the trial court drawn from such record are not binding upon the Supreme Court.

Subdivision (a) of the Federal Rule required the trial court to find facts specially and to state separately its conclusions of law.

That is the way your Committee recommended it to the Supreme Court, but the Supreme Court eliminated the requirement for special findings and for separate conclusions of law, and substituted the proviso that the court shall find the facts and state its conclusions of law thereon.

(b) Amendment.

This subdivision permits either party ten days after the entry of the judgment to move the court for an amendment to its findings, or for additional findings, and to amend the judgment accordingly.

This motion may be joined with a motion for new trial. This subdivision provides that if there is not sufficient evidence to support any findings, the question may be raised for the first time in the Supreme Court, and it need not have been mentioned in the motion for a new trial. The Committee followed the federal practice and dispensed with the necessity of a motion for a new trial as a prerequisite to appellate review. Our Supreme Court in adopting these rules differed with the Committee and retained the old practice which is Rule 59 C (e) so that the former Colorado procedure was retained and it is still necessary to either file a motion for a new trial or for the trial court to dispense with the necessity thereof. There is, therefore, a conflict between subdivision (b) of this rule which states that if there is not sufficient evidence, the question may be raised for the first time in the Supreme Court and the requirement of Rule 59 that a motion for a new trial must set forth all questions to be considered on review.

While we believe that a specific provision controls over a general provision, nevertheless it is advisable if the point concerning sufficient evidence to support a finding is desired to be presented to the Supreme Court to incorporate it in a motion for a new trial.

Rule 53. Masters.

(a) Appointment and Compensation.

Under the federal procedure and under our rules any person to whom a reference is made, whether he be a referee, auditor or examiner, is denominated as "master."

ADDRESS NO. 10

With very few minor changes Rule 53 is the same as the Federal Rule. The procedure provided for is like the procedure set up under the Code, and there is no important change necessitating a recital of the substance of Rule 53.

Address No. 11.

Judgment—Rules 54 to 63.

By JEAN S. BREITENSTEIN,

Assistant Attorney General of Colorado, 1925-29; Assistant United States District Attorney for Colorado, 1930-33; Special Counsel for Colorado in irrigation cases, 1933-41; member Revision Committee and the Supreme Court Rules Committee.

Rule 54. Judgments; Costs.

(a) Definition; Form.

The term "judgment" includes any order which may be reviewed by appeal from a county court to a district court or by writ of error in the Supreme Court. This subdivision provides that a judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings. This does away with the necessity for the long and verbose judgments which are now common in Colorado. Under Rule 52 in actions tried without a jury the court is required to find the facts, state its conclusions of law and direct the entry of a judgment. Matters which are not properly within the decretal portion of a judgment should appear in the findings of fact and conclusions of law. The judgment should contain only the specific decree or order of the court.

(b) Judgment at Various Stages.

Here is a change from the existing practice. Under the new rules a pleader may join many causes of action and different controversies may be brought into the case by joinder, counter-claim, cross-claim or third-party practice. Under subdivision (b) the judge, after he has disposed of one of the claims and all counterclaims relating thereto, may enter judgment on it then and there, and proceed with a later disposition of other claims and cross-claims. But that judgment may be stayed until the final outcome of the case, due regard being had for the protection of the party in whose favor the judgment is entered. See *Rosenblum v. Dingfelder* (C. C. A., N. Y.) 111 F. (2d) 406.

(c) Demand for Judgment.

Here it is provided that a default judgment shall not be different from that covered by the prayer. This conforms to Code Section 187. In a contested case the procedure differs. There the successful party may have a judgment giving him the relief to which he is entitled even though such relief is not demanded in the pleadings. This is a broader provision than that in Code Section 187 which limits relief to that "consistent with the case made by the complaint and embraced within the issue."

APPENDIX D

(d) Costs.

Costs go to the prevailing party unless the court directs otherwise. Costs may be taxed by the clerk on one day's notice and the action of the clerk may be reviewed by the court upon a motion served within five days thereafter. It is mandatory to comply with these time limitations (U. S. v. One Ford Coupe, 26 F. Supp. 598).

The next four subdivisions do not appear in the Federal Rules. Many matters relative to judgments, executions, and provisional remedies are left by the terms of Federal Rules 64 and 69 to the United States statutes and if they are silent to the local state law. A state code must necessarily be complete in itself. The desirability of these four subdivisions is apparent.

C (e) Against Partnership.

This is merely the retention of the existing Code provision that a judgment against a partnership or unincorporated association binds only the joint property and the separate property of the parties personally served.

C (f) After Death, How Payable.

This is practically a verbatim copy of Code Section 249 which authorized the rendition of a judgment against a party who died after verdict or decision and before the entry of judgment. Such judgment is not a lien against the realty of the deceased and is payable as a claim against his estate.

C (g) Against Unknown Defendants.

Here it is provided that the judgment in an action in rem shall apply to and conclude the unknown defendants whose interests are described in the complaint. Thus, it is important to describe the interests of unknowns in the complaint if it is desired that the judgment conclude the rights of such unknowns (see Rule 9 on pleading special matters). If the interests of the unknowns are not described, then the judgment is not conclusive as to them.

C (h) Revival of Judgments.

This subdivision permits a judgment to be revived against one or more judgment debtors whether they are jointly or severally liable under the judgment. This is a change from the existing Code, which, as construed in *Allen v. Patterson*, 69 Colo. 302, required an action to revive a judgment to be against all the judgment debtors. A further change is made in respect to the continuation of the judgment lien as it is provided that the filing of a transcript of the entry of the revived judgment before the expiration of the lien continues the lien. Revived judgments may themselves be revived.

Rule 55. Default.

(a) Entry.

Where there is a default in any action, and that fact is made to appear by affidavit or otherwise, the clerk "shall" enter the default. This is not an innovation. Section 186 of the Code authorized the clerk to enter a default in an

ADDRESS No. 11

action on a contract for the recovery of money or liquidated damages only and in all other actions either the clerk or the judge could enter the default.

(b) C (1) Judgment. By the Clerk.

In cases where the plaintiff's claim arises upon contract for the recovery of money or liquidated damages only and where there was personal service within the state, the clerk shall, upon affidavit of the amount due, enter judgment for that amount and costs unless the defendant is an infant or incompetent person. Here the Supreme Court in adopting the rules made a change from the recommendations of the Revision Committee. The Committee in this subdivision followed the Federal Rule which permits entry of judgment by the clerk on a default in cases where the claim is "for a sum certain or for a sum which can by computation be made certain." The court substituted for this language the provision of Code Section 186 restricting the entry of such default judgments by the clerk to cases in which the claim "arises upon contract for the recovery of money or liquidated damages only."

(2) By the Court.

In all other cases judgment is entered by the court. No default shall be taken against an infant or incompetent person unless he is represented. It should be remembered that under Rule 17 C (c) in an action in rem it is not necessary to appoint a guardian ad litem for any unknown person who might be an infant or incompetent person. If a party against whom a default is sought has appeared in the case, he must be given three days' notice of the application for judgment. The court may take such evidence and conduct such hearings as it deems advisable. Of course while the Soldiers' and Sailors' Civil Relief Act is in effect, there must be compliance with its provisions.

(c) Setting Aside Default.

For good cause the court may set aside an entry of default and if judgment has been entered it may be set aside in accordance with the provisions of Rule 60 C (b).

(d) Plaintiffs, Counter-Claimants, Cross-Claimants.

The provisions relative to judgment by default apply to plaintiffs, third-party plaintiffs, counter-claimants and cross-claimants.

(e) Judgment Against an Officer or Agency of the State of Colorado.

No judgment by default shall be entered against an officer or agency of the state unless the claim is established by evidence satisfactory to the court.

C (f) Judgment on Substituted Service.

Here it is provided that in actions based upon constructive or extra-territorial service, proof of service and failure to plead must be made and the court must require proof of the claim. The judgment rendered must be in compliance with the limitations of Rule 54 (c).

APPENDIX D

Rule 56. Summary Judgment.

This procedure is an innovation in Colorado but has been thoroughly tested in other jurisdictions.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. California and New York have made great use of it. During the first nine years after its adoption in the latter state, the records of New York County alone show 5,600 applications for summary judgments.

With the exceptions noted in subdivisions (c) and (e) the Federal Rule on summary judgments is identical with the Colorado Rule. The Federal Rule is thus treated in 38 Columbia Law Review 1436:

"Several features are found in the new rules which have heretofore not generally appeared in summary judgment statutes. First, there is no limitation as to the type of action in which the remedy is available * * *. This change will result not only in a wide use of the device but also eliminate much quibbling as to the nature of various actions and their degree of 'liquidation'. Second, the remedy is available to both parties alike. While the patently unmeritorious claim has not so often recurred as the sham defense, yet when the former does arise, it affords as much hardship to the other party and as much burden upon judicial machinery as the latter. Third, and most important, is the fact that the rules have coupled summary judgment procedure with deposition-discovery procedure."

The provision for the taking of summary judgments is an indispensable part of the scheme for simplifying and expediting litigation. The rules are most liberal in their provisions for arriving at the true facts of a controversy through the taking of depositions, the submission of interrogatories to parties, the discovery and production of documents, physical and mental examinations of parties, the securing of admissions of facts and of the genuineness of documents (see Rules 26 to 37 inclusive). Through the use of these tools the disputes between litigants can be crystallized with a resulting narrowing of the issues. In many cases such procedure will disclose that there is no genuine issue as to any material fact. When such a situation exists, then a motion for summary judgment is in order and the case should be determined on such a motion without the necessity of a trial.

(a) For Claimant.

The remedy of summary judgment is available to a party seeking recovery upon a claim, counter-claim or cross-claim or seeking to obtain a declaratory judgment at any time after an answering pleading has been filed.

(b) For Defending Party.

A defending party may at any time move for a summary judgment.

ADDRESS No. 11

C (c) Motion and Proceedings Thereon.

The first sentence of this subdivision differs from the Federal Rule which requires that the motion for summary judgment "shall be served at least 10 days before the time" for hearing. As in Colorado it is both necessary and desirable, particularly in the outlying counties, to have such matters heard on a definite date fixed by the court, the language has been changed so as to require the date of hearing to be at least ten days after the service of the notice. The further provisions of the subdivision are the same as the Federal Rule. A motion may or may not be accompanied by supporting affidavits. The adverse party may serve opposing affidavits. Judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, show that except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) Case Not Fully Adjudicated on Motion.

A summary judgment may be rendered for only part of the relief asked in a case. When this is done the court shall ascertain what material facts are in good faith controverted and what are not. An order may then be made by the court specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just.

(e) Form of Affidavits; Further Testimony.

Affidavits must be made on personal knowledge (see *Person v. U. S.*, 112 F. (2d) 1) and shall set forth facts that are admissible in evidence and shall show that the affiant is competent to testify thereto.

(f) When Affidavits are Unavailable.

If the party opposing a summary judgment cannot present by affidavit facts to justify his opposition, the court may make such order as may be just either for a continuance to give further time to secure affidavits, or for the taking of a deposition, or for a discovery to be had.

(g) Affidavits Made in Bad Faith.

If affidavits are presented under this rule in bad faith or for the purpose of delay, the court shall order the offending party to pay the reasonable expenses of the other party and such offending party or his attorney may be adjudged guilty of contempt.

It should be noted that this rule on summary judgment does not affect or apply to judgments by confession on cognovit notes. In *Cross v. Moffat*, 11 Colo. 210, 211, the Colorado Supreme Court said:

"There is nothing in our statutes that prohibits the procedure (judgment by confession on a cognovit note) adopted in this case. It is fully recognized and generally pursued at common law; and the sections of the code providing for obtaining judgments without

APPENDIX D

action do not inhibit pursuing this common-law method when authorized by the contract of the parties themselves. There is, in fact, an action pending and the cognovit may appropriately be regarded as an answer to the complaint, the filing of which constitutes a waiver of the issue and service of process."

Rule 57. Declaratory Judgments.

This rule is the Colorado Declaratory Judgments Act found in 3 C. S. A. Chap. 93, Secs. 78-92. It differs from the Federal Rule but was retained because it is the uniform act on the subject and it was thought desirable to retain it in its present form as attorneys are generally thoroughly familiar with it. Hence there is no change in the present practice in this rule. For cases upholding and construing the present act see:

Colo. and Utah Coal Co. v. Walter, 75 Colo. 489.

Gabriel v. Board of Regents, 83 Colo. 582.

San Luis Power Co. v. Trujillo, 93 Colo. 385.

Rule 58. Entry and Satisfaction of Judgment.

(a) Entry.

This deals with the entry of judgment after trial. When a verdict is returned the judgment shall be entered forthwith by the clerk, unless the court otherwise directs, except in cases where there are special interrogatories or special verdicts in which case the court has to analyze them and direct what the judgment shall be. When the court directs the entry of a judgment either in passing on the answers of the jury to special questions, or in cases where the court under Rule 52 has made findings and given direction for judgment, if the judgment is only for money the clerk shall enter the judgment, but if the relief granted is more complicated (like a judgment for injunction) the form of judgment is to be submitted to the judge for approval and then entered.

It should be noted that the notation of the judgment in the civil docket as provided by Rule 79 C (d) constitutes the entry of the judgment. The time for writ of error runs from the time of such entry of the judgment.

C (b) Satisfaction.

There is no federal subdivision 58 (b). Under Federal Rules 64 and 69 procedure for satisfying judgments is left to local state law. Hence, it is necessary that the Colorado Rules contain definite provisions on this subject.

Satisfaction of judgments may be accomplished in whole or in part (1) by the return of an execution, (2) by an instrument acknowledged in the manner of a conveyance of real property by the judgment creditor or, within one year after judgment, by his attorney of record unless a revocation of authority is previously filed, and (3) by the signing on the judgment docket by a party authorized to execute an acknowledgment of satisfaction and the clerk's attestation thereof. When a judgment is satisfied other than by execu-

ADDRESS No. 11

tion, the entry of satisfaction may be compelled by court order. This differs from the code provision in that it sanctions partial satisfaction of a judgment.

Rule 59. New Trials.

The rules make practically no change in the Colorado procedure relative to new trials.

C (a) Grounds.

The federal subdivision dealing with grounds for new trial was not applicable to state practice and was not followed. The grounds for new trial are the same as those stated in Code Section 237, and, as required by the code, a motion for a new trial on any one of the first four grounds, i. e., irregularity in the proceedings, misconduct of the jury, accident or surprise, and newly discovered evidence, must be supported by an affidavit filed with the motion.

(b) Time for Motion.

A motion for a new trial must be filed not later than ten days after the entry of the judgment except that a motion based upon newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal or writ of error. This is a change from the code practice where the time for filing a motion for new trial was fixed by the court. The time for filing a motion for new trial may be enlarged under the provisions of Rule 6 (b).

(c) Time for Filing and Serving Affidavits.

Affidavits in support of a motion for new trial must be filed with the motion. Opposing parties have ten days after service thereof to file opposing affidavits. This time for opposing affidavits may be extended by the court or by stipulation of the parties for an additional period of not more than 20 days. The court may permit reply affidavits.

(d) On Initiative of Court.

The court on its own initiative may order a new trial at any time within ten days from the entry of the judgment.

C (e) No Review Unless Made.

There is no federal subdivision (e). Under the federal practice the filing of a motion for a new trial is not essential to secure a review in an appellate court. The Revision Committee preferred the federal practice and the rules as submitted to the Supreme Court were so drafted that a motion for new trial was not a prerequisite for appellate review. The Supreme Court desired the retention of the existing practice and accordingly the rule as adopted requires either the filing of a motion for a new trial or the entry of an order dispensing therewith to obtain appellate review.

APPENDIX D

Rule 60. Relief from Judgment or Order.

(a) Clerical Mistakes.

Clerical mistakes, arising from oversight or omission, in judgments, orders or other parts of the record, may be corrected by the court at any time on its own initiative or on the motion of any party after such notice, if any, as the court orders. This provision is more explicit than Code Section 81.

C (b) Mistake; Inadvertence; Surprise; Excusable Neglect.

Here the court is authorized to relieve a party from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. A motion for such relief must be made within a reasonable time but in no case more than six months after the judgment, order or proceeding was taken. Code Section 81 permitted such relief to be granted within six months after the adjournment of the term. The time is thus shortened by the new rule. A motion made under this rule does not affect the finality of a judgment or suspend its operation and the rule does not limit the power of the court to entertain an action to relieve a party from a judgment.

In the last sentence of the subdivision the provision headed (2) differs from the Federal Rule as the federal provision was not applicable to state practice. It is stated that the rule does not limit the power of a court to permit a defendant who has not been personally served to answer to the merits of the original action at any time within six months after the rendition of the judgment. This is a change from Code Sections 50 (e) and 81 as by them a person not personally served was permitted to answer to the merits at any time within one year from the rendition of the judgment.

Rule 61. Harmless Error.

The Hon. William D. Mitchell, commenting upon the Federal Rules said that this rule expresses "the core of the spirit of these rules." It is provided that no error in the admission or exclusion of evidence and no error in any ruling or order or in anything done or omitted by the court is ground for setting aside a verdict or disturbing a judgment or order unless there has been a denial of substantial justice.

The theory of this rule was found in the Code at Sections 84 and 439.

In referring to the Federal Rule on harmless error a commentator in 25 Va. Law Review 261 said:

"It is fondly to be hoped that federal judges will appreciate that this rule really means what it says."

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) Automatic Stay; Exceptions, Injunctions, Receiverships.

Except in injunction and receivership actions there is an automatic stay of 10 days after the entry of judgment unless the court otherwise directs. This is a change from the Code under which the automatic stay was 5 days. In

ADDRESS NO. 11

injunction and receivership actions there is no automatic stay but, unless and until a supersedeas is granted, the trial court may impose such terms as it considers proper to secure the rights of the losing party.

(b) Stay on Motion for New Trial or for Judgment.

This subdivision authorizes the trial court to grant a stay pending the disposition of a motion for a new trial upon such conditions for security as it deems proper. This likewise applies to a stay pending the hearing of a motion for relief from judgment, a motion for judgment in accordance with a motion for a directed verdict, a motion for amendment to findings or for additional findings, or pending the filing and determination of an application to the Supreme Court for a supersedeas.

Rule 63. Disability of Judge.

There was no Colorado Code provision which was comparable to this section. It is here provided that if a judge, before whom an action has been tried, is incapacitated by death, sickness or other disability and thus unable to perform the duties necessary after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge lawfully sitting in or assigned to the court may perform such duties. However, if the new judge feels that he cannot perform these duties because he did not preside at the trial, or for any other reason, then he may in his discretion grant a new trial.

Address No. 12.

Injunctions, Receivers, Deposits in Court, Offer in Judgment —Rules 65 to 68.

By A. R. MORRISON,

Member Revision Committee, Revised Statutes '08; member Colorado Civil Service Commission, 1915-1918; Professor of Mining Law, Westminster Law School, 1915-35; member Revision Committee.

Rule 65. Injunctions.

- (a) **Preliminary Notice.** Provides that no preliminary injunction shall issue without notice to the adverse party.

This follows exactly the Federal Rule. In effect, it supersedes the provision of Code Section 167, requiring notice to be given upon application for a temporary injunction immediately after the issuance of a restraining order; it coincides with the restriction as to notice contained in Code Section 165, and takes care of the requirement of Code Section 177, which prohibits the granting of affirmative relief without notice.

APPENDIX D

- (b) **Temporary Restraining Order; Notice; Hearing; Duration.** Provides for the issuance of a temporary restraining order without notice, when it appears from specific facts shown by affidavit or verified complaint that immediate or irreparable injury would result before notice could be given or hearing had.

This follows almost verbatim the Federal Rule. The provision for the indorsement at the time of the issuance, and the immediate filing of the same in the clerk's office, is new to our practice, as is the provision that the order shall define the injury complained of and state why the order was granted without notice. The temporary restraining order shall expire by its terms within not to exceed ten (10) days, unless for good cause shown, it may be extended for a like period. The reason for the extension shall be entered of record. Hearing thereafter on application for preliminary injunction shall be set for the earliest possible time, and take precedence over any other matters. Failure to proceed with the application for preliminary injunctions shall dissolve the temporary restraining order. It provides for hearing upon application to dissolve or modify the temporary restraining order.

This section supplants Code Section 165 relative to temporary restraining orders. It allows the issuance of the temporary restraining order on the affidavit of the petitioner without the necessity of two supporting affidavits as is now required. The court may extend the time for the hearing upon the application for a temporary injunction. The provisions for the entry of the order by the clerk at the time of granting the same and the reason for an extension of time are new.

- C (c) **Security.** Provision for bond in case of restraining order or preliminary injunction.

This subdivision follows the Federal Rule with the exception of the added provision relative to new security in case the security has become impaired or is insufficient. The provision relative to security in case the state or a county is a party is substituted for a like provision in the Federal Rule which relieves the United States, if a party, from giving security.

It leaves to the discretion of the court the amount and condition of such bonds and dispenses with the special provision of Code Section 165, relative to the special bond on an application for a temporary restraining order. The exception as to bond for a state or municipal corporation is the same as now contained in Code Section 173.

- C (d) **Form and Scope of Injunction or Restraining Order.** This is the Federal Rule. It provides that the order granting injunction or restraining order shall set forth the reasons for its issuance, and shall describe, without reference to the complaint, the acts sought to be restrained.

That part of this subdivision requiring the order to set forth the reason for its issuance is new to our practice.

ADDRESS No. 12

- C (f) Mandatory.** A provision for mandatory injunction where restraining of an act will not affect the relief.

This provision is not found in the Federal Rules. Such an injunction may restore one to possession of property from which he has been ousted under certain conditions. The provision relative to mandatory injunction is now found in Code Section 159. The provision relative to the restitution of a party to possession of his property is new save that by Code Section 176, jurisdiction to effect such restitution of mining property was conferred.

- C (g) When Relief Granted.** Providing that injunction may be had by either party before or in connection with final judgment.

This provision is not found in the Federal Rules. Code Sections 161 and 175 have heretofore been the authority for the issuance of the injunction to either party.

- C (h) When Inapplicable.** Provides that the chapter shall not apply in cases involving domestic relations, but that in such matters the injunction may be issued without such notice or bond.

There is no such provision in the Federal Rules. It was considered by the committee that the notice and bond restrictions should not apply to divorce suits and the like.

- C (i) State Courts Jurisdiction When Suit Commenced in Federal Court; Stay of Proceedings; Notice; Writ of Error.** A provision for restraining a procedure in the federal district court which would restrain any state official from administering a state statute.

This subdivision provides that the defendant, in such suit, or the attorney general, might apply in the district court of the state for an order restraining the federal court from proceeding until a decision is rendered in the state court.

This rule must be kept intact owing to Section 266 of the Federal Judicial Code which is the authority for the procedure, and under the authority of which the General Assembly passed the act in 1931 from which the rule is taken.

Rule 66. Receivers.

- (a) When Appointed.** Contains the same provisions relative to the appointment of a receiver that are now contained in Code Section 180.

There is added to the same, the provision for the appointment of a receiver in the event that the property is in danger of being removed beyond the jurisdiction of the court.

- (b) Oath and Bond, Suit on Bond.** This section providing for the oath and bond of a receiver is practically the same as the present Code Section 183.

Neither of the above sections are found in the Federal Rules. They are purely a matter of state practice and their substance is found in Chapter IX

APPENDIX D

of the Code of Civil Procedure. Some of the sections found in that chapter have been omitted because they are limited to procedure which is covered generally by other sections of these rules.

Rule 67. Deposit in Court.

C (a) By Party. Provides for deposit in court of money or anything capable of delivery, by a party, upon notice to other parties, of such money or thing, to be withdrawn upon order of court.

This rule is practically identical with the Federal Rule.

C (b) By Trustee. Provides that where party has in his possession, as trustee, any money or property capable of delivery, that it may, on order, be deposited with the court or delivered to such party as the court may direct.

This provision is not found in the Federal Rules, but is a repetition of the present Code Section 179.

Rule 68. Offer of Judgment.

Provides for an offer to allow judgment to be taken for a specified amount. If not accepted, and judgment shall be for less, then subsequent costs shall be charged to declining party.

The above is identical with Rule 68 of the Federal Rules, and is practically the same as Section 313 of the Code.

Address No. 13.

Rules 69 to 71, 77 to 83 and 85.

By JOHN L. ZANONI,
Member Revision Committee.

CHAPTER VIII.

Rule 69. Execution and Proceedings Subsequent to Judgment.

Rule 69 relates to execution and supplemental proceedings in aid of judgment and execution. The rule does not change the practice and procedure established by existing statutes relating to execution, but it does effect two salutary changes in supplemental procedure.

(a) In General.

This subdivision prescribes the method for enforcement of a money judgment. It is new in form but not in substance.

(b) Execution for Costs.

This subdivision is a restatement of Code Section 461.

(c) Debtor of Judgment Debtor May Pay Sheriff.

This subdivision is the same as Code Section 267.

(d) Order for Appearance of Judgment Debtor; Arrest.

Subdivision (d) effects two salutary changes in the procedure established by Code Sections 265 and 266. Under Code Section 265 supplemental proceedings could not be maintained until after the issuance of an execution and the return thereof unsatisfied in whole or in part. The new rule eliminates this usually useless preliminary step and provides that supplemental proceedings may be commenced at any time when execution can issue on the judgment sought to be enforced.

Under Code Section 265 a judgment debtor could not be required to attend before a court or master outside the county where he resided unless he failed to move to quash the proceedings, at or before the time limited for appearance and answer, on the ground that he was ordered to attend in the wrong county. The new rule provides that a judgment debtor may be required to attend before a court or master outside the county where he resides, but, in such case, the court may make such order as to mileage and expenses as is just.

(e) Order for Appearance of Debtor of Judgment Debtor.

This subdivision, which is based upon Code Section 268, also eliminates the requirement that execution be issued and returned unsatisfied. The new rule permits proceedings against debtors of a judgment debtor at any time when execution can issue on the judgment. Witness fees and mileage may be awarded by the court.

(f) Order for Property to be Applied on Judgment; Contempt.

This subdivision is a restatement of Code Sections 270 and 271.

(g) Witnesses.

Subdivision (g) is the same as Code Section 269.

(h) Depositions.

This subdivision, taken from Federal Rule 69 (a), provides that the new deposition method of discovery shall be available in proceedings in aid of judgment or execution. Under Rule 69 (h) the judgment creditor or his assignee or subrogee of record, after obtaining an order of court so to do, may examine any person, including the judgment debtor, in the manner provided in the new rules for taking depositions. The order for such examination may be obtained ex parte.

Since Rule 26 (a) provides that "depositions shall be taken only in accordance with these rules," it is imperative that proceedings under Rule 69 (h) conform to the procedure prescribed by the applicable rules set forth in Chapter IV on Depositions and Discovery. The proceedings may be initiated in accordance with Rule 30 (a). No subpoena is required for examination

APPENDIX D

of the judgment debtor, but subpoenas should be served upon other witnesses as provided in Rule 45 (d).

The examination under Rule 69 (h) may be oral or by written interrogatories. The scope of the examination must necessarily be very liberal and should permit a comprehensive inquiry concerning the property and business of the judgment debtor. Since Rule 69 (h) refers only to the procedure for taking depositions, it is quite probable that the discovery and production of documents provided by Rule 34 is not available in proceedings in aid of judgment or execution. Furthermore, by express terms thereof, Rule 34 is applicable only in "pending" actions, and it is doubtful whether an action is "pending" after judgment.

The sanctions of contempt and the imposition of costs provided by Rule 37 are appropriate and applicable in proceedings under Rule 69 (h). The taxation of ordinary costs in proceedings subsequent to judgment is generally within the discretion of the court.

Rule 70. Judgment for Specific Acts; Vesting Title.

This rule, which is the same as Federal Rule 70, provides certain remedies for the enforcement of judgments directing the performance of any specific acts. Obedience to such judgments may be compelled in proper cases by contempt proceedings, by attachment of property of the disobedient party or, when the judgment is for delivery of possession, by execution. Writs of attachment or execution shall issue upon application to the clerk by the party entitled to performance. If a party fails to do or perform any specific act required by a judgment the court may direct such act to be done by some person appointed by the court, and such act when so done has the same effect as if performed by the disobedient party. When the real or personal property affected by a judgment directing conveyance or transfer is within the state, the court may enter a judgment divesting the title of any party and vesting it in others, and such judgment has the effect of a duly executed conveyance or transfer.

Rule 70 is new in form but not in substance. The power of courts to compel obedience to their lawful judgments, orders and decrees is recognized and established by Code Section 464 and various other statutes. The collateral or auxiliary remedies prescribed by the rule are included in the inherent power of courts to enforce their judgments and decrees and to issue such process as may be necessary to render them effective.

Rule 71. Process in Behalf of and Against Persons Not Parties.

Rule 71, which is the Federal Rule, provides that obedience to orders in favor of and against a person who is not a party to an action may be enforced by such process as is proper to compel obedience to orders for and against a party.

CHAPTER IX

Rule 77. Courts and Clerks.

Rule 77 effects only one substantial change in the practice established by the Code and existing statutes.

(a) Courts Always Open.

This subdivision is a concise restatement of the major part of Code Section 445.

(b) Proceedings in Court and Chambers.

All acts and proceedings, except trials upon the merits, may be done or conducted in open court or in chambers and at any place within the state. However, no hearing shall be conducted outside the territorial limits of the district court or county court in which the action is pending without the consent of all parties affected thereby who are not in default.

This subdivision is a substantial change from the former practice. Under Code Section 445 the judicial business pertaining to a district or county court could be done or conducted only within the territorial limits of the district or county. Rule 77 (b) provides, in effect, that the judicial business of a district or county court, except trials upon the merits, may be done at any place within the state. In other words, the new rule permits a judge to perform judicial acts and conduct judicial proceedings pertaining to his court outside the territorial limits of his court and at any place within the state.

(c) Clerk's Office and Orders by Clerk.

This rule is new in form only. The clerk's office shall be and remain open at such time as may be provided by law or local rules not in conflict therewith. All proceedings which do not require allowance or order of the court are grantable of course by the clerk subject to suspension, alteration or rescission by the court or judge upon cause shown.

(d) Orders in Any County.

This subdivision is identical with Session Laws of 1939, Chapter 95, Section 2. Any ex parte order in a pending action may be entered at any place within the district, irrespective of the county in which the action is pending.

Rule 78. Motion Day.

This rule, which is practically the same as Federal Rule 78, is new in form only. The directions, requirements and permissions of the rule are designed and intended to expedite the business of the courts. Unless it be impracticable, courts are required to establish regular times and places for hearing and disposing of motions requiring notice and hearing. Orders for the advancement, conduct and hearing of actions may be made by the judge at any time or place and on such notice as he deems reasonable. The court, by rule or order, may dispense with oral hearings on motions and require that they be

APPENDIX D

submitted and determined upon brief written statements of the reasons in support and opposition.

The final provision of this rule does not appear in the corresponding Federal Rule. The provision states and adopts the prevailing practice of trial courts relating to notices for set motions for hearing or for calling up motions to hearing without prior setting.

Rule 79. Books Kept by the Clerk and Entries Therein.

This rule prescribes the form and style of the books which shall be kept by the clerk and the nature of the required entries therein.

(a) Civil Docket.

Although this subdivision is practically the same as the corresponding subdivision of Federal Rule 79, the requirements and directions are based upon Code Sections 222 and 416. The "register of actions" designated by Code Section 416 corresponds to and is supplanted by the "civil docket" required by the new rule. The requirements of Code Section 416 are very general. The requirements of this subdivision are specific. In addition to specifying the notations required, the new rule prescribes the order in which entries shall be made and the nature and content of such notations. The requirements of the rule include notations of the entries and orders directed to be made in the minutes of the court by Code Section 222. The subdivision is designed and intended to make the civil docket a complete chronological history of each civil action or proceeding appearing therein.

C (b) Civil Order Book.

This subdivision, a modified statement of Federal Rule 79 (b), effects a salutary change in the existing practice. The clerk is required to keep a "civil order book" which shall contain exact copies of all judgments and orders in the sequence of their making. It is important to note that the rule requires exact copies of judgments and orders and not merely notations or digests thereof. The Code contained no comparable provision and heretofore copies of judgments and orders have been kept in the minutes of the court, the judgment book required by Code Section 248 and in other books variously designated as "civil journal" or "judgment record." This subdivision eliminates the possibility of such undesirable diversity of practice and provides an entirely new and exact record of all judgments and orders.

C (c) Indices; Calendars.

This subdivision is taken from the corresponding Federal Rule. The clerk is required to keep suitable indices of all court books. Specific requirements of indices are set forth in 2 C. S. A., Chapter 46, Sections 1 and 2.

The provision relating to calendars is new and requires the clerk to prepare calendars of all actions ready for trial which shall distinguish "jury actions" from "court actions."

C (d) Judgment Docket.

This subdivision, which does not appear in the corresponding Federal Rule, is substantially the same as Code Section 250. The name, nature and contents of the judgment docket are unchanged. The clerk is required to make proper notations in the judgment docket immediately after entry of the judgment. It is important to note that Rule 58 (a) provides that this notation constitutes the entry of the judgment and that the judgment is not effective before such entry. The time for issuance of a writ of error, as provided in Rule 111 (b), starts to run from the time of this entry in the judgment docket.

Since an exact copy of each judgment must be entered in the civil order book and the notations in the judgment docket constitute the entry of the judgment, the "judgment book" required by Code Section 248 can serve no useful purpose and the section is superseded by this rule.

The directions and requirements of Rule 79 and its subdivision are mandatory but not exclusive. Consequently, although the court books must contain the required entries and notations, they may contain such other entries and notations as local conditions make proper or advisable. However, it is suggested that any additional entries and notations be authorized by local rules in accordance with Rule 83. Rule 79 is designed and intended to simplify and standardize court books and to provide a uniformity of practice that presently does not exist.

Rule 80. Reporter; Stenographic Report or Transcript as Evidence.

C (a) Reporter.

This subdivision is taken largely from subdivisions (a) and (b) of Federal Rule 80. Under Code Section 460 it was necessary for a party to request that testimony be taken stenographically and the appointment of a reporter was discretionary with the court. The new rule requires the district court or master to direct that evidence be taken stenographically and requires the appointment of a reporter for that purpose unless the parties stipulate to the contrary. The court is directed to fix the reporter's fee subject to statutory limitations. The reporter's fee shall be paid as provided by law and, if taxed to a litigant, it ultimately may be taxed as costs if the court so orders. Except as provided in Rule 112 (b), the cost of a transcript must be paid in the first instance by the party ordering the same.

C (b) Official Reporters.

Each court is permitted to designate one or more official reporters. The rule is permissive and not mandatory. The appointment, duties, compensation and expenses of official reporters are regulated by statutes.

(c) Stenographic Report or Transcript as Evidence.

This subdivision is identical with Federal Rule 80 (c). The rule provides that whenever the testimony given by a witness at a former trial or hearing is admissible in evidence at a later trial, such testimony may be proved by

APPENDIX D

the transcript thereof duly certified by the person who reported the testimony. This provision may be useful in various situations, particularly for the purpose of impeachment and to prove the testimony of a witness in a former trial involving the same subject matter when such witness is not living at the time of a later trial.

CHAPTER X

GENERAL PROVISIONS

Rule 81. Applicability in General.

This rule, as the note thereto indicates, is entirely different from the corresponding Federal Rule and does not include or incorporate any provisions of the Code or statutes.

(a) Special Statutory Proceedings.

Rule 1 provides that the Rules of Civil Procedure shall govern in all special statutory proceedings, except as stated in Rule 81. Because of their great number and widely diverse natures the Committee deemed it impractical and inadvisable to specifically state or designate the special statutory proceedings to which these rules do not apply. Therefore, this subdivision provides that the new rules shall not apply in any such proceedings insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute. These rules do apply in all instances where the applicable statute provides for procedure under any former code.

(b) Divorce and Separate Maintenance.

In several matters and instances the procedure and practice prescribed by the present divorce and separate maintenance statutes is inconsistent or in conflict with the provisions of the new rules. All such instances are governed by the statute and not by the Rules of Civil Procedure.

(c) Appeals from County to District Court.

The Rules of Civil Procedure do not govern the procedure and practice in appeals from the county court to the district court. Such procedure and practice is prescribed by statutes.

Rule 82. Jurisdiction Unaffected.

The corresponding Federal Rule deals with both jurisdiction and venue. This rule provides that the Rules of Civil Procedure shall not be construed to extend or limit the jurisdiction of any court.

ADDRESS No. 13

Rule 83. Rules by Trial Courts.

This rule, which supplants Supreme Court Rule 14, is practically identical with Federal Rule 83. Each trial court is permitted to make and amend rules governing local practice. Such rules must not be inconsistent with the Rules of Civil Procedure. Copies of all local rules and amendments thereof must be furnished to the Supreme Court. Trial courts also are permitted to regulate their practice in all cases not provided for by these rules, but such regulations must not be inconsistent with the Rules of Civil Procedure.

Rule 85. Title.

The new rules are officially entitled the Colorado Rules of Civil Procedure. They may be so cited or as "R. C. P. Colo."

Address No. 14.

Change of Judge, Place of Trial, Water Rights—Rules 97 to 100.

By FREDERICK P. CRANSTON,

Assistant City Attorney of Denver, 1931-35; member Colorado House of Representatives, 1923-24; Professor of Municipal Corporations, School of Commerce, University of Denver, 1939-41; member Revision Committee.

We now come to the second group of rules, which are the state procedure trial court provisions not covered by the Federal Rules. Rule 86 was the last numbered Federal Rule, but the Committee combined it with Rule 1. This left a gap after Rule 85 for the addition of any further rules which might be adopted by the United States Supreme Court and be later accepted by our Supreme Court.

In the main, Rules 97 to 110 will be subject to the present decisions of the Supreme Court on the old Code sections, Supreme Court rules or statutes from which they were taken. But there are some new matters in which new decisions may be made.

Rule 97. Change of Judge.

This rule, as the bracketed source sentence indicates, is a combination of a Supreme Court rule, Code sections and statutes, boiling them all down into one paragraph.

The rule states the grounds of disqualification of a judge, which are—if he is interested or prejudiced, or is related to or has been of counsel for any party, or is related to counsel for any party. In such cases he "shall be" disqualified. But note the disqualification exists only if a motion is made therefor. This is to prevent invalidations of non-contested matters or cases in which no objection is made, even where the disqualification exists.

APPENDIX D

The motion requires one affidavit, which may be in the form of a verification. As soon as the motion is filed all proceedings are stayed until a ruling is made. However, remember that where the singular word "affidavit" is used you may file "affidavits" if you so prefer, because under Rule 110 the singular always includes the plural.

If the motion is sustained, the court must call in another judge, if he is available and agreed upon by the parties, otherwise the court certifies the fact of disqualification to the chief justice and he selects a judge of the proper court.

If the case is in the county court, a judge of that court will be assigned, if in the district court a district judge will be selected.

Rule 98. Place of Trial.

Venue provisions were found hopelessly scattered in the Code, statutes and Supreme Court rules, with resultant uncertainty and conflict as to what was the legislative intent. We have tried to clarify them all in this one rule.

(a) Venue for Property; Franchises and Utilities.

This is a combination of old Code Sections 25 and 26. Section 25 related to real estate only, and fixed the place of trial in the county in which the real estate, or some part of it, was located. Section 26 was broader and applied to property of all kinds, franchises and utilities. But it had a fruitful source of trouble in the provision that such action should be tried in the county where such property, franchise or utility was located, or in the county where the greater part thereof was situated. Where would the greater part of a franchise be located?

So we used the general language that all actions affecting property, franchises or utilities shall be tried in the county in which the subject of the action, or a substantial part thereof, is situated. Hence if the action relates to a flock of sheep in Colorado it shall be tried in any county where a substantial portion of the sheep are located.

(b) Venue for Recovery of Penalty.

This is the same as old Code Section 28, except that the word "cause" has been changed to "claim." This was done to follow Rule 8, which speaks of a "claim for relief" instead of a "cause of action." Also, the provision "subject to the like power of the court to change the place of trial" was stricken, since that is covered by the general language in subdivision (e).

(c) Venue for Tort, Contract and Other Actions.

Old Code Section 29 had the same two sentences as does this subdivision, but they were reversed. It started with the words "In all other cases," while the second sentence began with "Actions on book accounts." We simply reversed the order of the sentences; the meaning is the same, and the court construction will be the same.

(d) Venue for Injunction to Stay Proceedings at Law.

This subdivision contains the first two phrases of Code Section 162, which provided that proceedings for injunction to stay any suit or judgment should be brought in the county where the action was pending or the judgment obtained. The remainder of the Code section was dropped.

(e) Power to Change Venue.

This assembles in one paragraph sentences which under the Code were inserted separately in many sections, and leaves the procedure just as it has been; that in subdivisions (a) to (e) the court has the power to change the venue as provided for under the remaining subdivisions (f) to (k).

(f) Causes of Change.

This makes a change discretionary when the county designated in the complaint is not the proper one, and when the convenience of witnesses and the ends of justice would be promoted by the change.

This is the same as the old Code provisions except that the belief "that an impartial trial cannot be had" is transferred to subdivision (g) and the disqualification of the judge is placed in its proper place in Rule 97. Code Section 182, providing the venue of receivership of public utilities, is superseded entirely as needless, special legislation.

The application for the change is by motion, under Rule 7 (b) C (1), and no affidavit is required. However, we believe that the motion should as required in that rule, "state with particularity the grounds thereof" and in the case of witnesses it should set forth fully the testimony to be expected from each.

(g) Change from County.

This subdivision covers undue influence and prejudice. In this case the motion requires an affidavit, either of a party or by a stranger to the claim, to which the opposite party may, if he so desires, file a counter affidavit. If he also wants a change of venue he files a counter motion, supported by an affidavit.

(h) Transfers where Concurrent Jurisdiction.

This provides for interchange of actions between district and county courts when the parties consent and the courts have concurrent jurisdiction. For instance, an action for \$1500.00 is pending in the county court of Boulder County, the judge is engaged in a long will contest and cannot try the case for some time. By agreement of counsel and on order of the county court, that action can be transferred to the district court of Boulder County and there tried.

(i) Places Changed if all Parties Agree.

When all parties not in default agree, the place of trial in a district court may be changed to any other county in the district.

APPENDIX D

(j) Parties Must Agree on Change.

This subdivision was not in the Code, but comes from a statute which covered both civil and criminal cases, and applies only if there is more than one plaintiff or defendant. In such event if only one plaintiff or one defendant applies for a change of venue and the other does not so apply, the change will not be granted.

(k) Only One Change, no Waiver.

Under this, as under the Code, a litigant is entitled to only one change upon the same ground. And there is incorporated the Supreme Court provision that a litigant does not waive his right to change of judge or place of trial if the motion is made in "apt time." In *Burton v. Graham*, 36 Colo. 199, 200, the court held that what is considered "apt time" must be determined by the circumstances of the particular case in which the question arises. Apt time for a change on the ground of convenience of the witnesses is, as under former practice, after the issues are made up. *Lamar Milling Co. v. Bishop*, 80 Colo. 369, 370.

Rule 99. Water Rights.

This is the last paragraph of Supreme Court Rule 25, which applied to writ of error on water priorities. On it the court later grafted a provision for trial court practice as follows: "In actions to change the point of diversion of water it shall be competent to prove abandonment." The first portion of that old Supreme Court rule appears in Rule 111 (g). What to do with this sentence was a puzzle to the Committee. It could not be stricken, yet there was no logical place for it. A check of its origin disclosed that it was adopted after the decision in *Trinchera Ranch Co. v. Trinchera Irrigation District*, 83 Colo. 452, which held that the question of abandonment may not be proved in a proceeding to change the point of diversion. The attention of the court was called to the hardship resulting from this decision and the court thereupon added this to its water rule. For want of a better place, the Committee finally decided to make it a separate rule, in a classification by itself.

CHAPTER XII

Rule 100. Contested Elections.

This rule seems strange and out of place in this book, yet it belongs somewhere because the General Assembly in 1893, (3 C. S. A., Chapter 59. Section 263) directed the Supreme Court to prescribe rules for practice and procedure in election contests triable in the supreme or district courts. The rule as prepared by us boils down a page and a half into two short paragraphs.

Address No. 15.

Seizure of Person or Property—Rules 101 to 104.

By L. A. HELLERSTEIN,
Member Revision Committee.

Rules 101 to 104 relate to arrest and exemplary damages, attachment, garnishment and replevin. These rules are not found in the Federal Rules. In these matters the federal courts follow the remedies available under state procedure.

Rule 101. Arrest and Exemplary Damages.

This rule relates to body executions and exemplary damages. To make the rules complete the statutes covering these matters were embodied in the rules. The rule follows the statutes. A body execution may be had where it shall appear from the summons and other papers that the action is founded upon tort and upon the trial the verdict or finding in favor of plaintiff shall state that the defendant was guilty of either malice, fraud, wilful deceit or negligence consisting of a reckless or wilful disregard of the rights or safety of others. The statutory provision that no body execution shall issue when the defendant shall have been convicted in a criminal prosecution for the same wrong is retained in the rule.

No changes have been made in the rule concerning terms of commitment and costs.

Exemplary damages may be awarded where the injury complained of was attended by circumstances of fraud, malice, or insult or a wanton or reckless disregard of the injured party's rights and feeling.

Rule 102. Attachments.

The sections on attachment in the Code were found to be in an illogical order and contained some provisions which had been repealed and others which were deficient in some respects. In the rules as now adopted the subdivisions are placed in logical order, repealed sections are omitted and other sections have been rewritten to effectuate the relief intended. No changes are made in the causes or methods for attachment.

A plaintiff follows the same procedure under the rule in an attachment as heretofore followed under the Code. Plaintiff, at the time of filing his complaint, or issuing summons, or before judgment, may obtain a writ of attachment by filing the appropriate affidavit and bond. The twelve causes for attachment are the same as under the Code. The affidavit must show as heretofore that defendant is indebted to plaintiff or that the defendant is liable in damages to plaintiff for a tort committed by a non-resident of this state against the person or property of a resident of this state, and the nature and amount of such indebtedness or claim for damages.

The procedure for defendant to traverse the causes for attachment or to move to discharge the attachment remains the same as heretofore.

APPENDIX D

The rule makes some changes to which attention should be called. We believe them to be an improvement over the Code procedure.

Subdivision (f) Service; How Made.

This subdivision is new. Writs of attachment under the rule may be served in the same manner as other process except that if personal service be made in the state, the sheriff must serve the process. The former Code section provided merely for service upon the defendant without any further elaboration.

Subdivision (j) (1) Creditors.

Creditors are specifically limited by this subdivision to 30 days, after levy is made by the sheriff in an action, to intervene by filing a complaint, affidavit and bond therein in order to share in the proceeds of the attached property. Under Code Section 99 some ambiguity existed as to whether a creditor was limited to 30 days from the levy or at any time before judgment to intervene. Our Supreme Court construed the Code section to have intended to place a 30-day limitation upon creditors, in the case of *Hartner v. Davis*, 100 Colo. 464, 68 P. (2d) 456. The present rule is a codification of the Supreme Court decision.

The procedure for entering judgments in favor of several creditors who may appear in due time in the original suit, the payment of costs in the attachment action and the participation of creditors in the fruits of the attachment in proportion to their judgments is set out in subdivision (l) of the rule. In the same subdivision it is provided that diligent creditors who secure the attachment of the property may be given preference by the court over other attaching creditors as heretofore provided by the Code.

Subdivision (j) (2) Judgment Creditors.

This subdivision provides a simple method whereby a judgment creditor may be made a party to a pending attachment action and share with other creditors in the proceeds of the attached property. The affidavit, summons, bond and complaint formerly required are dispensed with. A judgment creditor under the present rule comes in by motion filed within 30 days after the plaintiff's levy. Such a judgment creditor filing his motion may be required by the court to prove that his judgment is bona fide and not in fraud of the rights of other creditors.

Subdivision (s) Perishable Property May Be Sold.

This rule is made applicable to cases of attachment, garnishment, replevin, property seized under court order, or execution, and adds a new provision authorizing sale in the event the property levied upon is "likely to depreciate rapidly pending the determination of the issues." The other Code provisions authorizing a sale are retained in the rule. An example of the value of this subdivision is the case of *French v. Commercial Credit Co.*, 99 Colo. 447, 64 Pac. (2d) 127, which involved the possession of an automobile. The case was contested and five years after its institution was reversed by the Supreme

ADDRESS No. 15

Court. An automobile after five years is of little value. Under this subdivision a sale could have been made for the benefit of all parties.

Subdivision (aa) New Trial; Appeal and Writ of Error.

This rule provides that an order by which an attachment or garnishment is released or sustained is a final judgment and appeal and writs of error are allowed from such orders.

Without this subdivision heretofore no appeal could be had nor a writ of error prosecuted since an order dissolving or sustaining an attachment was not a final judgment.

Rule 103. Garnishment.

This rule does not materially change garnishment procedure. A new form of writ of garnishment should be printed as the time for answer is twenty days, whether served in the county where the action was brought or elsewhere. Under the Code if a writ of garnishment was served out of the county where the action was brought 40 days was allowed for answer. (See Form 23.)

(z) Release upon Bond.

This subdivision is new. It permits the release of property or money garnished to be released upon the filing of a good and sufficient bond. Under the Code no such a provision is found. Without this rule it was felt a hardship occurred in contested cases since money or property garnished were held pending the final determination of an action. For example upon a debt of \$25.00 a defendant's bank account of \$5,000.00 or any amount could be tied up pending the issues being determined.

Rule 102 (s) which permits the sale of perishable or rapidly depreciating property is made applicable to property held under garnishment.

Rule 104. Replevin.

The same procedure for replevin applies under the rule as heretofore under the Code. Plaintiff files his affidavit, bond, etc., to obtain the writ. The causes or grounds for the replevin are not changed.

Some of the Code sections have been rewritten for clarity. Changes made are minor with the exception of subdivision (m).

Subdivision (c) Bond; Writ.

This subdivision provides concerning service upon a member of defendant's family that it be upon a person "over the age of 18 years." The Code fixes the age as over 15 years. This change was made to conform to the age fixed in the other rules.

Subdivision (m) Judgment.

This subdivision permits counterclaims in a replevin action. Prior hereto the same was not permissible. It places replevin actions in the same category as other actions. Rule 13 relating to counterclaims and cross-claims is made applicable to replevin actions.

APPENDIX D

Formerly under Code provisions as adjudicated in Colorado in the cases of *Mason v. General Machinery & Supply Co.*, 91 Colo. 69, 11 Pac. (2d) 802, and *Mosko v. Forsythe*, 102 Colo. 115, 76 Pac. (2d) 1106, a defendant could not interpose a counterclaim in a replevin action. In these cases the Supreme Court held that only the right to possession of the property in question may be determined. Under the rule as now drawn counterclaims may be interposed in a replevin action in the same manner as in any other action.

As has been stated by a previous writer, Mr. Thomas Keely, if an automobile be sold by a dealer who files a replevin action to obtain possession thereof upon default in his mortgage, the defendant may set up, for example, as a defense to the action, a counterclaim that the automobile was misrepresented to him and claim damages. It is to be noted that the rule is not intended to effect a change in the negotiable instruments statutes applicable in such cases, namely, that a holder in due course of a negotiable instrument purchases the same free from any defenses that could be interposed between the parties. The rule is a change in procedure only and not in substantive law.

Address No. 16.

Rules 106 to 110.

By GUY K. BREWSTER,
Member Revision Committee.

CHAPTER XV

Rule 106. Remedial Writs and Contempt.

This rule covers habeas corpus, mandamus, quo warranto, certiorari, prohibition, scire facias, and any other special writs. Before the adoption of the present rules, certain forms of pleadings and the writs issued in such pleadings had been required.

Subdivision (a) of the rule abolishes the special forms that have heretofore been considered necessary and peculiar to these particular proceedings, and in all of these matters relief may now be obtained either by an action or by a motion under the new practice set up in the rules. In other words, the rules of pleading prescribed in the new rules apply to all of these proceedings. Rule 106 covers in a very brief form the same field that was formerly covered by some thirty sections of the Code. The substance of those thirty sections has been boiled down into the short statement appearing in the rule.

Subdivision (a) (1) covers civil habeas corpus. Habeas corpus in civil cases is distinguished from habeas corpus in criminal cases, which is covered by the statutes outside of the Code. Civil habeas corpus covers cases arising out of imprisonment for contempt in civil cases and body judgment in civil cases, and like matters.

ADDRESS No. 16

Subdivision (a) (2) covers mandamus, including damages in such an action. The issuance of an alternative writ provided for under former practice is abolished. The question of damages in mandamus cases can be submitted to the jury on that issue alone. In a mandamus action, therefore, you file a complaint, have your hearing, and the court enters a judgment. No longer will a writ be issued.

Subdivision (a) (3) covers quo warranto, and preserves the right to recover any damages sustained, and also provides for a fine in the court's discretion in aggravated cases where the facts warrant a fine. The action is brought as formerly by the district attorney in the name of the people of the state of Colorado. But if he declines so to do, it may be brought upon the relation and complaint of any person. No longer is leave of court necessary. You just file your complaint.

Subdivision (a) (4) covers certiorari and prohibition, and merely combines the Code provisions and former Supreme Court Rule No. 57 without any important change in substance.

Subdivision (a) (5) covers scire facias, and needs no particular comment.

Subdivision (b) permits the same practice in cases under certiorari, writ of review, or quo warranto as in the cases where the statutes provide for the review of acts of a board, commission, officer, or court, such as workmen's compensation and other statutory boards or commissions. Many of these special proceedings were heretofore advanced on the docket. This is now covered by Rule 12 C (a), as follows: "In actions under subdivisions (1) to (4) inclusive, of Rule 106, the court, ex parte, before process issues, may shorten the time for answer, and thereafter may shorten any of the periods fixed in these rules."

Rule 107. Civil Contempt.

Our Supreme Court has held that criminal contempt is covered by the common law and not by the Code. Therefore criminal contempt is not included in the rule. There seems to be no reason, however, why, in a proper case, a like practice might not be used in cases of criminal contempt. The United States Supreme Court, in *Gompers v. Bucks Stove Co.*, 221 U. S. 418, has explained the difference between civil and criminal contempt as follows:

"Contempts are neither wholly civil nor altogether criminal. And 'it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both.' But in either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor. It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority

APPENDIX D

of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order, which either in form or substance, was mandatory in character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.

"For example: If a defendant should refuse to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance required by a decree for specific performance, he could be committed until he complied with the order. Unless there were special elements of contumacy, the refusal to pay or to comply with the order is treated as being rather in resistance to the opposite party than in contempt of the court. The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said in *re Nevitt*, 117 Fed. Rep. 451, 'he carries the keys of his prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do.

"On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience.

"It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or vice versa."

Subdivision (a) of the rule merely defines what shall constitute contempt, and is a combination of two former Code sections in a briefer form. There is no material change in substance. The definition includes any act or omission designated as contempt by any statutory provisions or elsewhere in the rules. For example, Rule 37 (b) (1) states that if a party or witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in which an action is pending, the refusal may be considered a contempt of that court.

Subdivision (b) provides for summary punishment of contempt committed in the presence of the court, and states that the order adjudging the party guilty of contempt and prescribing the punishment shall be final and conclusive. This does not change the substance of previous Code provisions.

Subdivision (c) prescribes the practice where contempt occurs out of the presence of the court. An ex parte order is permitted for a citation to show cause on motion therefor supported by affidavit. It is necessary under the rule to serve a copy of the motion and affidavit with the citation. If the person cited fails to appear at the time designated, or if the court so orders at the time the citation is issued, or at any time thereafter, a warrant for his arrest may also issue. The court is required to endorse thereon the amount of bail required in such a case and provide for release of the arrested person upon filing with either the sheriff or the clerk an undertaking to appear at the time designated or pay the amount of the undertaking. The subdivision also provides for forfeiture of the undertaking in case the person arrested fails to appear at the time designated, and provides that the amount thereof, to the extent of the damages suffered by the contempt, shall be paid to the aggrieved party.

Subdivision (d) merely covers the procedure at the trial and provides for the presentation of evidence for and against the person charged with contempt, and permits the imposition of a fine not exceeding the damages suffered through the contempt, plus costs of the contempt proceeding, plus a reasonable attorney's fee in connection therewith, payable to the person damaged through the acts constituting the contempt. It is also provided that if the contempt consists of the failure to perform an act in the power of the person to perform, he may be imprisoned until he performs the act. In order to vindicate the dignity of the court, if it is so stated in the citation, the court may also impose a fine or imprisonment. If any fine is not paid, the court may order the person found guilty of contempt to be imprisoned until such fine is paid.

Subdivision (e) preserves the common law right criminally to prosecute a person for contempt with the single exception that, under the preceding subdivision (d), if a fine or imprisonment is imposed to vindicate the dignity of the court, no proceedings in criminal contempt shall be had upon the same facts.

APPENDIX D

CHAPTER XVI

Affidavits, Arbitration, and Miscellaneous Matters.

Rule 108.

This rule covers making of affidavits. It merely provides that an affidavit may be sworn to either within or without the state before any officer authorized to take and certify the acknowledgment of deeds conveying lands. The Code sections were boiled down to one short paragraph.

Rule 109.

This rule covers arbitration and makes no important changes in substance, except as to the fees of arbitrators. Heretofore, the Code has provided that arbitrators should be paid \$3.00 a day. Under the new rule, they shall receive \$10.00 a day, and the amount of their fees shall be included in the award and the judgment entered thereon.

Rule 110.

Subdivision (a) allows a liberality in permitting amendments to writs, process, affidavits, traverse or other paper, and provides that no writ or process shall be quashed or any order or decree set aside, nor any undertaking be held invalid, nor any paper be held insufficient if the same be corrected within the time and manner prescribed by the court.

Subdivision (b) merely covers the use of terms found in the rules to the effect that words used in the present tense shall include the future, singular shall include the plural, masculine shall include the feminine, etc. Also that the words, clerk, sheriff, or other officer, shall include his deputy or any other person authorized to perform his duties. It is further provided that a superintendent, overseer, foreman, sales director or person occupying a similar position may be considered a managing agent for the purpose of these rules.

There are two subdivisions, (c) and (d), containing matter which does not appear in the Code. These are merely that certificates shall be made in the name of the officer, either by the officer or by his deputy, and subdivision (d), that where a cross-claim, counter-claim or third-party claim is filed, the claimant thereunder shall have the same rights and remedies as if a plaintiff.

ADDRESS No. 17

Address No. 17.

Supreme Court Proceedings—Rules 111 to 119.

By JOSEPH G. HODGES,

Deputy District Attorney Denver, 1934; Member Revision Committee and the
Supreme Court Rules Committee.

Rules 111 to 119 relate to Supreme Court proceedings. Both review of errors and original proceedings are covered. The federal review practice is by appeal, but the new rules are based upon review by writ of error. This is necessary because Article VI, § 23 of the Constitution of Colorado provides that writs of error shall lie from the Supreme Court to every final judgment of the county court, and it was thought wise to have the same procedure for a review by the Supreme Court of the action of county court, and for review of the action of the district court. Consequently the new practice is based primarily upon the old practice in the Supreme Court, but certain fundamental changes have been made in order to clarify that practice, and, in some respects, to simplify it.

In each proceeding on error there are at least three major questions which must be considered. There are the following:

- (1) Is the action of the lower court one that can be reviewed by the Supreme Court?
 - (2) If so, what must be done to initiate a writ of error proceeding in the Supreme Court to review that action; and
 - (3) After the writ of error proceeding is initiated, what then takes place?
- These questions will be discussed in this order.

Rule 111. Writ of Error.

(1) What Can Be Reviewed by the Supreme Court?

(a) Matters Reviewable.

This subdivision provides that four classes of judgments or orders may be reviewed on writ of error. They are:

- (1) A final judgment of any district, county or juvenile court in all actions or special proceedings, whether governed by these rules or by the statutes.
- (2) An order refusing, granting or cancelling in whole or in part a conditional decree in proceedings for the adjudication of water priorities.
- (3) An order granting or denying a temporary injunction.
- (4) An order appointing or denying the appointment of or sustaining or overruling a motion to discharge a receiver.

Attention is directed again to Rule 59 (c) (e), which provides that unless otherwise ordered a motion for a new trial must be filed, and only questions presented in such motion will be considered on review.

APPENDIX D

(2) What Must Be Done to Initiate a Review in the Supreme Court, and When Must It Be Done?

(b) Limitation on Time of Issuance.

This subdivision provides that in order to initiate a review proceeding in a proper case, a writ of error must be obtained within one year from the judgment or order complained of, except that on writ of error to an order relating to the appointment or discharge of a receiver, or an order granting or denying a temporary injunction, the writ of error must be sued out within sixty days from the judgment or order complained of, and in special proceedings, if by statute a time less than twelve months is specified within which a writ of error can be sued out, the statute shall control.

The additional time within which an infant, or person imprisoned, or non compos mentis, may sue out a writ of error, contained in the old Supreme Court Rules, is not included in the new rules.

(c) How Obtained.

This subdivision provides that to obtain a writ of error the party seeking reversal must file the record of the lower court with the Supreme Court, or, in lieu thereof, a praecipe for writ of error, and pay docket fee, all within the time set forth in subdivision (b) of the rules.

If a praecipe is filed the writ of error is issued and sent to the clerk of the lower court requiring him to certify the record to the Supreme Court within sixty days, or within such additional time as the court may allow.

If the record is filed when the writ of error is obtained, the writ is issued, but is retained by the clerk of the Supreme Court in the files of the case. The preparation of the record will be discussed under Rule 112.

(d) Joint or Several Writs.

This subdivision provides that if the judgment or order sought to be reviewed is made against two or more persons, any one or more of those persons may obtain a single writ of error, and each may also obtain a separate writ of error.

(e) Summons to Hear Errors; Contents; Service.

This subdivision provides that when the writ of error is issued the clerk of the Supreme Court also issues a summons to hear errors directed to the defendant in error and requiring him to appear in the Supreme Court within ten days from the service thereof on him, and pay the required docket fee. The summons further sets forth that if he fails to do so, plaintiff in error shall not be required to serve him with any papers, and the court may proceed to a determination of the writ of error ex parte.

Service of this summons to hear errors is in the same manner as is provided in the rules for the service of an ordinary summons; or the summons may be served by the clerk mailing a copy thereof by registered mail addressed to the party at his last address given in his pleadings in the trial court.

ADDRESS No. 17

The rules also provide that a proceeding on writ of error is a proceeding in rem, and service proper only in proceedings in rem is proper in connection with the service of the summons to hear errors.

Written acknowledgment of service of the summons by the defendant in error, or in his behalf by an attorney admitted to practice in the state, satisfies the requirements of the service of summons.

Separate, additional or amended summons to hear errors may issue at any time.

(f) Specification of Points.

This subdivision provides that assignments of error, as such, have been abolished, and no assignment of errors need be filed when the writ of error is obtained. The new rules provide that, in lieu of assignments of error, the plaintiff in error in his first brief, or if he wishes, prior thereto, must file a Specification of Points on which he relies. The defendant in error in his brief, or by a separate paper, may file a Cross-Specification of Points. This matter will be further mentioned in connection with the requirements for briefs under Rule 115.

The dismissal of the error proceedings by the plaintiff in error will not affect the right of defendant in error to seek reversal or modification of the judgment, where Cross-Specifications of Error, or notice of intention to file the same, have been filed by defendant in error.

(g) Review of Adjudication of Water Priorities.

This subdivision has special provisions for the designation of parties in actions to review water adjudication proceedings.

[In this address Rule 112 follows Rule 113.]

Rule 113. Supersedeas and Stay of Execution.

(a) Application for; After Record Filed.

This subdivision provides that if a supersedeas is sought it may be applied for at any time after a record on error is filed with the Supreme Court.

The application for supersedeas must be accompanied by a printed or type-written brief. This brief must be served on defendant in error, who has ten days to file an answer brief, and plaintiff in error has five days from the receipt of the answer brief to file a reply brief.

A party at the time of filing his first brief may request a final determination of the controversy on the application for supersedeas, and the court, upon that application, may affirm or reverse the judgment.

(b) Review of Stay of Execution; Verified Statement.

This subdivision provides that if such an application for supersedeas is made, the Supreme Court, pending the determination of the application, may order a further stay of execution, or make any other order adequate to preserve the status quo or to protect the rights of the parties. If a party has

APPENDIX D

been prejudiced by a ruling or order of the trial court in connection with a stay of execution pending application for supersedeas, the party claiming to be prejudiced may docket the case in the Supreme Court by filing a verified statement setting forth the nature of the case, the judgment and rulings complained of, and the Supreme Court has power to grant, modify or restore an injunction, and make such further orders in the premises as are necessary for the protection of the parties.

Attention is again called to Rule 62 which covers the powers of the lower court to stay execution pending the filing and determination of an application to the Supreme Court for supersedeas.

(c) Bond.

This subdivision provides that no supersedeas can issue when prohibited by statute, or unless a bond is deposited with the clerk of the court, or, in lieu thereof, cash in the amount of the bond; except where a statute prescribes different conditions, the bond must be conditioned for satisfaction of the judgment in full, or as modified, together with costs, interest and damages for delay, if for any reason the writ of error is dismissed, or the judgment is affirmed or modified. If the judgment is for the recovery of money not otherwise secured, the bond must be fixed by the court at such sum as shall cover the whole amount of the judgment remaining unsatisfied, the costs on writ of error, interest and damages for delay.

The court, however, has the power, after notice and hearing, for good cause shown, to fix a different amount or order security other than the bond. This is intended to permit the court to grant a supersedeas upon a bond of say \$5,000, in the case of a plaintiff in error who has property worth only \$5,000, but has a judgment of a much larger amount against him, which judgment he wishes superseded.

If the judgment determines the disposition of property in controversy, as in actions in replevin, or in real actions, or actions to foreclose mortgages, or when the property is in the custody and control of the court, the amount of the bond shall be fixed at such sum only as shall secure the amount to be recovered for the use and detention of the property, costs of the action, costs on writ of error, and damages for delay.

If a judgment determines the right to an office, the bond shall be fixed at such sum as will cover the emoluments of the office up to the time the writ of error is determined, plus costs of action and costs on writ of error. Recovery on such bond is for the use and benefit of the person adjudged entitled to the office.

If a bond is executed by an attorney-in-fact the original power of attorney or copy thereof should be filed with the clerk.

(d) When Bond Not Required.

This subdivision provides that under certain circumstances supersedeas bonds are not required in line with our present practice.

ADDRESS NO. 17

(e) Bond; Amendment; Increase.

This section permits amendment of defective bonds and increase of the amount of bonds.

(f) Bond; Liability of Surety.

This subdivision provides that by entering into a supersedeas bond the surety thereon submits himself to the jurisdiction of the court to which the writ is directed, and appoints the clerk of the court his agent for service in connection with his liability on the bond. This liability may be enforced on motion without an independent action, and such notice of the motion as the court prescribes shall be served on the clerk of the lower court who shall mail copies to the surety if his address is known.

[Subdivision (g) follows (i).]

(h) Bond Effective as to Parties Filing Same.

This subdivision provides that if the writ of error is sued out by two or more persons, and only one shall file the bond, the supersedeas shall be good only as to the persons filing the bond, but the rights of the parties shall be determined at the same time.

(i) Endorsement When Granted.

This subdivision provides that if supersedeas has been granted, the clerk endorses on the writ of error "supersedeas has been granted," and signs that endorsement.

(g) Bond; Release of Lien; Notice of Lis Pendens.

This subdivision provides that if a judgment for the payment of money has been made a lien on real estate, and a supersedeas bond is given, the clerk shall issue a certificate that the judgment has been superseded.

(j) Stay of Execution.

This subdivision provides that a certified copy of a writ of error endorsed "supersedeas has been granted" may be served on any officer holding an execution, and thereupon all proceedings under the execution shall be discontinued.

The clerk of the lower court need not be advised by the clerk of the Supreme Court of the granting of the supersedeas.

(3) What Is to Be Done After the Proceeding on Error Has Been Initiated?

Rule 112. Record on Error.

[Under this rule the author places the subdivisions in chronological order rather than rule order.]

(a) Preparation, Certification.

A record of the proceedings in the lower court is essential to review the actions of the lower court. The preparation and obtaining of the record is governed by Rule 112. The record may be filed at the time the writ of error

APPENDIX D

is issued, or within sixty days thereafter, or such further time as the Supreme Court may allow, if in response to a praecipe for record.

A record is obtained from the clerk of the trial court in the following manner:

The party seeking to reverse the judgment must promptly file with the clerk of the trial court a designation indicating the parts of the record, proceedings and evidence to be certified to the Supreme Court. He serves a copy of this designation on the opposing party, personally or by mail, if his address is known, or upon his attorney. The opposing party has ten days after service on him within which to serve and file a designation of additional parts of the record proceedings and evidence to be included in the record to be certified to the Supreme Court. The matters designated by the parties constitutes the record which shall be certified and transmitted to the Supreme Court, and must, in any event, include the material pleadings, the verdict or findings of fact and conclusions of law, together with the direction for entry of judgment, the master's report, if any, the opinion, if any, the judgment or part thereof to be reviewed, and the designation or stipulations of the parties as to the matters to be included in the record.

The reporter's original transcript, if designated, may be a part of the record, and it shall include, as far as practicable, original depositions and exhibits. Supplemental records may be filed containing proceedings subsequent to judgment.

Copies of records and files of the clerk shall be certified by him, and other portions of the record shall be certified by the trial judge.

(f) Transcript; Objections; Certification.

This subdivision provides that if the reporter's notes contain any matters designated for inclusion in the record, within sixty days from the date of the judgment sought to be reviewed, the party seeking reversal shall lodge with the clerk of the court a reporter's transcript containing such parts of the proceedings and evidence as may have been designated. Immediate written notice is given to the opposing parties by the clerk, which parties have fourteen days after the notice to them to file objections to the transcript. If no objections are filed, the transcript is signed and certified by the judge, and becomes a part of the record. If objection is filed, the party seeking reversal shall immediately be notified by the clerk of the trial court, and the objection shall immediately be heard and determined, and the transcript signed and certified. Exceptions are no longer necessary (see Rule 46), and there is no bill of exceptions, as such.

(c) Stipulation as to Record.

This subdivision provides that instead of serving designations the parties may, by written stipulation filed with the clerk of the trial court, designate what is to be included in the record in error.

ADDRESS No. 17

(d) Agreed Record.

This subdivision provides that the parties may also agree upon a record in error, which may be certified to the clerk of the Supreme Court.

(e) Agreed Statement.

This subdivision provides that if the questions presented can be determined without an examination of all pleadings, evidence and proceedings, an agreed statement showing how the questions arose, and were decided in the trial court, and setting forth only such facts averred and sought to be proved, as are essential to a decision of the question by the Supreme Court, may be certified and presented to the Supreme Court, in lieu of a record otherwise prepared and certified.

(g) More Than One Writ of Error.

This subdivision provides that if more than one writ of error is brought to review the same judgment, a single record on error should be prepared containing all matters designated.

(b) Costs, by Whom Paid.

This subdivision provides that the party seeking to reverse the judgment must pay the costs of preparing the record, except that the trial court may, on objections by him, order the opposing party to advance or pay for those parts of the record designated by him, which the trial court determines are unessential to a complete understanding of the controversy. If such an order is made and the opposing party fails to advance payment for the parts in connection with which he is ordered to advance payment, those parts are omitted from the record.

Subdivision (a) also provides that the record properly certified shall be transmitted to the Supreme Court, and shall be bound under the direction of the clerk of the Supreme Court at the cost of plaintiff in error.

Rule 114. Costs.

(a) Fees of Clerk.

Docket fees are the same as contained in the old rules.

(b) Proceedings by a Poor Person.

This subdivision provides that if a litigant files a motion under oath with the Supreme Court stating that, because of his poverty, he is unable to pay the costs in the Supreme Court, and believes he is entitled to the relief he seeks, and sets forth the points on which he relies, the court may permit him to prosecute the writ of error without being required to pay the fees or costs. He may also be permitted to proceed on a typewritten brief and abstract of record.

(c) Costs.

This subdivision provides that the successful party on writ of error, unless otherwise ordered, may recover his costs paid to the Supreme Court, his

APPENDIX D

expenses actually and necessarily incurred in procuring the record on writ of error, not exceeding twenty cents per folio, and his expenses actually and necessarily incurred for printing the abstract of record, not exceeding one dollar per page. Additional costs may be imposed or may be remitted by the court.

(d) Statement to Trial Court.

This subdivision provides that upon request the clerk of the Supreme Court shall send a written statement of the costs recoverable there to the clerk of the trial court, which amount may be included in the execution for costs issued by the trial court.

Rule 115. Abstracts, Briefs, Motions and Withdrawal of Papers.

If no application for supersedeas is filed, or if one is filed and the court does not make a final determination of the case thereon, printed briefs and abstracts of record are necessary.

(a) Abstracts of Record; Contents.

This subdivision provides that within thirty days after the record is filed in the Supreme Court, or within thirty days after the application for supersedeas is determined, fifteen printed copies of an abstract of record must be filed by plaintiff in error with the Supreme Court.

The requirements for an abstract of record are set out in this subdivision.

(b) Briefs; When Filed.

This subdivision provides that within thirty days after the abstract is filed, plaintiff in error must file his brief with the Supreme Court.

The brief of defendant in error is due thirty days after service of the brief of plaintiff in error on him, and the defendant in error may, within the time allowed for filing his brief, file fifteen copies of a supplemental abstract, and if the same is essential, the plaintiff in error shall pay the costs of the supplemental abstract.

The plaintiff in error has twenty days after service of the brief of defendants in error on him within which to file a reply brief.

Additional or supplemental briefs may not be filed without leave of court.

Fifteen copies of all briefs must be filed.

(c) Briefs; Contents.

The new rules contain certain definite provisions for the contents of a brief, which are as follows:

“Every brief, except one filed in support of or in opposition to a motion filed in the Supreme Court, shall contain separately in the order following:

- “1. A subject index of the entire brief.
- “2. A table of all cases or statutes cited.

ADDRESS No. 17

- "3. A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate folio references.
- "4. A separate and particular statement of each point intended to be urged with appropriate reference to the specification of points.
- "5. A concise summary of the argument.
- "6. The argument, exhibiting clearly the points of fact and law being presented, and citing the authorities or statutes relied on."

(If any other than a Colorado statute is cited, so much thereof as may be necessary to the decision must be printed in full, either in the body of the argument, or in an appendix. In all cases references to the record shall be accompanied by appropriate folio numbers.)

- "7. The Specification of Points which takes the place of assignment of errors and is provided for in Rule 111 (f), unless such Specification of Points shall have been theretofore filed separately."

Briefs of defendants in error need not contain a statement of the case unless that presented in the brief of plaintiff in error is controverted or is deemed insufficient; nor a statement of points relied on, except that where a defendant in error seeks the modification or reversal of a judgment, he must make a separate statement of the points upon which he intends to rely, with appropriate references to the Cross-Specification of Points, and must also include in his brief a Cross-Specification of Points, unless it has been theretofore filed.

Reply briefs are to be confined to answering new matters raised by the adversary's brief.

The Specification of Points to be contained in the brief or in a separate paper, are provided for in Rule 111 (f), and take the place of assignments of error. This Specification of Points contains the points upon which the parties seeking reversal relies for reversal or modification of the judgment. Each specification of error shall set out separately and particularly the points relied on. Counsel will be confined to those points so specified, but the court may, in its discretion, notice any error appearing of record.

No writ of error shall be dismissed, and no Specification of Points shall be disregarded on account of any technical defect not affecting the substantial rights of the parties.

(d) Failure to File Abstract of Record or Brief; Effect of.

This subdivision provides that if plaintiff in error fails to file an abstract or brief, the opposite party may proceed ex parte, or the court may, on motion of the party, or its own motion, dismiss the writ of error without notice. If the defendant in error fails to file his brief, disposition of the writ of error may be had ex parte.

APPENDIX D

(e) Time to File; Time for Filing May Be Extended or Abridged by Court Only.

This subdivision provides that the time for filing abstract, briefs and other papers may be extended or abridged by the court, but not by stipulation of the parties.

(f) Motions and Briefs Thereon.

This subdivision relates to motions and briefs thereon, and there is no change in the practice.

(g) Amicus Curiae.

This subdivision relates to amicus curiae, and the practice is the same.

(h) Printing or Typewriting Abstracts and Briefs.

This subdivision provides for printing or typewriting abstracts and briefs, and the requirements in connection therewith. The printing specifications and length of paper are changed.

(i) Copies to Be Served or Filed.

This subdivision provides that two copies of each printed brief, abstract and other papers, and one copy of each typewritten paper shall be served on all parties, and proof of service filed with the clerk, provided, that no service is necessary on a defendant in error who has not entered his appearance in the Supreme Court as required in the summons to hear error, but one additional copy of each of those papers shall be filed with the clerk for the use of such defendant in error in default.

(j) Withdrawal of Papers from Files.

This subdivision provides that no papers shall be taken from the files without leave of court, except the record may be withdrawn for twenty days for the purpose of making abstracts. Every paper taken from the files must be retained in the custody of the party withdrawing it, and must not be in any way mutilated, taken apart or marked.

(k) Industrial Commission.

This subdivision provides that writs of error from the Industrial Commission are governed by special provisions similar to those now existing, and the present rule relating to writs of review to the Public Utilities Commission has been abolished because no longer pertinent.

Rule 116. Original Jurisdiction.

This rule provides for original jurisdiction of the Supreme Court. Original jurisdiction is now invoked by filing a complaint with the Supreme Court, which must set forth the circumstances which render it necessary or proper that the Supreme Court exercise its original jurisdiction. In general, the proceeding is governed by these rules, subject to the power of the court to prescribe different procedure.

ADDRESS No. 17

It appears that it is no longer necessary, unless the court so orders, if a court or justice or other officer or board or tribunal, in the discharge of his or its duties of a public character is named as respondent, to disclose in the complaint the real party or parties in interest, or to serve a copy of the complaint or of any order issued in connection therewith on such person.

Rule 117. Oral Arguments.

This rule is substantially the same as the present practice, except that failure to file opening, answer or reply brief shall preclude the party so failing from demanding an oral argument.

Rule 118. Disposition of Cause.

(a) Failure to Prosecute Writ.

This subdivision relates to the penalties for failure to prosecute a writ of error, which are the same as our present practice.

(b) Advancement on Docket.

This subdivision provides that the court may advance any pending action on the docket and may dispose of actions in such order as the court determines, and further, that in matters of great public importance, the court may make such orders relating to the time and necessity for the filing of an abstract of record, the time for filing printed or typewritten briefs, and the time and necessity for oral argument as it deems the circumstances permit.

(c) Rehearings.

This subdivision relates to rehearings and petitions therefor, and is the same as the present practice.

(d) Affirmation.

This subdivision relates to the power of the court in regard to affirmation of judgments, and is substantially the same as our present practice.

(e) Reversal.

Included in this subdivision is a provision that if plaintiff in error prevails in the Supreme Court, payment of costs by defendant in error shall not be a condition of further proceedings in the lower court, if such are necessary, but the costs recovered on writ of error shall await final determination of the case, and if final determination is adverse to plaintiff in error, his costs recovered on writ of error shall be offset against the judgment finally recovered against him. In other respects the practice is the same.

(f) Disposition of Cause.

This subdivision provides that the Supreme Court may enter judgment, may issue execution thereon, or may remand the cause to the trial court for issuance of execution, or for other proceedings. It contains other provisions now incorporated in our present practice.

APPENDIX D

(g) Remittitur.

This subdivision provides that remittitur may issue upon denial of a petition for rehearing, or on the expiration of the time allowed for filing such petition, if one is not filed.

(h) Copies of Opinion.

This subdivision provides for the mailing of copies of the opinion to the trial judge, and to one attorney on each side of the case, and is the same as our present practice.

Rule 119. Sessions and Terms.

The only change in our present practice is the elimination of any provision for special terms of the court.

Appendix E

Rules for Criminal Procedure in the Supreme Court.

Criminal procedure in the supreme court shall be under the practice heretofore existing. (Order of Supreme Court, January 6, 1941.)

As to uniform procedure for criminal contempt, see Rule 107 (c) and committee note thereunder. See also, Rule 107 (e).



Index to Rules of Civil Procedure



Index to Rules of Civil Procedure

ABANDONMENT

- Waters and watercourses.
- Actions to change the point of diversion of water, Rule 99.

ABATEMENT, REVIVAL AND SURVIVAL

- Judgments.
 - Entry after verdict or decision regardless of death, Rule 54 (f).
- Revival of judgments.
 - Liens.
 - Effect of liens, Rule 54 (h).
 - Motions, Rule 54 (h).
 - Notice issued by clerk of court, Rule 54 (h).
 - Time of entry, Rule 54 (h).
 - Trial and determination by court on answer, Rule 54 (h).
- Writ of error.
 - Review of judgment, Rule 54 (h).
- Presentment of death, Rule 25 (a) (2).
- Substitution of parties, Rule 25. See Substitution of Parties.

ABBREVIATIONS

- Pleading, appx. B, § 18.

ABSENCE

- Attachment.
 - Affidavit, Rule 102 (b) (4).
- Depositions.
 - Deposition before action.
 - Use of deposition, Rule 27 (a) (4).
 - Notice to absent parties, Rule 30 (h).
 - Use of deposition when witness is absent from state, Rule 26 (d) (3).

ABSTRACTS

- Library, Rule 261.
- Record, Rules 115 (a), 115 (e), 115 (h).
 - See Writ of Error.

ACCIDENT

- New trials.
 - Ground, Rule 59 (a) (3).

ACCORD AND SATISFACTION

- Defenses, Rule 8 (c).
- Pleading.
 - Setting forth affirmatively, Rule 8 (c).

ACCOUNTS

- Complaint.
 - Forms, appx. A, Form 4.
- Default.
 - Taking account or to determine amount of damage, Rule 55 (b) (2).
- Discovery, Rule 34.
- Evidence.
 - Secondary evidence, Rule 43 (f) (5).
- Masters.
 - Statement of accounts, Rule 53 (d) (3).
- Production, Rule 34.

ACKNOWLEDGMENTS

- Admission.
 - Proof of service of process, Rule 4 (i) (5).
- Affidavits, appx. B, § 16.
- Conveyances, appx. B, § 16.
- Judges, appx. B, § 16.
- Judgments.
 - Satisfaction, Rule 58 (b).
- Justices of the peace, appx. B, § 16.
- Service of process.
 - Written admission of waiver of service, Rule 4 (i) (5).
- Waiver.
 - Proof of service, Rule 4 (i) (5).

ACTIONS

- Attorney's fees.
 - Suing client for fee, appx. C, § 14.
- Capacity to sue or be sued, Rule 17 (b).
- Class actions, Rule 23.
- Commencement of action, Rule 3.
 - Complaint, Rule 3 (a).
 - Service of process, Rule 3 (a).
- Dismissal.
 - Failure to file complaint within 10 days after summons is served, Rule 3 (a).
- Form of action, Rule 2.
- Joinder of claims, Rule 18. See Joinder of Claims.
- Joinder of remedies, Rule 18 (b).
- Parties. See Parties.

RULES OF CIVIL PROCEDURE

ACTIONS (Cont'd)

- Pending actions.
 - Effect of rules, Rule 1 (b).
- Procedure governed, Rule 1 (a).
- Sheriffs.
 - Actions against sheriff, appx. B, § 26.
- Venue, Rule 98. See Venue.

ADDITIONAL SUMMONS

- Issued against defendant at any time, Rule 4 (b).

ADDRESSES, appx. D

ADJOURNMENT

- Clerks of court, Rule 119 (b); appx. B, § 24.
- Courts, Rule 119 (b); appx. B, § 24.
 - Discharge of jury upon final adjournment, Rule 47 (p).

ADMISSIONS

- Acknowledgment.
 - Proof of service of process, Rule 4 (i) (5).
- Admission of facts and of genuineness of documents, Rule 36.
 - Effect of admission, Rule 36 (b).
 - Expenses on refusal to admit, Rule 37 (c).
 - Request for admission, Rule 36 (a).
- Attorney's fees.
 - Expenses on refusal to admit genuineness of documents, Rule 37 (c).
- Documents.
 - Form of admission for request as to genuineness, appx. A, Form 21.
- Forms.
 - Genuineness of documents, appx. A, Form 21.
- Pleading.
 - Effect of failure to deny, Rule 8 (d).
- Pre-trial conference to determine possibility of obtaining, Rule 16 (3).
- Service of process.
 - Proof of service, Rule 4 (i) (5).

ADMISSION TO THE BAR, Rules 201-229.

- See Attorney and Client.

ADOPTION BY REFERENCE

- Motions.
 - Statements in other pleadings, Rule 10 (c).
- Pleading, Rule 10 (c).

ADVERTISING

- Canons of ethics.
 - Direct or indirect, appx. C, § 27.

ADVISORY JURY, Rule 39 (c).

AFFIDAVITS

- Acknowledgments, appx. B, § 16.
- Agreed case, Rule 7 (d).
- Amendments, Rule 110 (a).
 - Attachment, Rule 102 (q).
- Attachment, Rule 102 (b).
 - Amendment, Rule 102 (q).
 - Debts not due, Rule 102 (o).
 - Judgment creditors, Rule 102 (j) (2).
 - Making creditors parties, Rule 102 (j) (1).
 - Traverse of affidavit, Rule 102 (p).
- Certiorari.
 - Required, Rule 11 (Note).
- Change of venue, Rule 98 (g).
- Contempt.
 - Out of presence of court, Rule 107 (c).
 - Required, Rule 11 (Note).
- Default.
 - Amount due, Rule 55 (b) (1).
 - Showing failure to plead or otherwise defend, Rule 55 (a).
- Depositions.
 - Deposition before action, Rule 27 (a) (2).
 - Prima facie evidence, Rule 27 (a) (3).
 - To perpetuate testimony, Rule 11 (Note).
- Evidence.
 - Motion based on facts not appearing of record, Rule 43 (e).
- Injunction.
 - Required, Rule 11 (Note).
 - Temporary restraining order, Rule 65 (b).
- Judges.
 - Affidavits for change of judge, Rule 97.
- Jurisdiction.
 - Relief when jurisdiction exceeded, Rule 106 (a) (4).
- Motions.
 - Service when motion is supported by affidavit, Rule 6 (d).
- New trials.
 - Reply affidavit, Rule 59 (c).
 - Supporting motion by affidavit, Rule 59 (a).
 - Time for filing, Rule 59 (c).
 - Time for serving, Rule 59 (c).

INDEX

AFFIDAVITS (Cont'd)

- Oaths, Rule 108.
- Opposing affidavits.
 - Time of service, Rule 6 (d).
- Pleading.
 - Need not be accompanied by affidavit unless provided by rule of statute, Rule 11.
- Public officers.
 - Who may administer oaths, Rule 108.
- Replevin.
 - Causes, Rule 104 (b).
- Service of process.
 - Affidavit of publication, Rule 4 (i) (4).
 - Motion and affidavit served together, Rule 6 (d).
 - Opposing affidavits, Rule 6 (d).
 - Proof of service, Rule 4 (i) (2).
- Summary judgments.
 - Made in bad faith, Rule 56 (g).
 - Opposing affidavits, Rule 56 (c).
 - Supporting and opposing affidavits, Rule 56 (e).
 - When affidavits are unavailable, Rule 56 (f).
 - With or without supporting affidavits, Rule 56 (a).
- Time.
 - Service, Rule 6 (d).
- Venue.
 - Change of venue, Rule 98 (g).

AFFIRMANCE

- Forms, appx. B, § 14.
- Oaths.
 - Affirmation in lieu of oath, Rule 43 (d).
 - Use of term, Rule 110 (b).
 - Who may administer, appx. B, § 13.
- Witnesses, appx. B, § 14.
- Writ of error.
 - Equally divided court, Rule 118 (f).

AGENTS

- Attorneys.
 - Canons of ethics, appx. C, § 28.
- Definition.
 - Managing agent, Rule 110 (b).
- Depositions.
 - Use of deposition of managing agent, Rule 26 (d) (2).
- Interrogatories.
 - Managing agent, Rule 33.
- Pleading.
 - Capacity of party, Rule 9 (a) (1).

AGENTS (Cont'd)

- Service of process.
 - Managing or general agent of corporation, Rule 4 (e) (5).
 - Managing or general agent of partnership or association, Rule 4 (e) (4).
 - Process agent for corporation, Rule 4 (e) (5).
 - Service of process authorized by appointment or by law to receive, Rule 4 (e) (1).
- State.
 - Agent of state, Rule 4 (e) (9).

AGREED CASE, Rule 7 (d).

- Affidavits, Rule 7 (d).
- Canons of ethics.
 - Agreements between counsel should be reduced to writing, appx. C, § 25.
- Issue, Rule 7 (d).
- Pre-trial conference, Rule 16.
- Stipulations. See Stipulations.
- Writ of error.
 - Agreed record, Rule 112 (e).

ALIAS WRITS

- Garnishment, Rule 103 (d).

ALIMONY

- Injunctions.
 - Rule not applicable, Rule 65 (h).

ALTERATION OF INSTRUMENTS

- Evidence.
 - Explaining alterations in documents, Rule 43 (g).

ALTERNATE JURORS, Rule 47 (b).

AMENDMENTS, Rules 15, 110 (a).

- Affidavits, Rule 110 (a).
- Attachment, Rule 102 (q).
- Attachment.
 - Affidavit, Rule 102 (q).
- Bonds, Rule 110 (a).
 - Supersedeas bond, Rule 113 (e).
- Complaint.
 - Time of filing pleading after amended complaint, Rule 12 (a).
- Continuance.
 - Court may grant continuance to enable objecting party to meet evidence after amendment, Rule 15 (b).
- Evidence.
 - Amendments to conform to evidence, Rule 15 (b).

RULES OF CIVIL PROCEDURE

AMENDMENTS (Cont'd)

- Findings of court, Rule 52 (b).
- Judgments, Rule 110 (a).
- Motions.
 - Motion to amend pleading to conform to evidence, Rule 15 (b).
- Pleadings, Rule 15.
 - Amendment to conform to evidence, Rule 15 (b).
 - Consent of adverse parties, Rule 15 (a).
 - Leave of court, Rule 15 (a).
 - Pre-trial conference to consider the necessity or desirability, Rule 16 (2).
 - Third-party practice, Rule 14 (a).
- Relation back, Rule 15 (c).
- Replevin.
 - Bonds, Rule 104 (g).
- Responsive pleading.
 - Responsive pleading after amendments, Rule 15 (a).
- Service of process, Rule 110 (a).
 - Proof of service, Rule 4 (j).
 - Terms, Rule 4 (j).
 - Time, Rule 4 (j).
- Summons.
 - Amended summons issued against defendant at any time, Rule 4 (b).
- Supersedeas.
 - Bond, Rule 113 (e).
- Third-party practice.
 - Amendment to pleading, Rule 14 (a).
- Time.
 - Amendment of pleading, Rule 15 (a).
- Traverse, Rule 110 (a).
- Verdict.
 - Correction of verdict, Rule 47 (r).

AMICUS CURIAE

- Pending actions.
 - Supreme court proceedings, Rule 115 (g).
- Supreme court proceedings, Rule 115 (g).
- Writ of error, Rule 115 (g).

AMOUNT IN CONTROVERSY

- Counterclaim.
 - Claim in excess of \$2,000.00 certified to district court, Rule 13 (1).
- Injunctions.
 - Stay of proceedings, appx. B, § 9.

ANSWER

- Allowance, Rule 7 (a).

ANSWER (Cont'd)

- Counterclaims.
 - Joinder of claim, Rule 18 (a).
 - Term when counterclaim is filed, Rule 12 (a).
- Cross-claim, Rule 7 (a).
 - Time of filing answer when cross-claim is filed, Rule 12 (a).
- Filing pleadings and papers.
 - Time of filing, Rule 12 (a).
- Forms.
 - Money had and received, appx. A, Form 17.
 - Presenting defenses under Rule 12 (b), appx. A, Form 16.
- Garnishment.
 - Failure to answer, Rule 103 (f).
 - Funds of state and municipal corporations, appx. B, § 7.
 - Interrogatories answered under oath, Rule 103 (f).
 - Public officials, Rule 103 (c).
 - Refusal of garnishee to answer, Rule 103 (k).
 - Traverse, Rule 103 (l).
 - Trial, Rule 103 (m).
- Joinder of claims.
 - Counterclaim, Rule 18 (a).
- Libel and slander, appx. B, § 3.
- Money had and received.
 - Form, appx. A, Form 17.
- Orders, Rule 12 (a).
- Time.
 - Time of filing, Rule 12 (a).
 - When counterclaim is filed, Rule 12 (a).
 - When cross-claim is filed, Rule 12 (a).

APPEAL AND ERROR

- County courts.
 - Appeal to district courts, Rule 81 (c).
- Defenses.
 - Overruling motions preserved point for consideration on review, Rule 12 (b) (Note).
- District courts.
 - Appeal from county court to district court, Rule 81 (c).
- Error, writ of, Rule 111. See Writ of Error.
- Motion.
 - Overruling motion preserves point for consideration on review, note to Rule 12 (b).
- New trials.
 - Necessity for motion, Rule 59 (e).

INDEX

APPEAL AND ERROR (Cont'd)

Record on error, Rule 112. See Writ of Error.

Writ of error, Rule 111. See Writ of Error.

APPEARANCE

Executions.

Order for appearance of debtor of judgment debtor, Rule 69 (e).

Order for appearance of judgment debtor, Rule 69 (d).

Service of process, Rule 5 (a).

No service or pleading of process need be made on parties in default for failure to appear, Rule 5 (a).

Summons.

Notice in summons that judgment by default will be rendered on failure to appear, Rule 4 (c).

ARBITRATION AND AWARD, Rule 109.

Affirmative defenses, Rule 8 (c).

Agreement.

Articles of agreement, Rule 109 (b).

Attachment.

Powers of arbitrators. Rule 109 (d).

Award, Rule 109 (b).

Filing, Rule 109 (e).

Clerks of court.

Filing award with clerk, Rule 109 (e).

Contempt.

Arbitrators, Rule 107 (a).

Controversies may be arbitrated, Rule 109 (a).

Defenses, Rule 8 (c).

Execution, Rule 109 (e).

Fees.

Arbitrators, Rule 109 (f).

Filing pleadings and papers.

Award, Rule 109 (e).

Former adjudication or res adjudicata.

Arbitrated matters held adjudicated, Rule 109 (g).

Fraud.

Effect of fraud, Rule 109 (g).

Judgment, Rule 109 (e).

Mistake.

Relief, Rule 109 (g).

Negligence.

Relief, Rule 109 (g).

Oaths.

Oaths of arbitrators, Rule 109 (c).

ARBITRATION AND AWARD (Cont'd)

Pleading, Rule 8 (c).

Affirmative defenses, Rule 8 (c).

Powers.

Powers of arbitrators, Rule 109 (d).

Subpoenas.

Witnesses, Rule 109 (d).

Surprise.

Relief, Rule 109 (g).

Witnesses.

Subpoenas, Rule 109 (d).

ARGUMENTS OF COUNSEL

Canons of ethics, appx. C, § 15.

Discipline of attorney, Rule 245.

ARREST

Body executions, Rule 101 (a).

Contempt, Rule 107 (c).

Debtor, Rule 69 (d).

Judgment debtor, Rule 69 (d).

Sheriffs.

Judgment debtor, Rule 69 (d).

ASSIGNMENT OF CASES FOR TRIAL, Rule 40.

ASSIGNMENTS

Attachment.

Affidavit, Rule 102 (b) (8).

Counterclaim.

Claims against assignee, Rule 13 (j).

Cross-claims.

Claims against assignee, Rule 13 (j).

Substitution of parties.

Transfer of interest, Rule 25 (c).

ASSOCIATIONS

Definitions.

Person or party includes all manner of organizations, Rule 110 (b).

Depositions.

Use of deposition of officer, Rule 26 (d) (2).

Interrogatories, Rule 33.

Judgments.

Judgment against association, Rule 54 (e).

Parties, Rule 17 (b).

Secondary action by shareholders, Rule 23 (b).

Pleading.

Legal existence of association need not be averred, Rule 9 (a) (1).

Service of process, Rule 4 (e) (4).

RULES OF CIVIL PROCEDURE

ATTACHMENT, Rule 102.

- Absence.
 - Affidavit, Rule 102 (b) (4).
- Affidavit, Rule 102 (b).
- Abstract, Rule 102 (b) (4).
- Amendment, Rule 102 (q).
- Debts not due, Rule 102 (o).
- Judgment creditors, Rule 102 (j) (2).
- Making creditors parties, Rule 102 (j) (1).
- Traverse of affidavit, Rule 102 (p).
- Amendments.
 - Affidavit, Rule 102 (q).
- Application of proceeds, Rule 102 (t).
- Application to discharge attachment, Rule 102 (y).
- Arbitration and award.
 - Powers of arbitrators, Rule 109 (d).
- Assignment.
 - Affidavit, Rule 102 (b) (8).
- Balance.
 - Delivery by sheriff to defendant, Rule 102 (u).
- Bankruptcy and insolvency.
 - Proration where defendant insolvent, Rule 102 (m).
- Bonds.
 - Defendant undertaking, Rule 102 (e).
 - New bond, Rule 102 (z).
 - Plaintiff's bond, Rule 102 (c).
 - Release of property by defendant, Rule 102 (w).
 - Conditions of bond, Rule 102 (x).
- Clerks of court.
 - Execution on Sunday or holiday, Rule 102 (i).
 - Issuance of writ, Rule 102 (d).
- Contents of writ, Rule 102 (e).
- Contracts.
 - Contracts not yet due.
 - When defendant insolvent, Rule 102 (m).
- Costs.
 - Plaintiff's bond, Rule 102 (c).
- County court.
 - Appeals from county court to district court, Rule 102 (aa).
 - Transferred to district court, Rule 102 (n).
 - On intervener, Rule 102 (n) (2).
- Creditors, Rule 102 (j) (1).
 - Dismissal by one creditor does not affect others, Rule 102 (k).
 - Judgment creditors, Rule 102 (j) (2).
 - Preference of creditors, Rule 102 (l).
 - Proration of judgment, Rule 102 (l).
 - Proration where defendant insolvent, Rule 102 (m).

ATTACHMENTS (Cont'd)

- Damages.
 - Intervention, Rule 102 (r).
- Debts not due, Rule 102 (o).
- Dismissal, Rule 102 (p).
- Insolvent defendant, Rule 102 (m).
- Discharge.
 - Application to discharge, Rule 102 (y).
- Dismissal.
 - Debts not due, Rule 102 (p).
 - Dismissal by one creditor does not affect others, Rule 102 (k).
- Dissolution.
 - Traverse of affidavit, Rule 102 (p).
- District court.
 - Appeals from county to district court, Rule 102 (aa).
 - Transfer to district court on intervener, Rule 102 (n) (2).
 - When suit transferred to district court, Rule 102 (n).
- Evidence.
 - Amendment of affidavit when evidence does not prove cause, Rule 102 (q).
- Execution of writ, Rule 102 (g).
- False pretenses.
 - Affidavit, Rule 102 (b) (12).
- Foreign corporations.
 - Affidavit, Rule 102 (b) (2).
- Fraud.
 - Affidavit, Rule 102 (b) (12).
- Fraudulent and voluntary conveyances.
 - Affidavit, Rules 102 (b) (6), 102 (b) (9).
- Garnishment.
 - Affidavit, Rule 102 (b) (7).
- Holidays, appx. B, § 23.
 - Execution of writ on holiday, Rule 102 (i).
- Indivisible property over \$2,000.00.
 - Transferred to district court, Rule 102 (n) (1).
- Interest.
 - Rebate in case of debts not due, Rule 102 (o).
- Intervention, Rule 102 (r).
 - Intervener or attachment creditor, Rule 102 (n) (2).
- Inventory.
 - Full inventory of attached property, Rule 102 (h).
- Issuance of writ, Rule 102 (d).
 - Discharge on improper issuance, Rule 102 (y).

INDEX

ATTACHMENTS (Cont'd)

Judgments.

- Final judgment prorated, Rule 102 (l).
- Judgment creditors, Rule 102 (j) (2).
- No final judgment until 30 days after levy, Rule 102 (j).
- Order by which attachment is released or sustained is final judgment, Rule 102 (aa).
- Procedure when judgment is for defendant, Rule 102 (v).
- Sales and collection, Rule 102 (t).
- Satisfaction of judgment, Rule 102 (t).

Motions.

- Amendment of affidavit, Rule 102 (q).
- New trial, Rule 102 (aa).

New bond, Rule 102 (z).

New trials, Rule 102 (aa).

Non-residents.

- Affidavit, Rule 102 (b) (1).
- Torts, Rule 102 (a).

Parties.

- Creditors, Rule 102 (j) (1).

Payment.

- Affidavit that defendant has failed or refused to pay, Rules 102 (b) (10), 102 (b) (11).

Perishable property.

- Sale, Rule 102 (s).

Personal property.

- Taking into custody, Rule 102 (g) (3).

Preference, Rule 102 (l).

Priorities, Rule 102 (l).

Proration of judgment, Rule 102 (l).

Real estate, Rules 102 (g) (1), 102 (g) (2).

Recorder.

- Filing copy of writ with recorder, Rule 102 (g) (1).

Release of property, Rules 102 (w), 102 (x).

- Bond, Rule 102 (w).

Removal of property.

- Affidavit, Rule 102 (b) (5).

Replevin.

- Affidavits, Rule 104 (b) (3).

Return of writ, Rule 102 (h).

Sale.

- Dissatisfied judgment, Rule 102 (t).
- Perishable property, Rule 102 (s).

Satisfaction of judgment, Rule 102 (t).

Security.

- Judgments, Rule 102 (a).
- Sheriff taking money or undertaking in lieu of property, Rule 102 (e).

ATTACHMENTS (Cont'd)

Service of process, Rule 102 (f).

Return, Rule 102 (h).

Traverse of affidavit, Rule 102 (p).

Sheriffs.

- Delivery of balance due, Rule 102 (u).
- Direction of writ to sheriff, Rules 102 (d), 102 (e).
- Execution of proceeds, Rule 102 (h).
- Execution of writ, Rule 102 (g).
- Liability of sheriff for release to defendant, Rule 102 (x).
- Return, Rule 102 (h).
- Sale, Rule 102 (t).
- Taking money or undertaking in lieu of property, Rule 102 (e).

Specific performance, Rule 70.

Sundays.

- Execution of writ on Sunday, Rule 102 (i).

Surplus.

- Delivery by sheriff to defendant, Rule 102 (u).

Time.

- No final judgment until 30 days after levy, Rule 102 (j).

Torts.

- Non-residents, Rule 102 (e).

Traverse.

- Affidavit, Rule 102 (p).

Writ of error, Rule 102 (aa).

ATTORNEY AND CLIENT

Admission to the bar, Rules 201-229.

- Additional affidavit in classes A, B, and C, Rule 205.

Additional examinations, Rule 217.

Admissions by order en banc, Rule 220.

Admissions in other jurisdictions, Rule 209.

Affidavit as to qualifications, Rule 204.

Applications considered, Rule 219.

Applications in duplicate, Rule 203.

Canons of ethics, Rule 228.

Character certificates transferred to bar committee, Rule 215.

Classification of applicants, Rule 202.

Conviction for felony as ground for suspension, Rule 225.

Disbarment.

- Effect of disbarment in another state, Rule 224.

Examination fund, Rule 229.

Examining committees, Rule 201.

Fees.

- Examination fees, Rule 204.

Filing applications, Rule 203.

RULES OF CIVIL PROCEDURE

ATTORNEYS AND CLIENT (Cont'd)

Admissions to the Bar (Cont'd)
Notice of applications, Rule 218.
Oaths.
Date for administration, Rule 221.
Oath of admission, Rule 222.
Violation, Rule 223.
Objections, Rule 218.
Hearings, Rule 219.
Personal interviews, Rule 216.
Persons not permitted to practice, Rule 226.
Probate practice.
Rules applicable, Rule 227.
Proof of general educational qualifications, Rule 211.
Proof of legal educational qualifications, Rule 212.
Proof of moral and ethical qualifications, Rule 210.
Proof of requirements, Rule 206.
Qualifications in classes C and D, Rule 208.
Qualifications preliminary to law study, Rule 207.
Reports and recommendations, Rule 218.
Rules applicable to probate practice, Rule 227.
Semi-annual examinations, Rule 214.
Special credits in class C, Rule 213.
Arguments of counsel.
Discipline of attorney, Rule 245.
Attorney general.
Discipline of attorney, Rule 250.
Briefs.
Discipline of attorney, Rule 245.
Canons of ethics, appx. C, §§ 1-32. See Canons of Ethics.
Costs.
Discipline of attorney, Rule 247.
Courts.
Pre-trial conference, Rule 16.
Discipline of attorneys.
Arguments, Rule 245.
Briefs, Rule 245.
Costs, Rule 247.
Delay, Rule 244.
Duty of attorney general to prosecute, Rule 250.
Duty of grievance committee, Rule 248.
Evidence, Rule 243.
Informal hearings, Rule 249.
Orders, Rule 246.
Pleadings, Rule 242.
Service, Rule 242.
Title of proceedings, Rule 241.

ATTORNEYS AND CLIENT (Cont'd)

Ethics, appx. C, §§ 1-32. See Canons of Ethics.
Evidence.
Discipline of attorney, Rule 243.
Fees. See Attorney's Fees.
Filing pleadings and papers.
Signing, appx. A, Forms, Introductory Statement, Paragraph 4.
Foreign attorneys.
Association of resident attorneys upon whom pleadings and papers are served, Rule (b) (2).
Hearings.
Discipline of attorney, Rule 249.
Indecent matter in pleading, Rule 11.
Judges.
Judge may not act as attorney, appx. B, § 29.
Judge not to have law partner, appx. B, § 30.
When judge shall not act unless by consent, appx. B, § 28.
Justices of the peace.
Justice not to have law partner, appx. B, § 30.
Motion.
Signing, appx. A, Forms, Introductory Statement, Paragraph 4.
Orders.
Discipline of attorney, Rule 246.
Pleading.
Discipline of attorney, Rule 242.
Scandalous matter.
Punishment of attorney, Rule 11.
Service on resident attorney, Rule 5 (b) (2).
Signing, Rule 11; appx. A, Forms, Introductory Statement, Paragraph 4.
Violation of rule requiring signing of pleading, Rule 11.
Scandalous matter in pleading, Rule 11.
Service of process, Rule 5 (b) (1).
Discipline of attorney, Rule 242.
Issuance of summons by attorney, Rule 4 (b).
Summons.
Issuance by attorney, Rule 4 (b).
Supreme court proceedings.
Oral arguments, Rule 117.

ATTORNEY GENERAL

Attorney and client.
Discipline of attorney, Rule 249.
Declaratory judgments.
Party when statute or ordinance is attacked on ground of unconstitutionality, Rule 57 (j).

INDEX

ATTORNEY GENERAL (Cont'd)

- Injunctions.
 - State courts jurisdiction when suit commenced in federal court, Rule 65 (i).

ATTORNEY'S FEES

- Actions.
 - Suing client for fee, appx. C, § 14.
- Admissions.
 - Expenses on refusal to admit genuineness of documents, Rule 37 (c).
- Contingent fees, appx. C, § 13.
- Costs.
 - Tax of attorney's fees as costs when action is dismissed, Rule 3 (a).
- Depositions.
 - Payment by party giving notice who fails to attend, Rule 30 (g) (1).
 - Payment by party giving notice who fails to serve subpoena upon witness, Rule 30 (g) (2).
- Dismissal.
 - Tax as costs when action is dismissed, Rule 3 (a).
- Interrogatories.
 - Upon refusal to answer, Rule 37 (a).
- Summary judgments.
 - Payment by party making affidavit in bad faith, Rule 56 (g).

AUDITORS, Rule 53. See Masters.

AWARD, Rule 109. See Arbitration and Award.

BAIL

- Contempt.
 - Endorsement on warrant, Rule 107 (c).

BANKRUPTCY AND INSOLVENCY

- Declaratory judgments.
 - Purposes for which declaration may be had, Rule 57 (d).
- Defenses, Rule 8 (c).
- Discharge.
 - Pleading, Rule 8 (c).
- Pleading.
 - Discharge in bankruptcy, Rule 8 (c).

BAR

- Admission to the bar, Rules 201-229. See Attorney and Client.

BILL OF PARTICULARS. See Particulars, Bill of.

BOARDS

- Compelling relief from, Rule 106 (a) (2).
- Statutes.
 - Review under statutes, Rule 106 (b).

BODY EXECUTIONS, Rule 101 (a).

BONDS

- Amendments, Rule 110 (a).
- Supersedeas bond, Rule 113 (e).
- Attachment.
 - Defendant undertaking, Rule 102 (e).
 - New bond, Rule 102 (z).
 - Plaintiff's bond, Rule 102 (c).
 - Release of property by defendant, Rule 102 (w).
 - Conditions of bond, Rule 102 (x).
- Contempt, Rule 107 (c).
- Garnishment.
 - Release upon bond, Rule 103 (z).
- Mortgages and deeds of trust.
 - Supersedeas in action to foreclose mortgage, Rule 113 (c).
- Public officers.
 - Supersedeas bond in action to determine office, Rule 113 (c).
- Receivers, Rule 66 (b).
- Suit on bond, Rule 66 (b).
- Replevin, Rule 104 (c).
 - Additional bond, Rule 104 (g).
 - Amended bonds, Rule 104 (g).
 - Custodian of property, Rule 104 (k).
 - Defendant's bond on exception to sureties, Rule 104 (e).
 - Exceptions to sureties, Rule 104 (d).
 - New bond, Rule 104 (f).
 - Qualification of sureties, Rule 104 (f).
 - Return.
 - When defendant excepts to sureties, Rule 104 (e).
 - Supersedeas bond, Rule 113 (c).
- Supersedeas, Rule 113 (c).
 - Amendment, Rule 113 (e).
 - Effective as to parties filing same, Rule 113 (h).
 - Liability of surety, Rule 113 (f).
 - Public officers, Rule 113 (c).
 - Release of lien, Rule 113 (g).
 - When bond not required, Rule 113 (d).

BOOKKEEPER

- Service of process, Rule 4 (e) (1).

BOOKS

- Clerks of court.
 - Books kept by clerk, Rule 79.

RULES OF CIVIL PROCEDURE

BOOKS (Cont'd)

Depositions.
Examination as to, Rule 26 (b).
Discovery, Rule 34.
Production, Rule 34.
Subpoenas, Rule 45 (b).

BRIEFS

Argument, Rules 115 (c) (5), 115 (c) (6).
Attorney and client.
Discipline of attorney, Rule 245.
Contents, Rule 115 (c).
Docket.
Advancement on docket, Rule 118 (b).
Filing pleadings and papers.
Copy to be served or filed, Rule 115 (i).
Failure to file, Rule 115 (a).
Form, Rule 115 (c).
Industrial commission, Rule 115 (k).
Library, Rule 261.
Motions, Rule 115 (f).
Points.
Specification of points, Rule 115 (c) (7).
Printing, Rule 115 (h).
Specification of points, Rule 115 (c) (7).
Stipulations.
Not to suspend operation of rules,
Rule 115 (e).
Supplemental briefs, Rule 115 (b).
Time.
Enlargement of time for filing, Rule
115 (e).
Time of filing, Rule 115 (b).
Typewriting, Rule 115 (h).

BURDEN OF PROOF

Explaining alterations in documents, Rule
43 (g).

CALENDAR

Clerks of court, Rule 79 (c).
Pre-trial calendar, Rule 16.

CANONS OF ETHICS, appx. C, §§ 1-32.

Acquiring interest in litigation, appx. C,
§ 10.
Adverse influences, appx. C, § 6.
Advertising.
Direct or indirect, appx. C, § 27.
Advising upon merits of cause, appx. C,
§ 8.

CANONS OF ETHICS (Cont'd)

Agreed case.
Agreements between counsel should be
reduced to writing, appx. C, § 25.
Arguments of counsel, appx. C, § 15.
Candor, appx. C, § 22.
Cappers, appx. C, § 28.
Conflicting interests, appx. C, § 6.
Conflicts of opinion, appx. C, § 7.
Contingent fees, appx. C, § 13.
Crimes and offenses.
Defense or prosecution of those accused
of crime, appx. C, § 5.
Duty in last analysis, appx. C, § 32.
Duty of lawyer to courts, appx. C, § 1.
Expedition, appx. C, § 21.
Fairness, appx. C, § 22.
False claims, appx. C, § 15.
Fees.
Contingent fees, appx. C, § 13.
Fixing amount of fee, appx. C, § 12.
Suing for fees, appx. C, § 14.
Honor of the profession, appx. C, § 29.
Ill-feeling between advocates, appx. C,
§ 17.
Influence on court, appx. C, § 3.
Judges.
Selection of judges, appx. C, § 2.
Jury.
Attitude toward jury, appx. C, § 23.
Justifiable litigation, appx. C, § 30.
Litigants.
Treatment of litigants, appx. C, § 18.
Negotiations with opposite party, appx.
C, § 9.
Newspapers.
Discussion of pending litigation, appx.
C, § 20.
Personal influence on court, appx. C,
§ 3.
Personalities, appx. C, § 17.
Prisons and prisoners.
When counsel for an indigent prisoner,
appx. C, § 4.
Professional advocacy other than before
courts, appx. C, § 26.
Professional colleagues, appx. C, § 7.
Punctuality, appx. C, § 21.
Recommendation of court, Rule 228.
Responsibility for litigation, appx. C,
§ 31.

INDEX

CANONS OF ETHICS (Cont'd)

- Restraining clients from improprieties, appx. C, § 16.
- Rewards, appx. C, § 28.
- Runners, appx. C, § 28.
- Stirring up litigation, appx. C, § 28.
- Support of client's cause, appx. C, § 15.
- Technical advantage of opposite counsel, appx. C, § 25.
- Trial.
 - Right of lawyer to control incidents, appx. C, § 24.
- Trusts and trustees.
 - Dealing with trust property, appx. C, § 11.
- Unjustifiable litigation, appx. C, § 30.
- Witnesses.
 - Appearance of lawyer as witness for client, appx. C, § 19.
 - Treatment of witnesses, appx. C, § 18.

CAPACITY

- Defenses, Rule 9 (a) (1).
- Parties, Rule 17 (b).
- Pleading, Rule 9 (a) (1).

CAPPERS

- Canons of ethics, appx. C, § 28.

CAPTION

- Number of action, appx. A, Forms, Introductory Statement, Paragraph 1.
- Parties, Rule 10 (a).
 - Naming parties, appx. A, Forms, Introductory Statement, Paragraph 2.
- Pleading, Rule 10 (a); appx. A, Forms, Introductory Statement, Paragraph 2.
- Applicability of rules, Rule 7 (b) (2).
- File number, Rule 10 (a).
- Name of court, Rule 10 (a).
- Title of action, Rule 10 (a).
- When party is designated in caption as one "whose true name is unknown," Rule 9 (a) (2).
- Service of process.
 - Summons, appx. A, Forms, Introductory Statement, Paragraph 2.
- Summons, appx. A, Forms, Introductory Statement, Paragraph 2.

CASE AGREED, Rules 7 (d), 16, 112 (e).
See Agreed Case.

CERTIFICATES

- Definition.
 - How made, Rule 110 (c).
- Deputy, Rule 110 (c).
 - Service of process, Rule 4 (i) (1).
- Public officers.
 - Made by officer or deputy, Rule 110 (c).
- Service of process.
 - Deputy, Rule 4 (i) (1).
 - Mail, Rule 4 (i) (2).
 - Certificate of clerk as to mailing copies, Rule 4 (i) (4).
 - Sheriff, Rule 4 (i) (1).
 - United States marshal, Rule 4 (i) (1).

CERTIFICATION

- Pleading.
 - Grounds for certification, Rule 8 (a).

CERTIORARI

- Abolished, Rule 106 (a).
- Affidavit.
 - Required, Rule 11 (note).
- Verifications.
 - Required, Rule 11 (note).

CHAMBERS

- Courts.
 - Proceedings in chambers, Rule 77 (b).
- Judges.
 - Proceedings in chambers, Rule 77 (b).

CHANGE OF VENUE

- Affidavits, Rule 98 (g).
- Agreement, Rule 98 (i).
- Causes of change, Rule 98 (f).
- County.
 - Change from county, Rule 98 (g).
- Judges.
 - Change of judge, Rule 97.
- Motions, Rule 98 (g).
- Only one change, Rule 98 (k).
- Parties must agree on change, Rule 98 (j).
- Power to change, Rule 98 (e).
- Supreme court proceedings.
 - Original jurisdiction, Rule 116.
- Waiver.
 - No waiver, Rule 98 (k).

CHARGES TO JURY. See Instructions.

CHATTEL MORTGAGES

- Garnishment.
 - Plaintiff may pay lien and be subrogated, Rule 103 (t).

RULES OF CIVIL PROCEDURE

CIVIL CONTEMPT, Rule 107. See Contempt.

CIVIL DOCKET

Clerks of court, Rule 79 (a).

CIVIL ORDER BOOK

Clerks of court, Rule 79 (b).

CLAIMS

Complaint.

Claim for debt.

Forms, appx. A, Form 13.

Joinder of claims, Rule 18.

CLASS ACTIONS, Rule 23.

Compromise.

Not compromised without approval of court, Rule 23 (c).

Dismissal.

Not dismissed without approval of court, Rule 23 (c).

Notice.

Dismissal or compromise, Rule 23 (c).

CLERICAL MISTAKES

Orders, Rule 60 (a).

CLERKS OF COURT

Adjournment, Rule 119 (b); appx. B, § 24.

Arbitration and award.

Filing award with clerk, Rule 109 (e).

Attachment.

Execution on Sunday or holiday, Rule 102 (i).

Issuance of writ, Rule 102 (d).

Books.

Books kept by clerk, Rule 79.

Calendars, Rule 79 (c).

Civil docket, Rule 79 (a).

Civil order book, Rule 79 (b).

Costs.

Supreme court proceedings.

Fees, Rule 114 (a).

When taxed by clerk, Rule 54 (d).

Default.

Computation, Rule 55 (b) (1).

Entry, Rule 55 (a).

Motions granted as of course, Rule 77 (c).

Definitions.

Use of words, Rule 110 (b).

Deposit in court, Rule 67.

CLERKS OF COURT (Cont'd)

Deputies.

Use of term, Rule 110 (b).

Docket.

Civil docket, Rule 79 (e).

Judgment dockets, Rule 79 (d).

Entries.

Entries in books kept by clerk, Rule 79.

Filing papers, Rule 79 (a).

Filing pleadings, Rule 5 (e).

Indices, Rule 79 (c).

Injunctions.

Filing temporary restraining order, Rule 65 (b).

Instructions.

Filing with clerk of court, Rule 51.

Judges.

Adjournment by clerk in absence of judge, appx. B, § 24.

Judgments.

Docket open for inspection, appx. B, § 10.

Entry, Rule 58 (a).

Jury.

Administration of oath, Rule 47 (g).

Selecting, Rule 47 (g).

Masters.

Filing report with clerk of court, Rule 53 (e) (1).

Motions.

Granted as of course, Rule 77 (c).

Oaths.

Who may administer, appx. B, § 13.

Office of clerk, Rule 77 (c).

Orders.

Orders by clerk, Rule 77 (d).

Receivers.

Approval of bond, Rule 66 (b).

Remittitur.

Duty, Rule 69 (b).

Replevin.

Approval of bond, Rule 104 (c).

Issuance of writ, Rule 104 (c).

Liability of clerk to exception to sureties, Rule 104 (d).

Seals.

Clerk to keep seal, appx. B, § 20.

Service of process.

Issuance of summons by clerk, Rule 4 (b).

Issuing granted as of course, Rule 77 (c).

Mail, Rule 4 (g) (1).

Proof of service, Rule 4 (i) (3).

INDEX

CLERKS OF COURT (Cont'd)

- Service of process (Cont'd)
 - Publication.
 - Proof of service, Rule 4 (i) (4).
- Subpoenas.
 - Issuance, Rule 45 (a).
- Summons.
 - Issuance by clerk, Rule 4 (b).
- Supersedeas.
 - Endorsement, Rule 113 (i).
- Supreme court.
 - Office shall close at noon Saturday, Rule 77 (c).
- Writ of error.
 - Duty of clerk of supreme court as to record, Rule 112 (a).
 - Obtaining through clerk, Rule 111 (c).
 - Summons, Rule 111 (e).

COMMENCEMENT OF ACTION, Rule 3.

- Complaint, Rule 3 (a).
- Service of process, Rule 3 (a).
- Vexatiously commencing.
 - Costs, Rule 3 (a).

COMMISSIONS

- Statutes.
 - Review under statutes, Rule 106 (b).

COMMITMENT

- Body executions, Rule 101 (b).
- Illegal detention of person, Rule 106 (a) (1).
- Jails.
 - Body executions, Rule 101 (b).

COMMITTEE

- Addresses by revision committee, appx. D.

COMMON ORIGIN

- Parties.
 - Claims not identical or with common origin, Rule 22.

COMPLAINT

- Accounts and accounting.
 - Forms, appx. A, Form 4.
- Amendment.
 - Time of filing pleading after amended complaint, Rule 12 (a).
- Claims.
 - Claim for debt.
 - Forms, appx. A, Form 13.

COMPLAINT (Cont'd)

- Commencement of action, Rule 3 (a).
- Conversion.
 - Form, appx. A, Form 11.
- Conveyances.
 - Form of complaint for specific performance of contract to convey land, appx. A, Form 12.
- Corporations.
 - Secondary action by shareholders, Rule 23 (b).
- Declaratory judgment.
 - Form, appx. A, Form 14.
- Dismissal.
 - Failure to file complaint within 10 days after summons is served, Rule 3 (a).
- Forms.
 - Accounts and accounting, appx. A, Form 4.
 - Claim for debt, appx. A, Form 13.
 - Conversion, appx. A, Form 11.
 - Declaratory judgment, appx. A, Form 14.
 - Fraudulent and voluntary conveyances, appx. A, Form 13.
 - Goods sold and delivered, appx. A, Form 5.
 - Interpleader, appx. A, Form 14.
 - Money had and received, appx. A, Form 8.
 - Money lent, appx. A, Form 6.
 - Money paid by mistake, appx. A, Form 7.
 - Negligence, appx. A, Form 9.
 - Responsibility of two parties, appx. A, Form 10.
 - Where plaintiff is unable to determine whether person responsible is C. D. or E. F., appx. A, Form 10.
 - Wilfulness or recklessness, appx. A, Form 10.
 - Negotiable instruments, appx. A, Form 3.
 - Specific performance of contract to convey land, appx. A, Form 12.
- Fraudulent and voluntary conveyances.
 - Form of complaint to set aside, appx. A, Form 13.
- Goods sold and delivered.
 - Forms, appx. A, Form 5.
- Injunctions.
 - Temporary restraining order, Rule 65 (b).
- Interpleader.
 - Form, appx. A, Form 14.
- Joinder of claims, Rule 18 (a).

RULES OF CIVIL PROCEDURE

COMPLAINT (Cont'd)

- Jurisdiction.
 - Allegation, appx. A, Forms, Introductory Statement, Paragraph 3.
 - Relief when jurisdiction exceeded, Rule 106 (a) (4).
 - Time of filing complaint determines jurisdiction, Rule 3 (b).
- Libel and slander, appx. B, § 2.
- Mistake.
 - Form of complaint for money paid by mistake, appx. A, Form 7.
- Money had and received.
 - Form, appx. A, Form 8.
- Money lent.
 - Forms, appx. A, Form 6.
- Money paid by mistake.
 - Forms, appx. A, Form 7.
- Negligence.
 - Forms, appx. A, Form 9.
 - Responsibility of two parties, appx. A, Form 10.
 - Where plaintiff is unable to determine whether person responsible is C. D. or E. F., appx. A, Form 10.
 - Wilfulness or recklessness, appx. A, Form 10.
- Negotiable instruments.
 - Forms, appx. A, Form 3.
- Parties.
 - Caption, Rule 10 (a).
 - Names of parties, Rule 10 (a).
 - Naming parties, appx. A, Forms, Introductory Statement, Paragraph 2.
- Pleadings allowed, Rule 7 (a).
- Service of process.
 - Must be filed within 10 days after summons is served, Rule 3 (a).
- Specific performance.
 - Form.
 - Contract to convey land, appx. A, Form 12.
- Stock and stockholders.
 - Secondary action by shareholders, Rule 23 (b).
- Summons.
 - Complaint must be filed within 10 days after summons, Rule 3 (a).
- Third-party practice.
 - Serving complaint on third-party, Rule 14 (a).
- Title of action.
 - Pleading, Rule 10 (a).

COMPROMISE

- Class actions.
 - Not compromised without approval of court, Rule 23 (c).

CONCISENESS

- Pleading, Rule 8 (e).

CONCLUSIONS OF LAW

- Pleading.
 - Failure to state ultimate facts as distinguished from conclusions of law, Rule 8 (e) (1).
- Writ of error.
 - Record, Rule 112 (a).

CONCURRENCE

- Verdict.
 - Sending out jury again where there is no concurrence, Rule 47 (s).

CONDITIONS

- Judgments.
 - Separate judgments, Rule 54 (b).
- Pleading.
 - Conditions precedent, Rule 9 (c).

CONFERENCE

- Pre-trial conference, Rule 16.

CONSENT

- Judges.
 - When judge shall not act unless by consent, appx. B, § 28.

CONSERVATORS

- Default.
 - Representation of incompetent, Rule 55 (b) (2).
- Parties, Rule 17 (a).
 - Action by conservators for infants or incompetents, Rule 17 (c).
- Service of process, Rule 4 (e) (3).
- Supersedes.
 - When bond not required, Rule 113 (d).

CONSERVATORS OF THE PEACE

- Judges.
 - Judges to conserve the peace, appx. B, § 33.

CONSISTENCY

- Pleading, Rule 8 (e).

CONSOLIDATION

- Actions, Rule 42.
- Motions, Rule 12 (g).

CONSTRUCTION OF RULES

- Liberal construction, Rule 1 (a).

INDEX

CONSUL

- Service of process.
 - In foreign country, Rule 4 (d) (3).

CONTEMPT, Rule 107.

- Affidavit.
 - Out of presence of court, Rule 107 (c).
 - Required, Rule 11 (Note).
- Arbitration and award.
 - Arbitrators, Rule 107 (a).
- Arrest, Rule 107 (c).
- Bail.
 - Endorsement on warrant, Rule 107 (c).
- Bond, Rule 107 (c).
- Costs, Rule 107 (d).
 - Taxation of costs, Rule 103 (x).
- Criminal contempt, Rule 107 (e).
- Criminal prosecution, Rule 107 (e).
- Definition, Rule 107 (a).
- Depositions.
 - Failure to comply with order, Rule 37 (b) (1).
- Executions.
 - Order for property to be applied on judgment, Rule 69 (f).
- Fines, Rule 107 (d).
- Garnishment.
 - Refusal to deliver property, Rule 103 (w).
- Interrogatories, Rule 37 (b) (1).
 - Failure to comply with order, Rule 37 (b) (1).
- Judgments.
 - Interference, Rule 107 (a).
- Master.
 - Definition, Rule 107 (a).
 - Punishment of witness, Rule 53 (d) (2).
- Orders.
 - Failure to comply with order, Rule 37 (b) (1).
 - Interference with orders, Rule 107 (a).
 - Presence of court, Rule 107 (b).
- Presence of court, Rule 107 (b).
 - Out of presence of court, Rule 107 (c).
- Public officers.
 - Obstructing administration of justice, Rule 107 (a).
- Punishment, Rule 107 (d).
- Service of process.
 - Interference with process, Rule 107 (a).
 - Service of citation.
 - Copy of motion and affidavit, Rule 107 (c).

CONTEMPT (Cont'd)

- Sheriffs.
 - Duties, Rule 107 (c).
- Specific performance, Rule 70.
- Summary judgments and proceedings, Rule 107 (b).
 - Affidavits made in bad faith, Rule 56 (g).
- Trial, Rule 107 (d).
- Verification, Rule 11 (Note).
- Warrant, Rule 107 (c).
- Witnesses.
 - Punishment of witnesses by masters, Rule 53 (d) (2).
- Writs.
 - Interference with lawful writ, Rule 107 (a).

CONTESTED ELECTIONS, Rule 100.

See Elections.

CONTINGENT FEES

- Canons of ethics, appx. C, § 13.

CONTINUANCE

- Amendment.
 - Court may grant continuance to enable objecting party to meet evidence after amendment, Rule 15 (b).
- Summary judgment.
 - Ordering continuance to permit affidavits to be obtained or depositions to be taken, Rule 56 (f).

CONTRACTS

- Attachment.
 - Contracts not yet due.
 - When defendant insolvent, Rule 102 (m).
- Declaratory judgments.
 - Construction before breach, Rule 57 (c).
 - Persons interested may obtain, Rule 57 (b).
- Jury.
 - Jury trial on issues of fact, Rule 38 (a).
- Pleading.
 - Failure of consideration, Rule 8 (c).
- Venue, Rule 98 (c).

CONVERSION

- Complaint.
 - Form, appx. A, Form 11.

RULES OF CIVIL PROCEDURE

CONVEYANCES

- Acknowledgments, appx. B, § 16.
- Complaint.
 - Form of complaint for specific performance of contract to convey land, appx. A, Form 12.
- Deeds of trust.
 - When fact of deed being a mortgage may be proved by oral testimony, appx. B, § 12.
- Mortgages.
 - Mortgage not deemed a conveyance, appx. B, § 12.

COPIES

- Depositions.
 - Furnishing copies on payment of reasonable charges, Rule 30 (f) (2).
- Evidence.
 - Certified copies of records read in evidence, Rule 44 (d).
 - Statutes and laws of other states and countries, Rule 44 (f).
- Jury.
 - Taking of papers by jury, Rule 47 (m).
- Library.
 - Certified copies of laws of other states, Rule 264.
- Proof of official record, Rule 44 (a).
- Writ of error.
 - Record, Rule 112 (a).

COPYING, Rule 34.

CORPORATIONS

- Compelling relief from, Rule 106 (a) (2).
- Complaint.
 - Secondary action by shareholders, Rule 23 (b).
- Damages.
 - Compelling relief from corporations, Rule 106 (a) (2).
- Definitions.
 - Person or party includes all manner of organizations, Rule 110 (b).
- Depositions.
 - Use of deposition of officer, Rule 26 (d) (2).
- Interrogatories, Rule 33.
- Parties.
 - Secondary action by shareholders, Rule 23 (b).
- Service of process.
 - Agent, Rule 4 (e) (5).
 - Foreign corporations.
 - Publication, Rule 4 (g) (2) (iii).

CORPORATIONS (Cont'd)

- Service of process (Cont'd)
 - Mailing copy to last known address of corporation, Rule 4 (e) (5).
 - Municipal corporations, Rule 4 (e) (6).
 - Principal employee, Rule 4 (e) (5).
 - Process agent, Rule 4 (e) (5).
 - Publication, Rule 4 (g) (2) (ii).
 - Foreign corporations, Rule 4 (g) (2) (iii).
 - Stockholders, Rule 4 (e) (5).

COSTS

- Attachment.
 - Plaintiff's bond, Rule 102 (c).
- Attorney and client.
 - Discipline of attorney, Rule 247.
- Attorney's fees.
 - Tax of attorney's fees as costs when action is dismissed, Rule 3 (a).
- Body executions, Rule 101 (c).
- Clerks of court.
 - Supreme court proceedings.
 - Fees, Rule 114 (a).
 - When taxed by clerk, Rule 54 (d).
- Contempt, Rule 107 (d).
- Taxation of costs, Rule 103 (x).
- Depositions.
 - On granting or refusing order for suspension of examination, Rule 30 (d).
- Dismissal.
 - Costs of previously-dismissed action, Rule 41 (d).
 - Voluntary dismissal, Rule 41 (a) (1).
- Evidence.
 - Transcript, Rule 80 (a).
- Executions.
 - Body executions, Rule 101 (c).
 - Execution for costs, Rule 69 (b).
- Fees.
 - Supreme court proceedings, Rule 114 (a).
- Garnishment.
 - Refusal of garnishee to answer, Rule 103 (k).
- Injunctions.
 - Security, Rule 65 (c).
- Judgments, Rule 54 (d).
- Entry, Rule 58 (a).
- Jury.
 - Additional jurors, Rule 48.
- Motions.
 - Motions for cost bonds not excluded by Rule 12, Rule 12 (Note).
- Offer of judgment, Rule 68.

INDEX

COSTS (Cont'd)

- Orders.
 - Previously-dismissed action, Rule 41 (d).
- Paupers.
 - Supreme court proceedings, Rule 114 (b).
- Poor persons.
 - Supreme court proceedings, Rule 114 (b).
- Real property.
 - Disclaimer saves cost, Rule 105 (c).
 - Execution of quit claim deed saves cost, Rule 105 (d).
- Remittitur.
 - Execution, Rule 69 (b).
- Specific performance, Rule 70.
- State.
 - Costs against the state of Colorado, Rule 54 (d).
- Supreme court proceedings.
 - Additional costs, Rule 114 (c).
 - Amount, Rule 114 (c).
 - Fees of clerk, Rule 114 (a).
 - Proceedings by poor person, Rule 114 (b).
 - Statement to trial court, Rule 114 (d).
 - Writ of error.
 - Motion to review action in taxing costs, Rule 54 (d).
 - Record on error, Rule 112 (b).
 - Reversal, Rule 118 (e).
- Vexatious commencement of action, Rule 3 (a).
- Writ of error, Rule 114. See within this title, "Supreme Court Proceedings."
 - Motion to review action of court in taxing costs, Rule 54 (d).
 - Record on error, Rule 112 (b).
 - Reversal, Rule 118 (e).

COUNTERCLAIM, Rule 13.

- Acquired after pleading, Rule 13 (e).
- Amount in controversy.
 - Claim in excess of \$2,000.00 certified to district court, Rule 13 (l).
- Answer.
 - Joinder of claim, Rule 18 (a).
 - Term when counterclaim is filed, Rule 12 (a).
- Assignments.
 - Claims against assignee, Rule 13 (j).
- Compulsory counterclaim, Rule 13 (a).
- County court.
 - Claims in excess of \$2,000.00 certified to district court, Rule 13 (l).

COUNTERCLAIM (Cont'd)

- Cross-claim generally, Rule 13. See Cross-Claim.
- Default, Rule 55 (d).
- Defeating recovery, Rule 13 (c).
- Defenses.
 - When party has mistakenly designated defense as counterclaim or vice versa, Rule 8 (c).
- Different relief sought from that sought in pleading of opposing party, Rule 13 (c).
- Diminishing recovery, Rule 13 (c).
- Dismissal, Rule 41 (c).
- Effect of counterclaim on motion for dismissal, Rule 41 (a) (2).
- District court.
 - Claim in excess of \$2,000.00 certified to district court, Rule 13 (l).
- Exceeding opposing claim, Rule 13 (c).
- Executors and administrators, Rule 13 (k).
- Forms.
 - Answer to complaint for money had and received, appx. A, Form 17.
- Improvements, Rule 105 (e).
- Interpleader.
 - Defendant obtaining interpleader by counterclaim, Rule 22.
- Joinder of claim, Rule 18 (a).
- Judgment.
 - Separate judgment, Rule 13 (i).
- Maturing after pleading, Rule 13 (e).
- Omitted counterclaim, Rule 13 (f).
- Parties.
 - Additional parties may be brought in, Rule 13 (h).
 - Counterclaim has rights and remedies of plaintiff, Rule 110 (d).
 - When plaintiff may bring in third-party, Rule 14 (b).
- Permissive counterclaim, Rule 13 (b).
- Personal representatives, Rule 13 (k).
- Pleading.
 - Assertion in responsive pleading, Rule 12 (b).
 - When party has mistakenly designated defense as counterclaim or vice versa, Rule 8 (c).
- Replevin, Rule 13 (a) (Note).
- Reply, Rule 7 (a).
- Service, Rule 5 (c).
- Summary judgment.
 - Motion, Rule 56 (b).

RULES OF CIVIL PROCEDURE

COUNTERCLAIM (Cont'd)

- Third-party practice.
 - Plaintiff may cause third-party to be brought in, Rule 14 (b).
- Trial.
 - Separate trials, Rule 42 (b).

COUNTIES

- Clerk.
 - Service of process, Rule 4 (e) (7).
- Depositions.
 - Use of deposition of officer, Rule 26 (d) (2).
- Garnishment.
 - Funds of municipal corporations, appx. B, §§ 4-8.
 - Public officers, Rule 103 (c).
- Injunctions.
 - Security not required, Rule 65 (c).
- Interrogatories, Rule 33.
- Service of process.
 - Delivery to county clerk or chief deputy, Rule 4 (e) (7).
- Summons.
 - Counties in which action is brought, Rule 4 (c).
- Supersedeas.
 - When bond not required, Rule 113 (d).

COUNTS

- Pleading.
 - Separate counts, Rule 10 (b).
 - Motion, Rule 12 (e).

COUNTY COURTS

- Appeal and error.
 - Appeal to district courts, Rule 81 (c).
- Attachment.
 - Appeals from county court to district court, Rule 102 (aa).
 - Transferred to district court, Rule 102 (n).
 - Transferred to district court on intervenor, Rule 102 (n) (2).
- Counterclaim.
 - Claims in excess of \$2,000.00 certified to district court, Rule 13 (l).
- Cross-claim.
 - Claim in excess of \$2,000.00 certified to district court, Rule 13 (l).
- Jurisdiction.
 - Allegation, appx. A, Forms, Introductory Statement, Paragraph 3.
 - Counterclaim and cross-claim claimed in excess of \$2,000.00 certified to district court, Rule 13 (l).
 - Transfer where concurrent jurisdiction, Rule 98 (h).

COUNTY COURTS (Cont'd)

- Powers, appx. B, § 34.
- Procedure governed, Rule 1 (a).
- Seals, appx. B, § 19.
- Third-party practice.
 - Claim in excess of \$2,000.00 certified to district courts, Rule 13 (l).
- Writ of error.
 - Final judgment, Rule 111 (a) (1).

COUNTY SEAT

- Courts.
 - Courts sit at county seat, appx. B, § 25.

COURTS, Rule 77.

- Adjournment, Rule 119 (b); appx. B, § 24.
- Discharge of jury upon final adjournment, Rule 47 (p).
- Attorney and client.
 - Pre-trial conference, Rule 16.
- Chambers.
 - Proceedings in chambers, Rule 77 (b).
- Clerks of court. See Clerks of Court.
- Contempt. See Contempt.
- County court. See County Court.
- County seat.
 - Courts sit at county seat, appx. B, § 25.
- Deposit in court, Rule 67.
- District courts. See District Courts.
- Exclusion of persons not officers, Rule 42 (c).
- Findings of court, Rule 52. See Findings of Court.
- Holidays, appx. B, § 23.
- Instructions.
 - Holidays, appx. B, § 23.
- Juridical days, appx. B, § 22.
- Jurisdiction.
 - Inferior tribunal exceeding jurisdiction, Rule 106 (a) (4).
- Masters, Rule 53. See Masters.
- Motions.
 - Courts always open for making and directing interlocutory motions, Rule 77 (a).
- Ne exeat, appx. B, § 31.
- Official reporter, Rule 80 (b).
- Open courts, Rule 119 (b).
 - Courts always open, Rule 77 (a).
 - Holidays, appx. B, § 23.
 - Proceedings, Rule 77 (b).
 - While jury is retired, Rule 47 (p).

INDEX

COURTS (Cont'd)

- Orders. See Orders.
- Powers, appx. B, §§ 27, 34.
- Public session, Rule 42 (c).
- Removal of causes.
 - Counterclaim and cross-claim of third-party claim.
 - County court claim in excess of \$2,000.00 certified to district courts, Rule 13 (l).
- Reporter, Rule 80.
- Seals.
 - Courts with seal, appx. B, § 19.
- Statutes.
 - Review under statutes, Rule 106 (b).
- Sundays, appx. B, § 23.
- Terms of court, appx. B, § 32.
 - Open and continuous, Rule 77 (a).
- Trial courts.
 - Rules, Rule 83.
- Trial without jury, Rule 39 (b).
- Verdicts.
 - Holidays, appx. B, § 23.
- When closed, Rule 42 (c).
- Writs.
 - Courts may issue proper writs, appx. B, § 31.

CREDITORS

- Declaratory judgments.
 - Purposes for which declaration may be had, Rule 57 (d).

CREDITOR'S BILL, Rule 69 (f).

CRIMES AND OFFENSES

- Canons of ethics.
 - Defense or prosecution of those accused of crime, appx. C, § 5.
- Criminal rules, appx. E.

CRIMINAL CONTEMPT, Rule 107 (e).

CRIMINAL PROSECUTION

- Contempt, Rule 107 (e).

CRIMINAL RULES, appx. E.

CROSS-CLAIM, Rule 13.

- Against co-party, Rule 13 (g).
- Answer, Rule 7 (a).
 - Time of filing answer when cross-claim is filed, Rule 12 (a).

CROSS-CLAIM (Cont'd)

- Assignments.
 - Claims against assignee, Rule 13 (j).
- Counterclaim generally, Rule 13. See Counterclaim.
- County court.
 - Claim in excess of \$2,000.00 certified to district court, Rule 13 (l).
- Default, Rule 55 (d).
- Dismissal, Rule 41 (c).
- District court.
 - Claim in excess of \$2,000.00 certified to district court, Rule 13 (l).
- Executors and administrators, Rule 13 (k).
- Interpleader.
 - Defendant obtaining interpleader by cross-claim, Rule 22.
- Judgment.
 - Separate judgment, Rule 13 (i).
- Parties.
 - Additional parties may be brought in, Rule 13 (h).
 - Cross-claim against co-party, Rule 13 (g).
 - Cross-claimant has rights and remedies of plaintiff, Rule 110 (d).
- Personal representatives, Rule 13 (k).
- Pleading.
 - Assertion in responsive pleading, Rule 12 (b).
- Summary judgment.
 - Motion, Rule 56 (b).
- Third-party practice, Rule 14 (a).
- Trial.
 - Separate trials, Rule 42 (b).

CROSS ERROR

- Writ of error.
 - Assignment of cross error not required, Rule 111 (f).

CROSS INTERROGATORIES, Rule 31 (a).

- Recross interrogatories, Rule 31 (a).

DAMAGES

- Attachment.
 - Intervention, Rule 102 (r).
- Compelling relief from tribunals, corporations, boards, etc., Rule 106 (a) (2).
- Default.
 - Determination, Rule 55 (b) (2).
- Exemplary damages, Rule 101 (b).

RULES OF CIVIL PROCEDURE

DAMAGES (Con'd)

- Fraud.
 - Exemplary damages, Rule 101 (d).
- Injunctions.
 - Security, Rule 65 (c).
- Inquiry of damages.
 - Default, Rule 55 (b) (2).
- Insult.
 - Exemplary damages, Rule 101 (d).
- Jury.
 - Breach of contract, Rule 38 (a).
- Libel and slander.
 - Reduction, appx. B, § 3.
- Malice.
 - Exemplary damages, Rule 101 (d).
- New trials.
 - Excessive or inadequate damages, Rule 59 (a) (5).
- Pleading.
 - Mitigating circumstances to reduce amount, Rule 8 (c).
 - Special damages, Rule 9 (g).
- Public officers.
 - Relief sought to compel officer to act, Rule 106 (a) (2).
- Replevin.
 - Judgment for damages for detention, Rule 104 (m).

DATE

- Effective date of rules, Rule 1 (b).

DAY

- Motions.
 - Motion day, Rule 78.

DEATH

- Abatement, revival and survival. See Abatement, Revival and Survival.
- Depositions.
 - Deposition before action.
 - Use of deposition, Rule 27 (a) (4).
 - Establishing by deposition before action, Rule 27 (a) (1).
 - Use of deposition when witness is dead, Rule 26 (d) (3).
- Judgments.
 - Entry after verdict or decision regardless of death, Rule 54 (f).
 - Liens, Rule 54 (f).
- Parties.
 - Substitution of parties, Rule 25 (a).
- Public officers, Rule 25 (d).
- Substitution of parties, Rule 25 (a).
- Suggestion of death, Rule 25 (a) (2).

DEATH BY WRONGFUL ACT

- Guardian and ward.
 - Action for injury or death of ward, Rule 17 (b).
- Judgment.
 - Interest of father and mother, Rule 17 (b).
- Parties.
 - Interest of father and mother in judgment, Rule 17 (b).
 - Suit by father or mother, Rule 17 (b).

DECEIT

- Executions.
 - Body executions, Rule 101 (a).

DECLARATORY JUDGMENTS, Rule 57.

- Affirmative form, Rule 57 (a).
- Any person interested, Rule 57 (b).
- Application for further relief, Rule 57 (h).
- Attorney general.
 - Party when statute or ordinance is attacked on ground of unconstitutionality, Rule 57 (j).
- Bankruptcy and insolvency.
 - Purposes for which declaration may be had, Rule 57 (d).
- Complaint.
 - Form, appx. A, Form 14.
- Construction of rule, Rule 57 (l).
- Contracts.
 - Construction before breach, Rule 57 (c).
 - Persons interested may obtain, Rule 57 (b).
- Creditors.
 - Purposes for which declaration may be had, Rule 57 (d).
- Deeds.
 - Person interested may obtain, Rule 57 (b).
- Descent and distribution.
 - Purposes for which declaration may be had, Rule 57 (d).
- Executors and administrators.
 - Purposes for which declaration may be had, Rule 57 (d).
- Force and effect, Rule 57 (a).
- Further relief, Rule 57 (h).
- Guardian and ward.
 - Purposes for which declaration may be had, Rule 57 (d).
- Infants.
 - Purposes for which declaration may be had, Rule 57 (d).

INDEX

DECLARATORY JUDGMENTS (Cont'd)

- Insanity.
 - Purposes for which declaration may be had, Rule 57 (d).
- Interpretation of rule, Rule 57 (l).
- Issues.
 - Issues of fact, Rule 57 (i).
- Municipal corporations.
 - Legal relations affected by ordinance, Rule 57 (b).
 - Ordinances, Rule 57 (j).
- Negative form, Rule 57 (a).
- Next of kin.
 - Purposes for which declaration may be had, Rule 57 (d).
- Ordinances, Rule 57 (j).
 - Legal relations affected by, Rule 57 (b).
- Parties, Rule 57 (j).
- Person who may obtain, Rule 57 (b).
- Petition.
 - Application for further relief, Rule 57 (h).
- Powers.
 - Not limited or restricted by enumeration, Rule 57 (e).
- Power to declare rights, Rule 57 (a).
- Purpose of rule, Rule 57 (k).
- Purposes for which person interested may have rights declared, Rule 57 (d).
- Refusal by court to declare right, Rule 57 (f).
- Remedial rule, Rule 57 (k).
- Statutes.
 - Legal relations affected by, Rule 57 (b).
- Summary judgment.
 - Motion, Rule 56 (b).
- Trusts and trustees.
 - Purposes for which declaration may be had, Rule 57 (d).
- Uncertainty.
 - Refusal where declaration would not terminate uncertainty, Rule 57 (f).
- Uniformity, Rule 57 (l).
- Wills.
 - Person interested may obtain, Rule 57 (b).
- Writ of error.
 - Review of judgments and decrees, Rule 57 (g).

DEEDS

- Conveyances generally. See Conveyances.
- Declaratory judgments.
 - Person interested may obtain, Rule 57 (b)

DEEDS (Cont'd)

- Judgments.
 - Direction to deliver deeds, Rule 70.
- Quitclaim deed.
 - Execution saves cost, Rule 105 (d).

DEEDS OF TRUST

- Evidence.
 - Fact of deed being a mortgage may be proved by parol evidence, appx. B. § 12.
- Powers.
 - Sale under powers, Rule 120 (b).

DEFAULT, Rule 55.

- Account.
 - Taking account or to determine amount of damage, Rule 55 (b) (2).
- Affidavits.
 - Amount due, Rule 55 (b) (1).
 - Showing failure to plead or otherwise defend, Rule 55 (a).
- Amount.
 - Judgment by default not to exceed amount prayed for, Rule 54 (c).
- Clerks of court.
 - Computation, Rule 55 (b) (1).
 - Entry, Rule 55 (a).
 - Motions granted as of course, Rule 77 (c).
- Conservator.
 - Representation of incompetent, Rule 55 (b) (2).
- Counterclaim, Rule 55 (d).
- Courts.
 - By the court, Rule 55 (b) (2).
- Cross-claim, Rule 55 (d).
- Damages.
 - Determination, Rule 55 (b) (2).
- Depositions and interrogatories.
 - Failure of party to attend or serve answers, Rule 37 (d).
- Entry, Rule 55 (a).
- Garnishment.
 - Refusal of garnishee to answer, Rule 103 (k).
- Guardian ad litem.
 - Representation of incompetent, Rule 55 (b) (2).
- Guardian and ward.
 - Representation of incompetent, Rule 55 (b) (2).
- Infants.
 - No judgment by default unless represented, Rule 55 (b) (2).

RULES OF CIVIL PROCEDURE

DEFAULT (Cont'd)

- Inquiry of damages, Rule 55 (b) (2).
- Insanity.
 - No judgment by default against insane person unless represented, Rule 55 (b) (2).
- Mail.
 - Judgment on substituted service, Rule 55 (f).
- Masters.
 - Reference, Rule 55 (b) (2).
- Publication.
 - Judgment on substituted service, Rule 55 (f).
- Public officers.
 - Judgment against officer of state, Rule 55 (e).
- Real property.
 - Defendant allowing judgment to be taken against him without answer saves cost, Rule 105 (c).
- Reference, Rule 55 (b) (2).
- Representative.
 - Representation of incompetent, Rule 55 (b) (2).
- Service of process.
 - Judgment on substituted service, Rule 55 (f).
- Setting aside default, Rule 55 (c).
- State.
 - Judgment against officer or agency of state, Rule 55 (e).
- Sum certain, Rule 55 (b) (1).
- Summons.
 - Judgment on substituted service, Rule 55 (f).
 - Notice in summons that judgment by default will be rendered on failure to appear, Rule 4 (c).
- Third-party practice, Rule 55 (d).
- Time, Rule 6 (a).

DEFENDANT. See Parties.

DEFENSES

- Accord and satisfaction, Rule 8 (c).
- Alternative statement, Rule 8 (e) (2).
- Amendments.
 - Making defenses by amendment, Rule 15. See Amendments.
- Appeal and error.
 - Overruling motions preserved point for consideration on review, Rule 12 (b) (Note).
- Arbitration and award, Rule 8 (c).
- Bankruptcy, Rule 8 (c).

DEFENSES (Cont'd)

- Capacity, Rule 9 (a) (1).
- Counter-claim.
 - When party has mistakenly designated defense as counter-claim or vice versa, Rule 8 (c).
- Denials, Rule 8 (b). See Pleading.
- Duress, Rule 8 (c).
- Estoppel.
 - Pleading, Rule 8 (c).
- Failure of consideration.
 - Pleading, Rule 8 (c).
- Failure to state claims.
 - Waiver, Rule 12 (h).
- Fellow servant.
 - Injury by fellow servant, Rule 8 (c).
- Forms.
 - Answer presenting defenses under Rule 12 (b), appx. A, Form 16.
 - Failure to state claim, appx. A, Form 15.
 - Lack of service of process, appx. A, Form 15.
- Fraud.
 - Pleading, Rule 8 (c).
- Fraud, statute of.
 - Pleading, Rule 8 (c).
- Garnishment.
 - Garnishee not required to defend claims of third persons, Rule 103 (h).
- Hearing, Rule 12 (d).
- How presented, Rule 12 (b).
- Illegality.
 - Pleading, Rule 8 (c).
- Laches.
 - Pleading, Rule 8 (c).
- Licenses.
 - Pleading, Rule 8 (c).
- Limitation of actions.
 - Pleading, Rule 8 (c).
- Motions.
 - Not waived by joinder with motion permitted under Rule 12, Rule 12 (b).
- Preliminary hearing, Rule 12 (d).
- Payment.
 - Pleading, Rule 8 (c).
- Pleading.
 - Affirmative defenses, Rule 8 (c).
 - Form of denials, Rule 8 (b).
 - Service, Rule 5 (c).
 - Statement, Rule 8 (b).
- Presentment by motion, Rule 12 (b). See Motions.

INDEX

DEFENSES (Cont'd)

- Release.
 - Pleading, Rule 8 (c).
- Res judicata.
 - Affirmative defenses, Rule 8 (c).
- Separate defenses stated regardless of consistency, Rule 8 (e) (2).
- Third-party practice, Rule 14 (a).
- Waiver, Rule 12 (h).
 - Not waived by being joined with one or more other defenses in responsive pleading, Rule 12 (b).
 - Pleading, Rule 8 (c).

DEFINITENESS

- Pleading.
 - Motion for more definite statement, Rule 12 (e).

DEFINITIONS, Rule 110 (b).

- Agent.
 - Managing agent, Rule 110 (b).
- Associations.
 - Person or party includes all manner of organizations, Rule 110 (b).
- Certificates.
 - How made, Rule 110 (c).
- Clerks of court.
 - Use of words, Rule 110 (b).
- Corporations.
 - Person or party includes all manner of organizations, Rule 110 (b).
- Marshal.
 - Use of term, Rule 110 (b).
- Oaths.
 - Use of term, Rule 110 (b).
- Sheriffs.
 - Use of term, Rule 110 (b).
- Signing.
 - Use of term, Rule 110 (b).

DELIVERY

- Service of process.
 - Attorney, Rule 5 (b) (1).

DEMAND

- Pleading.
 - Judgment, Rule 8 (a).
- Service of process, Rule 5 (a).

DEMURRERS

- Abolished, Rule 7 (c).

DENIALS, Rules 8 (b), 8 (d), 9 (e). See Pleading.

DEPOSIT IN COURT, Rule 67.

- Parties.
 - By party, Rule 67 (a).
- Trusts and trustees.
 - Deposit by trustee, Rule 67 (b).

DEPOSITIONS, Rules 26-37.

- Absence.
 - Deposition before action.
 - Use of deposition, Rule 27 (a) (4).
 - Notice to absent parties, Rule 30 (h).
 - Use of deposition when witness is absent from state, Rule 26 (d) (3).
- Admissibility.
 - Objections, Rule 26 (e).
- Affidavit.
 - Deposition before action, Rule 27 (a) (2).
 - Prima facie evidence, Rule 27 (a) (3).
 - To perpetuate testimony, Rule 11 (Note).
- Age.
 - Deposition before action.
 - Use of deposition, Rule 27 (a) (4).
 - Use of deposition, Rule 26 (d) (3).
- Agents.
 - Use of deposition of managing agent, Rule 26 (d) (2).
- All of deposition may be required to be introduced, Rule 26 (d) (4).
- Answers.
 - Failure of party to attend or serve answers, Rule 37 (d).
- Associations.
 - Use of deposition of officer, Rule 26 (d) (2).
- Attendance.
 - Failure of party giving notice to attend, Rule 30 (g) (1).
- Attorney's fees.
 - Payment by party giving notice who fails to attend, Rule 30 (g) (1).
 - Payment by party giving notice who fails to serve subpoena upon witness, Rule 30 (g) (2).
- Before action, Rule 27 (a).
 - Notice, Rule 27 (a) (1).
 - Order, Rule 27 (a) (1).
 - Petition, Rule 27 (a) (1).
- Books.
 - Examination as to, Rule 26 (b).
- Certificate.
 - Deposition before action, Rule 27 (a) (2).
 - Prima facie evidence, Rule 27 (a) (3).

RULES OF CIVIL PROCEDURE

DEPOSITIONS (Cont'd)

Certification, Rule 30 (f).
 Waiver of errors and irregularities, Rule 32 (d).
 Changes in deposition, Rule 30 (e).
 Consul.
 Before whom taken, Rule 28 (b).
 Contempt.
 Failure to comply with order, Rule 37 (b) (1).
 Copies, Rule 30 (f).
 Deposition before action.
 Prima facie evidence, Rule 27 (a) (3).
 Furnishing copies on payment of reasonable charges, Rule 30 (f) (2).
 Corporations.
 Use of deposition of officer, Rule 26 (d) (2).
 Costs.
 On granting or refusing order for suspension of examination, Rule 30 (d).
 Counties.
 Use of testimony of officer, Rule 26 (d) (2).
 Cross examination, Rule 26 (c).
 Cross interrogatories, Rule 31 (a).
 Recross interrogatories, Rule 31 (a).
 Death.
 Deposition before action.
 Use of deposition, Rule 27 (a) (4).
 Establishing by deposition before action, Rule 27 (a) (1).
 Use of deposition when witness is dead, Rule 26 (d) (3).
 Deposition before action.
 How used, Rule 27 (a) (4).
 When used, Rule 27 (a) (4).
 Descent and distribution.
 Establishing descent or heirship before action, Rule 27 (a) (1).
 Dismissal.
 Failure of party to attend or serve answers, Rule 37 (d).
 Use of depositions taken prior to dismissal in second action, Rule 26 (d) (4).
 Disqualification for interest.
 Objection must be promptly made, Rule 32 (b).
 Divorce.
 Establishing by deposition before action, Rule 27 (a) (1).
 Documents.
 Examination as to, Rule 26 (b).
 Effect of taking or using, Rule 26 (f).

DEPOSITIONS (Cont'd)

Embassy.
 Before secretary of embassy, Rule 28 (b).
 Errors and irregularities, Rule 32.
 As to completion and return of deposition, Rule 32 (d).
 As to disqualification of officer, Rule 32 (b).
 As to notice, Rule 32 (a).
 As to taking of deposition, Rule 32 (c).
 Examination.
 Changes, Rule 30 (e).
 Deposition before action, Rule 27 (a) (1).
 Errors and irregularities.
 Waiver, Rule 32 (c) (2).
 Limitation.
 Motion, Rule 30 (d).
 Limitation of persons and parties present by order, Rule 30 (b).
 Motion.
 Limitation, Rule 30 (d).
 Termination, Rule 30 (d).
 Notice, Rule 30 (a).
 Noting objections, Rule 30 (c).
 Oath, Rule 30 (c).
 Objection, Rule 30 (c).
 Oral examination or written interrogatories, Rule 26 (a).
 Order requiring written interrogatories, Rule 30 (b).
 Orders for protection of parties and deponents, Rule 30 (b).
 Parties transmitting written interrogatories to be propounded to witness, Rule 30 (c).
 Proceed as permitted under Rule 43 (b), Rule 26 (c).
 Record, Rule 30 (c).
 Scope, Rule 26 (b).
 Limited by order, Rule 30 (b).
 Sealed envelope, Rule 30 (b).
 Signing, Rule 30 (e).
 Submission to witness, Rule 30 (e).
 Subpoenas, Rule 45 (d).
 Termination.
 Motion, Rule 30 (d).
 Exceptional circumstances.
 Use of depositions, Rule 26 (d) (3).
 Executions.
 Deposition in aid of execution, Rule 69 (h).
 Expenses.
 Payment by party giving notice who fails to attend, Rule 30 (g) (1).
 Payment by party giving notice who fails to serve subpoena upon witness, Rule 30 (g) (2).

INDEX

DEPOSITIONS (Cont'd)

- Filing, Rule 30 (f).
 - Written interrogatories.
 - Notice of filing, Rule 31 (c).
- Foreign countries.
 - Before whom taken, Rule 28 (b).
- Identity.
 - Examination as to, Rule 26 (b).
- Impeachment.
 - Used to impeach testimony, Rule 26 (d) (1).
- Infirmity.
 - Use of deposition, Rule 26 (d) (3).
- Insanity.
 - Deposition before action.
 - Use of deposition, Rule 27 (a) (4).
- Interest.
 - Disqualification to take because of interest, Rule 28 (c).
- Interlocutory proceeding.
 - Use of depositions, Rule 26 (d).
- Interrogatories, Rule 31. See within this title, "Written Interrogatories."
 - Counties, Rule 33.
- Irregularities, Rule 32. See within this title, "Errors and Irregularities."
- Judgment.
 - After judgment, Rule 27 (b).
 - Deposition in aid of judgment, Rule 69 (h).
 - Failure of party to attend or serve answers, Rule 37 (d).
- Legation.
 - Before secretary of legation, Rule 28 (b).
- Letters rogatory, Rules 28 (b), 28 (d).
- Marriage.
 - Deposition before action, Rule 27 (a) (1).
- Motions.
 - Enlarging or shortening time for taking, Rule 30 (a).
 - Leave to take depositions after judgment or after writ of error, Rule 27 (b).
 - Limiting examination, Rule 30 (d).
 - Motion to suppress deposition for errors and irregularities as to completion and return, Rule 32 (d).
 - Termination of examination, Rule 30 (d).
 - Use of depositions, Rule 26 (d).
- Municipal corporations.
 - Use of deposition of officer, Rule 26 (d) (2).
- Nonresidents.
 - Giving notice by mail, Rule 30 (h).

DEPOSITIONS (Cont'd)

- Notice.
 - Absent parties, Rule 30 (h).
 - Deposition before action, Rule 27 (a) (1).
 - Examination, Rule 30 (a).
 - Failure of party to give notice to attend, Rule 30 (g) (1).
 - Filing, Rule 30 (i).
 - Mail, Rule 30 (h).
 - Unknown parties, Rule 30 (h).
 - Waiver of errors and irregularities, Rule 32 (a).
 - Written interrogatories.
 - Notice of filing, Rule 31 (c).
- Oaths.
 - Deposition before action, Rule 27 (a) (2).
 - Examination, Rule 30 (c).
- Objections.
 - As to taking of deposition, Rule 32 (c).
 - Disqualification of officer, Rule 32 (b).
 - Examination, Rule 30 (c).
 - To admissibility, Rule 26 (e).
 - Objections as to competency not waived by taking, Rule 26 (f).
 - Waiver of errors as to notice unless objection made promptly, Rule 32 (a).
 - Written interrogatories, Rule 32 (c) (3).
- One hundred miles distant from place of trial.
 - Use of deposition, Rule 26 (d) (3).
- Oral examination, Rule 30. See within this title, "Examination."
- Orders.
 - After judgment or after writ of error, Rule 27 (b).
 - Application for order compelling answer to written interrogatories, Rule 37 (a).
 - Contempt on failure to comply with order, Rule 37 (b) (1).
 - Deposition before action, Rule 27 (a) (1).
 - Deposition in aid of judgment or execution, Rule 69 (h).
 - Failure of party giving notice to attend, Rule 30 (g) (1).
 - Payment by party giving notice who fails to serve subpoena upon witness, Rule 30 (g) (2).
 - Protection of parties and deponents, Rule 30 (b).
 - Resumption of examination, Rule 30 (d).
 - Terminating or limiting examination, Rule 30 (d).

RULES OF CIVIL PROCEDURE

DEPOSITIONS (Cont'd)

Orders (Cont'd)

Written interrogatories.

Orders for the protection of parties and deponents, Rule 31 (d).

Parties.

Interrogatories to parties, Rule 33.

Pending actions, Rule 26.

Perpetuation of testimony.

After judgment or after writ of error, Rule 27 (b).

Deposition before action, Rule 27 (a) (1).

Persons before whom taken, Rule 28.

Disqualification for interest, Rule 28 (c).

Foreign countries, Rule 28 (b).

Outside Colorado, Rule 28 (d).

Within the United States, Rule 28 (a).

Petition.

Deposition before action, Rule 27 (a) (1).

Place.

Order for taking and place other than that stated in notice, Rule 30 (b).

Prima facie evidence.

Deposition before action, Rule 27 (a) (3).

Prisons and prisoners.

Leave of court to take deposition, Rule 26 (a).

Use of deposition where witness imprisoned, Rule 26 (d) (3).

Publication.

Notice of deposition before action, Rule 27 (a) (1).

Public officers.

Deposition used for any purpose, Rule 26 (d) (2).

Persons before whom taken, Rule 28 (b).

Question and answer.

Taking testimony in deposition before action, Rule 27 (a) (2).

Rebuttal.

Rebuttal of relevant evidence contained in deposition whether introduced by rebutter or not, Rule 26 (f).

Records.

Record of testimony, Rule 30 (c).

Recross interrogatories, Rule 31 (a).

Redirect interrogatories, Rule 31 (a).

Return.

Deposition before action, Rule 27 (a) (2).

Prima facie proof, Rule 27 (a) (3).

Errors and irregularities, Rule 32 (d).

DEPOSITIONS (Cont'd)

Scaled envelopes, Rule 30 (b).

Sealing, Rule 30 (f) (1).

Waiver of errors and irregularities, Rule 32 (d).

Service of process.

Notice in case of deposition before action, Rule 27 (a) (1).

Written interrogatories, Rule 31 (a).

Sickness.

Deposition before action.

Use of deposition, Rule 27 (a) (4).

Use of deposition, Rule 26 (d) (3).

Signing, Rule 30 (e).

Deposition taken before action, Rule 27 (a) (2).

Stipulation waiving, Rule 30 (e).

Waiver of errors and irregularities, Rule 32 (d).

Stipulations.

Stipulations regarding the taking of depositions, Rule 29.

Waiving signatures, Rule 30 (e).

Submission to witness, Rule 30 (e).

Subpoenas, Rule 45 (d).

Use when party has been unable to procure attendance by subpoena, Rule 26 (d) (3).

Substitution of parties.

Does not affect right to use depositions previously taken, Rule 26 (d) (4).

Summary judgments.

Continuance to permit taking depositions, Rule 56 (f).

Permitting affidavits to be supplemented or opposed by depositions, Rule 56 (e).

Taking testimony.

Deposition before action, Rule 27 (a) (2).

Time.

After judgment or after writ of error, Rule 27 (b).

Enlargement of time for taking, Rule 30 (a).

Objections, Rule 26 (e).

Written interrogatories, Rule 31 (a).

Transcribing testimony, Rule 30 (c).

Transmitting.

Waiver of errors and irregularities, Rule 32 (d).

Unincorporated association.

Use of deposition of officer, Rule 26 (d) (2).

Unknown parties.

Notice to unknown parties, Rule 30 (h).

INDEX

DEPOSITIONS (Cont'd)

- Unknown parties (Cont'd)
 - Statement in petition for deposition before action, Rule 27 (a) (1).
- Use of depositions, Rule 26 (d).
 - Deposition before action, Rule 27 (a) (4).
- Verification.
 - Perpetuation of testimony, Rule 11 (Note).
 - Petition for deposition before action, Rule 27 (a) (1).
- Waiver.
 - As to completion and return of deposition, Rule 32 (d).
 - As to taking of deposition, Rule 32 (c).
 - Disqualification of officer, Rule 32 (b).
 - Errors and irregularities in notice, Rule 32 (a).
 - Errors in commission or letters rogatory, Rule 28 (d).
 - Objections as to competency not waived by taking deposition, Rule 26 (f).
 - Stipulations regarding the taking of depositions, Rule 29.
 - Stipulation waiving signature, Rule 30 (e).
 - Written interrogatories, Rule 32 (c) (3).
- When depositions may be taken, Rule 26 (a).
- Writ of error, Rule 27 (b).
- Written interrogatories.
 - Agents, Rule 33.
 - Answer, Rule 33.
 - Failure to serve answer, Rule 37 (b).
 - Application for order compelling answer, Rule 37 (a).
 - Association, Rule 33.
 - Attendance.
 - Failure of party to attend, Rule 37 (d).
 - Attorney's fees.
 - Upon refusal to answer, Rule 37 (a).
 - Contempt, Rule 37 (b) (1).
 - Corporations, Rule 33.
 - Cross interrogatories, Rule 31 (a).
 - Dismissal, Rule 37 (b).
 - Expenses, Rule 37 (a).
 - Failure of a party to attend or serve answers, Rule 37 (b).
 - Garnishment.
 - Answer under oath, Rule 103 (f).
 - Form, appx. A, Form 23.
 - Interrogatories to parties, Rule 33.

DEPOSITIONS (Cont'd)

- Written interrogatories (Cont'd)
- Judgments.
 - Entry of appropriate verdict on answers to interrogatories, Rule 49 (b).
 - Failure of party to attend or serve answers, Rule 37 (b).
- Jury.
 - General verdict accompanied by answer to interrogatory, Rule 49 (b).
 - Special verdict, Rule 49 (a).
- Master.
 - Statement of account, Rule 53 (b) (3).
- Municipal corporations, Rule 33.
- Notice, Rule 31 (a).
 - Notice of filing, Rule 31 (c).
- Oaths, Rule 33.
- Objections.
 - Time, Rule 33.
- Officer to take responses and prepare record, Rule 31 (b).
- Orders.
 - Application for order compelling answer, Rule 37 (a).
 - For the protection of parties and deponents, Rule 31 (d).
- Parties.
 - Interrogatories to parties, Rule 33.
- Partnership, Rule 33.
- Redirect interrogatories, Rule 31 (a).
- Requiring, Rule 30 (b).
- Serving, Rule 31 (a).
 - Objections, Rule 33.
- Service of copies of answer, Rule 33.
- Signing, Rule 33.
- Time.
 - Objections, Rule 33.
 - Service of copies of answer, Rule 33.
- Unincorporated associations, Rule 33.
- Verdict, Rule 49 (b).
- Waiver of objections, Rule 32 (c) (3).

DEPUTIES

- Certificates, Rule 110 (c).
 - Service of process, Rule 4 (i) (1).
- Clerks of court.
 - Use of term, Rule 110 (b).
- Service of process.
 - Certificate of deputy to prove service, Rule 4 (i) (1).
 - Delivery to chief deputy or county clerk, Rule 4 (e) (7).
 - In another state or United States territory, Rule 4 (d) (2).
 - United States marshal, Rule 4 (d) (2).
 - Within state, Rule 4 (d) (1).

RULES OF CIVIL PROCEDURE

DEPUTIES (Cont'd)

- Sheriffs.
- Service in another state, Rule 4 (d) (2).
- Service of process within state, Rule 4 (d) (1).
- Use of term, Rule 110 (b).

DESCENT AND DISTRIBUTION

- Declaratory judgments.
- Purposes for which declaration may be had, Rule 57 (d).
- Depositions.
- Establishing descent or heirship before action, Rule 27 (a) (1).

DETAINER

- Replevin, Rule 104. See Replevin.
- Writ of error.
- Failure to prosecute, Rule 118 (a) (Note).

DIRECTED VERDICT

- Effect, Rule 50 (a).
- Entry of judgment, Rule 50 (b).
- Joinder of motion for new trial with motion for directed verdict, Rule 50 (b).
- Judgment.
- Entry of judgment on directed verdict, Rule 50 (b).
- Motion, Rule 50.
- Reservation of decision on motion, Rule 50 (b).
- Stay of proceedings.
- On motion for directed verdict, Rule 62 (b).
- Waiver.
- Motion for directed verdict does not waive right to trial by jury, Rule 50 (a).
- When made, Rule 50 (a).

DIRECTNESS

- Pleading, Rule 8 (e).

DISCIPLINE OF ATTORNEYS, Rules 241-250. See Attorney and Client.

DISCLAIMER

- Real property, Rule 105 (c).

DISCOVERY, Rules 26-37.

- Answers.
- Failure of party to serve, Rule 37 (d).
- Refusal to answer, Rule 37 (a).
- Consequences of refusal to make discovery, Rule 37.

DISCOVERY (Cont'd)

- Expenses.
- Refusal to admit, Rule 37 (c).
- Failure of party to attend or serve answers, Rule 37 (d).
- Motions, Rule 34.
- Orders, Rule 34.
- Application for order compelling answer, Rule 37 (a).
- Failure to comply with order, Rule 37 (b).
- Refusal to make discovery, Rule 37.
- Summary judgments.
- Continuance to permit discovery, Rule 56 (f).

DISMISSAL

- Actions.
- Failure to file complaint within 10 days after summons is served, Rule 3 (a).
- Attachment.
- Debts not due, Rule 102 (p).
- Attorney's fees.
- Tax as costs when action is dismissed, Rule 3 (a).
- Class actions.
- Not dismissed without approval of court, Rule 23 (c).
- Complaint.
- Failure to file complaint within 10 days after summons is served, Rule 3 (a).
- Costs.
- Costs of previously-dismissed action, Rule 41 (d).
- Voluntary dismissal, Rule 41 (a) (1).
- Counterclaim, Rule 41 (c).
- Effect of counterclaim on motion for dismissal, Rule 41 (a) (2).
- Cross-claim, Rule 41 (c).
- Depositions.
- Failure of party to attend or serve answers, Rule 37 (d).
- Use of depositions taken prior to dismissal in second action, Rule 26 (d) (4).
- Former adjudication or res adjudicata.
- Voluntary dismissal, Rule 41 (a) (1).
- Forms.
- Motion, appx. A, Form 15.
- Interrogatories.
- Failure of party to attend or serve answers, Rule 37 (d).
- Involuntary dismissal.
- By defendant, Rule 41 (b) (1).
- By the court, Rule 41 (b) (2).

INDEX

DISMISSAL (Cont'd)

Jurisdiction.

Suggestion of the lack of jurisdiction,
Rule 12 (h).

Motions.

Form, appx. A, Form 15.

Involuntary dismissal, Rule 41 (b) (1).

Notice.

Voluntary dismissal, Rule 41 (a) (1).

Orders.

Voluntary dismissal by order of court,
Rule 41 (a) (2).

Parties.

Misjoinder not ground for dismissal,
Rule 21.

Stipulations.

Voluntary dismissal, Rule 41 (a) (1).

Third-party action, Rule 41 (c).

Voluntary dismissal.

By order of court, Rule 41 (a) (2).

By plaintiff, Rule 41 (a) (1).

By stipulation, Rule 41 (a) (1).

Writ of error.

Affirmation, Rule 118 (d).

Dismissal by plaintiff in error does not
affect right of defendant to seek re-
versal or modification of judgment on
cross-specification, Rule 111 (f).

Failure to prosecute, Rule 118 (a).

Not dismissed for technical defect,
Rule 111 (f).

DISTRICT COURTS

Appeal and error.

Appeal from county court to district
court, Rule 81 (c).

Attachment.

Appeals from county to district court,
Rule 102 (aa).

When suit transferred to district court,
Rule 102 (n).

Counterclaim.

Claim in excess of \$2,000.00 certified
to district court, Rule 13 (l).

Cross-claim.

Claim in excess of \$2,000.00 certified to
district court, Rule 13 (l).

Jurisdiction.

Counterclaims and cross-claims in ex-
cess of \$2,000.00 certified to district
courts, Rule 13 (l).

Transfer where concurrent jurisdiction,
Rule 98 (h).

Justices of the peace.

Transcript of justice's judgment filed
in district court, appx. B, § 11.

DISTRICT COURTS (Cont'd)

Procedure governed, Rule 1 (a).

Seals, appx. B, § 19.

Third-party practice.

Claim in excess of \$2,000.00 certified
to district courts, Rule 13 (l).

Writ of error.

Final judgment, Rule 111 (a) (1).

DISTRICTS

Service of process.

Clerk or director of school district,
Rule 4 (e) (8).

DIVORCE

Depositions.

Establishing by deposition before ac-
tion, Rule 27 (a) (1).

Injunctions.

Rule not applicable, Rule 65 (h).

Rules not applicable, Rule 81 (b).

DOCKET

Briefs.

Advancement on docket, Rule 118 (b).

Clerks of court.

Civil docket, Rule 79 (a).

Judgment dockets, Rule 79 (d).

Inspection.

Judgment docket, appx. B, § 10.

Judgments.

Entry, Rule 58 (a).

Open for inspection, appx. B, § 10.

Revival, Rule 54 (h).

Satisfaction, Rule 58 (b).

Jury.

Designation of action as jury action,
Rule 39 (a).

Powers.

Docket fee, Rule 120 (e).

Supreme court proceedings.

Advancement on docket, Rule 118 (b).

Writ of error.

Advancement on docket, Rule 118 (b).

Costs, Rule 114 (a).

Docketing case in supreme court, Rule
111 (c).

Fee, Rule 111 (e).

DOCUMENTS

Admission of genuineness, Rule 36.

Expense on refusal to admit, Rule 37
(c).

Form of request, appx. A, Form 21.

RULES OF CIVIL PROCEDURE

DOCUMENTS (Cont'd)

- Depositions.
 - Examination as to, Rule 26 (b).
- Evidence.
 - Explaining alterations, Rule 43 (g).
- Genuineness.
 - Admission, Rules 36, 37 (c); appx. A, Form 21.
 - Expenses on refusal to admit, Rule 37 (c).
- Pleading.
 - Official document or act, Rule 9 (d).
- Production of documents, Rule 34.
- Seals.
 - How seal attached, appx. B, § 15.
- Subpoenas, Rule 45 (b).

DOMESTIC CORPORATIONS. See Corporations.

DURESS

- Defenses, Rule 8 (c).
- Pleading, Rule 8 (c).

EFFECTIVE DATE OF RULES, Rule 1 (b).

ELECTIONS

- Filing statement of contest, Rule 100 (a).
- Statement of contest, Rule 100 (a).
- Trial.
 - Contested elections, Rule 100 (b).

EMBASSY

- Depositions.
 - Before secretary of embassy, Rule 28 (b).

ENGLISH

- Pleadings.
 - Proceedings in English, appx. B, sec. 18.

ENTRIES

- Clerks of court.
 - Entries in books kept by clerk, Rule 79.
- Failure to permit entry on land as required by order, Rule 37 (b) (2).
- Judgments, Rule 58 (a).
 - Clerk of court, Rule 58 (a).

EQUITY

- Joinder of claims.
 - Joinder of legal and equitable claims, Rule 18 (a).

EQUITY (Cont'd)

- Laches.
 - Affirmative defenses, Rule 8 (c).
- Pleading.
 - Separate claims or defenses stated whether based on legal or equitable grounds, Rule 8 (e) (2).
 - Procedure governed, Rule 1 (a).

ERROR, WRIT OF, Rule 111. See Writ of Error.

ESTOPPEL

- Defenses.
 - Pleading, Rule 8 (c).
- Pleading.
 - Affirmative defenses, Rule 8 (c).

ETHICS

- Canons of ethics, appx. C, §§ 1-32. See Canons of Ethics.

EVIDENCE, Rule 43.

- Accounts.
 - Secondary evidence, Rule 43 (f) (5).
- Admissibility, Rule 43 (a).
 - Master's power to rule upon admissibility, Rule 53 (c).
- Admissions.
 - Acknowledgement.
 - Proof of service of process, Rule 4 (i) (5).
 - Admission of facts and of genuineness of documents, Rule 36.
 - Effect of admission, Rule 36 (b).
 - Expenses on refusal to admit, Rule 37 (c).
 - Request for admission, Rule 36 (a).
- Attorney's fees.
 - Expenses on refusal to admit genuineness of document, Rule 37 (c).
- Document.
 - Form of admission for request as to genuineness, appx. A, Form 21.
- Pleading.
 - Effect of failure to deny, Rule 8 (d).
 - Pre-trial conference to consider possibility of obtaining, Rule 16 (3).
- Service of process.
 - Proof of service, Rule 4 (i) (5).
- Affidavits.
 - Motion based on facts not appearing of record, Rule 43 (e).
- Alteration of instruments.
 - Explaining alterations in documents, Rule 43 (g).
- Amendment.
 - Amendment to conform to evidence, Rule 15 (b).

INDEX

EVIDENCE (Cont'd)

Attachment.

Amendment of affidavit when evidence does not prove cause, Rule 102 (q).

Attorney and client.

Discipline of attorney, Rule 243.

Copies.

Authentication of copy of official record, Rule 44 (a).

Certified copies of records read in evidence, Rule 44 (d).

Statutes and laws of other states and countries, Rule 4 (f).

Costs.

Transcript, Rule 80 (a).

Deeds of trust.

Fact of deed being a mortgage may be proved by parol evidence, appx. B, sec. 12.

Depositions, Rules 26-37. See Depositions.

Discovery, Rule 34.

Documents.

Certified copies of records read in evidence, Rule 44 (d).

Explaining alterations, Rule 43 (g).

Examination.

Physical and mental examination of persons, Rule 35. See Physical and Mental Examination of Persons.

Exclusion.

Record of excluded evidence, Rule 43 (c).

Exhibits.

Exhibits to pleading part thereof, Rule 10 (c).

Findings of court.

Sufficiency to support findings, Rule 52 (b).

Form, Rule 43 (a).

Injunctions.

Evidence on motion, Rule 43 (e).

Instructions.

Judge shall read instructions but not comment on evidence, Rule 51.

Laws.

Other states and countries, Rule 44 (f).

Libel and slander.

Mitigating circumstances, appx. B, sec. 3.

Lost or destroyed instruments.

Secondary evidence, Rule 43 (f) (1).

Masters.

Admissibility of master's findings of fact in jury action, Rule 53 (e) (3).

EVIDENCE (Cont'd)

Masters (Cont'd)

Master not directed to report evidence in jury action, Rule 53 (e) (3).

Record, Rule 53 (c).

Ruling upon admissibility, Rule 53 (c).

Mental examination of persons, Rule 35. See Physical and Mental Examination of Persons.

Mortgages.

Fact of deed being a mortgage may be proved by parol evidence, appx. B, sec. 12.

Motions, Rule 43 (e).

New trials.

Insufficiency of evidence, Rule 59 (a) (6).

Newly discovered evidence, Rule 59 (a) (4).

Time for motion, Rule 59 (b).

Objection.

Amendment to pleading, Rule 15 (b).

Offer of judgment.

Offer not admissible when withdrawn, Rule 68.

Parol evidence.

Fact of deed being a mortgage, appx. B, sec. 12.

Unwritten or common law, Rule 44 (f).

Physical examination, Rule 35. See Physical and Mental Examination of Persons.

Pre-trial conference.

Possibility of obtaining admissions, Rule 16 (3).

Production of documents, Rule 34.

Receivers.

Evidence on motion for appointment or discharge, Rule 43 (e).

Record.

Proof of lack of record, Rule 44 (b).

Proof of official record, Rule 44.

Recording acts.

Secondary evidence.

Copy of recorded instrument, Rule 43 (f) (4).

Reports, Rule 80 (c).

Seals.

Proof of official record, Rule 44 (e).

Secondary evidence, Rule 43 (f).

Contents of writing lost or destroyed, Rule 43 (f) (1).

Copy of record of original, Rule 43 (f) (4).

Document in custody of public officer, Rule 43 (f) (3).

Failure of party to produce after reasonable notice, Rule 43 (f) (2).

RULES OF CIVIL PROCEDURE

EVIDENCE (Cont'd)

- Secondary evidence (Cont'd)
 - Numerous accounts and documents, Rule 43 (f) (5).
 - Original not within state of Colorado, Rule 43 (f) (6).
- Service of process, Rule 4 (i).
 - Admission, Rule 4 (i) (5).
 - Affidavit, Rule 4 (i) (2).
 - Amendment of proof of service, Rule 4 (j).
 - Certificate of sheriff, United States marshal or deputy, Rule 4 (i) (1).
- Mail.
 - Certificate of clerk, Rule 4 (i) (3).
- Proof of service of subpoenas, Rule 45 (c).
- Publication.
 - Affidavit of publication, Rule 4 (i) (4).
 - Certificate of clerk as to mailing copy, Rule 4 (i) (4).
- Waiver of service, Rule 4 (i) (5).
- Statutes.
 - Other states and countries, Rule 44 (f).
- Stenographic report, Rule 80 (c).
- Stenographic reporter, Rule 80 (a).
- Transcript, Rules 80 (a), 80 (c).
- Waters and watercourses.
 - Proof of abandonment, Rule 99.
- Witnesses generally. See Witnesses.

EXAMINATION

- Depositions, Rule 30. See Depositions.
- Jury, Rule 47 (a).
 - Examination of premises by jury, Rule 47 (k).
- Physical and mental examination of persons, Rule 35. See Physical and Mental Examination of Persons.
- Witnesses, Rule 43 (c). See Witnesses.

EXAMINERS, Rule 53. See Masters.

EXCEPTIONS AND OBJECTIONS

- Evidence.
 - Amendment to pleading, Rule 15 (b).
- Pleading.
 - Exceptions for insufficiency not used, Rule 7 (c).
- Witnesses.
 - Record of excluded evidence when objection sustained, Rule 43 (c).

EXCESSIVE DAMAGES

- New trials.
 - Ground, Rule 59 (a) (5).

EXECUTIONS, Rule 69.

- Appearance.
 - Order for appearance of debtor of judgment debtor, Rule 69 (e).
 - Order for appearance of judgment debtor, Rule 69 (d).
- Arbitration and award, Rule 109 (e).
- Body executions, Rule 101 (a).
- Commitments.
 - Body executions, Rule 101 (b).
- Contempt.
 - Order for property to be applied on judgment, Rule 69 (f).
- Costs.
 - Body executions, Rule 101 (c).
 - Execution for costs, Rule 69 (b).
- Debtor of judgment debtor may pay sheriff, Rule 69 (c).
- Deceit.
 - Body executions, Rule 101 (a).
- Depositions.
 - Deposition in aid of execution, Rule 69 (h).
- Fraud.
 - Body executions, Rule 101 (a).
- Garnishment.
 - Set-off of execution by garnishee, Rule 103 (o).
- In general, Rule 69 (a).
- Judgments.
 - Where order or judgment is for delivery of possession, Rule 70.
- Justices of the peace, appx. B, § 11.
- Malice.
 - Body executions, Rule 101 (a).
- Masters.
 - Order for appearance of judgment debtor, Rule 69 (d).
 - Writ of execution against delinquent party for compensation, Rule 53 (a).
- Negligence.
 - Body executions, Rule 101 (a).
- Orders.
 - Order for appearance of debtor of judgment debtor, Rule 69 (e).
 - Order for appearance of judgment debtor, Rule 69 (d).
 - Order for property to be applied on judgment, Rule 69 (f).
- Perishable property.
 - Sale, Rule 102 (s).
- Prisons and prisoners.
 - Body executions, Rule 101 (b).
- Replevin.
 - Affidavits, Rule 104 (b) (3).

INDEX

EXECUTIONS (Cont'd)

- Sale.
 - Perishable property, Rule 102 (s).
- Sheriffs.
 - Debtor of judgment debtor may pay sheriff, Rule 69 (c).
- Stay of proceedings.
 - Motion for new trial or judgment, Rule 62 (b).
 - Supreme court proceedings.
 - Review of stay, Rule 113 (b).
- Time.
 - No execution to issue until 10 days after judgment, Rule 62 (a).
- Torts.
 - Body executions, Rule 101 (a).
- Witnesses, Rule 69 (g).
- Writ of error.
 - Affirmation, Rule 118 (d).
 - On final judgment, Rule 118 (f).
 - Stay of execution, Rule 113 (j).

EXECUTORS AND ADMINISTRATORS

- Counterclaim, Rule 13 (k).
- Cross-claims, Rule 13 (k).
- Declaratory judgments.
 - Purposes for which declaration may be had, Rule 57 (d).
- Parties, Rule 17 (a).
- Supersedeas.
 - When bond not required, Rule 113 (d).

EXEMPLARY DAMAGES, Rule 101 (d).

EXEMPTIONS

- Garnishment.
 - Garnishee not required to plead exemption on behalf of defendant, Rule 103 (g).

EXHIBITS

- Evidence.
 - Exhibits to pleading part thereof, Rule 10 (c).
- Pleadings.
 - Exhibit to pleading part thereof, Rule 10 (c).
- Supreme court proceedings.
 - Remittitur, Rule 118 (g).
- Writ of error.
 - Record, Rule 112 (a).

EX PARTE

- Hearing.
 - Service of process, Rule 4 (g) (1).
- Motions.
 - Third-party practice, Rule 14 (a).

EXPERT WITNESSES

- Limitation in pre-trial conference, Rule 16 (4).

FAILURE OF CONSIDERATION

- Defenses.
 - Pleading, Rule 8 (c).
- Pleading.
 - Affirmative defenses, Rule 8 (c).

FALSE PRETENSES

- Attachment.
 - Affidavit, Rule 102 (b) (12).

FATHER

- Parties.
 - Suit for injury or death of child, Rule 17 (b).
- Service of process.
 - Service on infant, Rule 4 (e) (2).

FEDERAL COURTS

- Injunctions.
 - State courts jurisdiction when suit commenced in federal court, Rule 65 (i).

FEES

- Arbitration and award.
 - Arbitrators, Rule 109 (f).
- Attorney's fees. See Attorney's Fees.
- Canons of ethics.
 - Contingent fees, appx. C, § 13.
 - Fixing amount of fee, appx. C, § 12.
 - Suing for fees, appx. C, § 14.
- Costs.
 - Supreme court proceedings, Rule 114 (a).
- Garnishment.
 - Fees of garnishee, Rule 103 (x).
 - Funds of state and municipal corporations, appx. B, § 5.
- Powers.
 - Docket fees, Rule 120 (e).
- Writ of error.
 - Docket fee, Rule 111 (e).

RULES OF CIVIL PROCEDURE

FELLOW SERVANT

- Defenses.
 - Injury by fellow servant, Rule 8 (c).
- Pleading.
 - Injury by fellow servant, Rule 8 (c).

FIDUCIARIES

- Executors and administrators. See Executors and Administrators.
- Guardian and ward. See Guardian and Ward.
- Parties.
 - Infants or incompetent persons, Rule 17 (c).
- Trusts and trustees. See Trusts and Trustees.

FILING PLEADINGS AND PAPERS,

- Rule 5.
- Answer.
 - Time of filing, Rule 12 (a).
- Arbitration and award.
 - Award, Rule 109 (e).
- Attorney and client.
 - Signing, appx. A, Forms, Introductory Statement, Paragraph 4.
- Briefs.
 - Copy to be served or filed, Rule 115 (i).
 - Failure to file, Rule 115 (a).
- Clerks of court, Rule 79 (a).
- Definition, Rule 5 (e).
- Depositions.
 - Written interrogatories.
 - Notice of filing, Rule 31 (c).
- Number of action, appx. A, Forms, Introductory Statement, Paragraph 1.
- Replevin.
 - Sheriffs, Rule 104 (l).
- Writ of error, Rule 111 (c).
 - Failure to file abstract of record or brief, Rule 115 (d).
 - Withdrawal of papers from files, Rule 115 (j).

FINDINGS OF COURT, Rule 52.

- Amendments, Rule 52 (b).
- Effect, Rule 52 (a).
- Evidence.
 - Sufficiency to support findings, Rule 52 (b).
- Judgment.
 - Entry of judgment on findings, Rule 52 (a).

FINDINGS OF COURT (Cont'd)

- Masters.
 - Court accepts master's findings unless clearly erroneous, Rule 53 (e) (2).
 - Findings considered findings of court, Rule 52 (a).
 - Stipulation, Rule 53 (e) (4).
- Motions.
 - Amendment, Rule 52 (b).
- New trial.
 - Motion for amendment of findings made with motion for new trial, Rule 52 (b).
- Time.
 - Amendment, Rule 52 (b).
- Writ of error, Rule 52 (a) and note.

FINDINGS OF FACT

- Masters.
 - Admissible as evidence in jury action, Rule 53 (e) (3).
- Writ of error.
 - Record, Rule 112 (a).

FINES

- Contempt, Rule 107 (d).
- Replevin.
 - Affidavit, Rule 104 (b) (3).

FORCIBLE ENTRY

- Writ of error.
 - Failure to prosecute writ, Rule 118 (a) (Note).

FOREIGN ATTORNEYS

- Service.
 - Association of resident attorneys upon whom pleadings and papers are served, Rule 5 (b) (2).

FOREIGN CORPORATIONS

- Attachment.
 - Affidavit, Rule 102 (b) (2).
- Service of process.
 - Publication, Rule 4 (g) (2) (iii).

FOREIGN COUNTRIES

- Depositions.
 - Before whom taken, Rule 28 (b).
- Service of process.
 - Consul, Rule 4 (d) (3).

FORFEITURE

- Venue.
 - Actions for recovery, Rule 98 (b) (1).

INDEX

FORMER ADJUDICATION OR RES ADJUDICATA

- Affirmative defenses, Rule 8 (c).
- Arbitration and award.
 - Arbitrated matters held adjudicated, Rule 109 (g).
- Dismissal.
 - Involuntary dismissal, Rule 41 (b) (1).

FORM OF ACTION, Rule 2.

FORM OF PLEADING, Rule 10.

- Technical forms not required, Rule 8 (e) (1).

FORMS

- Admissions.
 - Genuineness of documents, appx. A, Form 21.
- Affirmations, appx. B, § 14.
- Answer.
 - Money had and received, appx. A, Form 17.
 - Presenting defenses under Rule 12 (b), appx. A, Form 16.
- Complaint.
 - Accounts and accounting, appx. A, Form 4.
 - Claim for debt, appx. A, Form 13.
 - Conversion, appx. A, Form 11.
 - Declaratory judgment, appx. A, Form 14.
 - Fraudulent and voluntary conveyances, appx. A, Form 13.
 - Goods sold and delivered, appx. A, Form 5.
 - Interpleader, appx. A, Form 14.
 - Money had and received, appx. A, Form 8.
 - Money lent, appx. A, Form 6.
 - Money paid by mistake, appx. A, Form 7.
 - Negligence, appx. A, Form 9.
 - Responsibility of two parties, appx. A, Form 10.
 - Where plaintiff is unable to determine whether person responsible is C. D. or E. F., appx. A, Form 10.
 - Wilfulness or recklessness, appx. A, Form 10.
- Negotiable instrument, appx. A, Form 3.
- Specific performance of contract to convey land, appx. A, Form 12.
- Counterclaims.
 - Answer to complaint for money had and received, appx. A, Form 17.

FORMS (Cont'd)

- Defenses.
 - Answer presenting defenses under Rule 12 (b), appx. A, Form 16.
 - Failure to state claim, appx. A, Form 15.
 - Lack of service of process, appx. A, Form 15.
- Dismissal, discontinuance and non-suit.
 - Motion, appx. A, Form 15.
- Garnishment.
 - Interrogatories, appx. A, Form 23.
 - Writ of garnishment, appx. A, Form 23.
- Interpleader.
 - Answer to complaint for money had and received, appx. A, Form 17.
- Intervention.
 - Motion to intervene as defendant under Rule 24, appx. A, Form 19.
- Jurisdiction.
 - Allegation, appx. A, Form 2.
- Jury.
 - Oath, Rule 47 (i).
- Motions.
 - Bringing in third party defendant, appx. A, Form 18.
 - Dismissal, appx. A, Form 15.
 - Intervention, appx. A, Form 19.
 - Motion for production of document under Rule 34, appx. A, Form 20.
 - Pleading, appx. A, Form, Introductory Statement, Paragraph 2.
 - Signing by attorney, appx. A, Form, Introductory Statement, Paragraph 4.
- Omitting parties.
 - Allegation of reason, appx. A, Form 22.
- Parties.
 - Allegation of reason for omitting party, appx. A, Form 22.
- Production of documents.
 - Motion for production of documents under Rule 34, appx. A, Form 20.
- Real property.
 - Complaint for specific performance of contract to convey land, appx. A, Form 12.
- Service of process.
 - Motion to dismiss for lack of service, appx. A, Form 15.
 - Summons, appx. A, Form 1.
- Summons, appx. A, Form 1.
- Third-party practice.
 - Motion to bring in third-party defendant, appx. A, Form 18.

RULES OF CIVIL PROCEDURE

FRANCHISES

- Usurpation.
 - Relief, Rule 106 (a) (3).
- Venue.
 - Actions affecting, Rule 98 (a).

FRAUD

- Arbitration and award.
 - Effect of fraud, Rule 109 (g).
- Attachment.
 - Affidavit, Rule 102 (b) (12).
- Damages.
 - Exemplary damages, Rule 101 (d).
- Defenses.
 - Pleading, Rule 8 (c).
- Executions.
 - Body executions, Rule 101 (a).
- Injunctions.
 - Restoration of property taken by fraud, Rule 65 (f).
- Pleading.
 - Affirmative defenses, Rule 8 (c).
 - Particularity, Rule 9 (b).

FRAUDS, STATUTE OF

- Defenses.
 - Pleading, Rule 8 (c).
- Motion.
 - Defense cannot be raised under Rule 12 (b), Rule 12 (b) (Note).
- Pleading.
 - Affirmative defenses, Rule 8 (c).
 - Cannot be raised by motion under Rule 12 (b), Rule 12 (b) (Note).

FRAUDULENT AND VOLUNTARY CONVEYANCES

- Attachment.
 - Affidavit, Rules 102 (b) (6), 102 (b) (9).
- Complaint.
 - Form of complaint to set aside, appx. A, Form 13.
- Joinder of remedies, Rule 18 (b).

GARNISHMENT, Rule 103.

- Alias writs, Rule 103 (d).
- Amount, Rule 103 (a).
- Answer.
 - Failure to answer, Rule 103 (f).
 - Funds of state and municipal corporations, appx. B, sec. 7.
 - Interrogatories answered under oath, Rule 103 (f).

GARNISHMENT (Cont'd)

- Answer (Cont'd)
 - Public officials, Rule 103 (c).
 - Refusal of garnishee to answer, Rule 103 (k).
 - Traverse, Rule 103 (l).
 - Trial, Rule 103 (m).
- Attachment.
 - Affidavit, Rule 102 (b) (7).
- Bonds.
 - Release upon bond, Rule 103 (z).
- Chattel mortgages.
 - Plaintiff may pay lien and be subrogated, Rule 103 (t).
- Contempt.
 - Refusal to deliver property, Rule 103 (w).
- Costs.
 - Refusal of garnishee to answer, Rule 103 (k).
- Counties.
 - Funds of municipal corporations, appx. B, secs. 4-8.
 - Public officers, Rule 103 (c).
- Creditors.
 - Remedies of judgment creditors, Rule 103 (y).
- Debts not due.
 - Garnishee not liable on instruments not due, Rule 103 (p).
 - Liability of garnishee, Rule 103 (s).
- Default.
 - Refusal of garnishee to answer, Rule 103 (k).
- Defenses.
 - Garnishee not required to defend claims of third person, Rule 103 (h).
- Delivery of property by garnishee, Rule 103 (i).
 - Disposition of delivered property, Rule 103 (v).
 - Refusal to deliver, Rule 103 (w).
 - Release of garnishee, Rule 103 (j).
- Discharge of garnishee.
 - No bar to action by defendant, Rule 103 (r).
- Executions.
 - Set-off of execution by garnishee, Rule 103 (o).
- Exemptions.
 - Garnishee not required to plead exemption on behalf of defendant, Rule 103 (g).
- Fees.
 - Fees of garnishee, Rule 103 (x).
 - Funds of state and municipal corporations, appx. B, sec. 5.

INDEX

GARNISHMENT (Cont'd)

- Former adjudication or res adjudicata.
 - Discharge of garnishee no bar to action by defendant, Rule 103 (r).
- Forms.
 - Interrogatories, appx. A, Form 23.
 - Writ of garnishment, appx. A, Form 23.
- Indemnity, Rule 103 (v).
- Instruments not due.
 - Garnishee not liable, Rule 103 (p).
- Interrogatories.
 - Answer under oath, Rule 103 (f).
 - Form, appx. A, Form 23.
- Intervention.
 - Motions, Rule 103 (n).
- Issuance, Rule 103 (a).
 - Sheriff, Rule 103 (d).
- Judgments, Rule 103 (i).
 - Effect of judgment against garnishee, Rule 103 (q).
 - Order by which garnishment is released or sustained is final judgment, Rule 102 (aa).
 - Plaintiff failing to reply to garnishee's answer, Rule 103 (l).
 - Refusal of garnishee to answer, Rule 103 (k).
 - Remedies of judgment creditor, Rule 103 (y).
 - Set-off of judgment by garnishee, Rule 103 (o).
 - Trial of traverse, Rule 103 (m).
- Jurisdiction.
 - When jurisdiction acquired, Rule 103 (e).
- Liens.
 - Plaintiff may pay lien and be subrogated, Rule 103 (t).
 - Subrogation where pledge held under condition, Rule 103 (u).
- Motions.
 - Intervention, Rule 103 (n).
- Municipal corporations.
 - Funds, appx. B, §§ 4-8.
 - Public officials, Rule 103 (c).
- Negotiable instruments.
 - Garnishee not liable on instruments not due, Rule 103 (p).
- Oaths.
 - Interrogatories answered under oath, Rule 103 (f).
- Orders.
 - Funds of state and municipal corporations, appx. B, § 8.
- Perishable property.
 - Sale, Rule 102 (s).

GARNISHMENT (Cont'd)

- Pledge and collateral security.
 - Plaintiff may pay lien and be subrogated, Rule 103 (t).
 - Subrogation where pledge held under condition, Rule 103 (u).
- Pluries writs, Rule 103 (d).
- Public officers, Rule 103 (c).
 - Funds of state and municipal corporations, appx. B, §§ 4-8.
- Redemption.
 - Redemption money, Rule 103 (v).
- Release of garnishee upon delivery of property, Rule 103 (j).
- Remedies of judgment creditors, Rule 103 (y).
- Salaries.
 - Funds of state and municipal corporations, appx. B, §§ 4-8.
- Sale, Rule 103 (i).
 - Perishable property, Rule 102 (s).
- Service of process.
 - Funds of state and municipal corporations, appx. B, § 6.
 - Public officials, Rule 103 (c).
 - When garnishee summoned, Rule 103 (b).
- Set-off.
 - Garnishee may claim, Rule 103 (o).
- Sheriffs.
 - Issuance, Rule 103 (d).
- Specific performance.
 - Subrogation where pledge held under condition, Rule 103 (u).
- State.
 - Funds of state, appx. B, §§ 4-8.
 - Public officials, Rule 103 (c).
- Subrogation.
 - Plaintiff may pay lien and be subrogated, Rule 103 (t).
 - Subrogation where pledge held under condition, Rule 103 (u).
- Summons.
 - Funds of state and municipal corporations, appx. B, § 6.
 - Public officials, Rule 103 (c).
 - When garnishee summoned, Rule 103 (b).
- Surrender of property to court, Rule 103 (h).
- Third party actions.
 - Garnishee not required to defend claims of third persons, Rule 103 (h).
- Traverse of answer, Rule 103 (l).
 - Trial, Rule 103 (m).

RULES OF CIVIL PROCEDURE

GARNISHMENT (Cont'd)

- Trial.
- Traverse.
 - Issue, Rule 103 (m).
- Wages.
 - Funds of state and municipal corporations, appx. B, § 5.
- When writ issues, Rule 103 (a).
- Writ.
 - Issuance by sheriff, Rule 4 (b).

GENERAL DENIAL, Rule 8 (b).

GOODS SOLD AND DELIVERED

- Complaint.
 - Forms, appx. A, Form 5.

GUARDIAN AD LITEM

- Action, Rule 17 (c).
- Default.
 - Representation of incompetent, Rule 55 (b) (2).
- Infants, Rule 17 (c).
- In rem proceedings.
 - Not necessary, Rule 17 (c).
- Insane persons, Rule 17 (c).
 - Not necessary in in rem proceedings, Rule 17 (c).

GUARDIAN AND WARD

- Ad litem guardian. See Guardian ad Litem.
- Death by wrongful act.
 - Action for injury or death of ward, Rule 17 (b).
- Declaratory judgments.
 - Purposes for which declaration may be had, Rule 57 (d).
- Default.
 - Representation of incompetent, Rule 55 (b) (2).
- Insane persons.
 - Action, Rule 17 (c).
- Jury.
 - Challenge for cause when relationship exists, Rule 47 (e) (3).
- Parties, Rule 17 (a).
 - Injury or death of ward, Rule 17 (b).
- Service of process.
 - Service on infant, Rule 4 (e) (2).
- Supersedeas.
 - When bond not required, Rule 113 (d).

HABEAS CORPUS

- Abolished, Rule 106 (a).

HARMLESS ERROR, Rule 61.

- Error or defect not affecting substantial rights, Rule 118 (f).

HEARING

- Attorney and client.
 - Discipline of attorney, Rule 249.
- Defenses, Rule 12 (d).
- Ex parte hearing.
 - Service of process by mail, Rule 4 (g) (1).
- Injunctions.
 - Temporary restraining order, Rule 65 (b).
- Powers.
 - Sales, Rule 120 (c).
- Preliminary hearing, Rule 12 (d).
- Service of process.
 - Ex parte hearing, Rule 4 (g) (1).
- Subpoenas.
 - Subpoena for hearing or trial, Rule 45 (e).

HOLIDAYS

- Attachment, appx. B, sec. 23.
- Execution of writ on holiday, Rule 102 (i).
- Courts, appx. B, § 23.
- Time.
 - Exclusion, Rule 6 (a).
 - Half holidays, Rule 6 (a).

HUSBAND AND WIFE

- Parties, Rule 17 (b).

IDENTITY

- Depositions.
 - Examination as to, Rule 26 (b).

ILLEGAL DETENTION OF PERSON, Rule 106 (a) (1).

ILLEGALITY

- Defenses.
 - Pleading, Rule 8 (c).
- Pleading.
 - Affirmative defenses, Rule 8 (c).

IMMATERIALITY

- Pleading.
 - Striking, Rule 12 (f).

IMPEACHMENT

- Depositions.
 - Used to impeach testimony, Rule 26 (d) (1).

INDEX

IMPERTINENCY

- Pleading.
- Motion to strike, Rule 12 (f).

IMPROVEMENTS

- Counterclaim, Rule 105 (e).
- Real property, Rule 105 (e).
- Set-off, Rule 105 (e).

INADEQUATE DAMAGES

- New trials.
- Grounds, Rule 59 (a) (5).

INCOMPETENT PERSONS

- Infants. See Infants.
- Insanity. See Insanity.

INDECENT MATTER

- Pleading.
- Punishment of attorney, Rule 11.

INDEMNITY

- Garnishment, Rule 103 (v).

INDICES

- Clerks of court, Rule 79 (c).

INDUSTRIAL COMMISSION

- Briefs, Rule 115 (k).
- Writ of error, Rule 115 (k).

INFANTS

- Declaratory judgments.
 - Purposes for which declaration may be had, Rule 57 (d).
- Default.
 - No judgment by default unless represented, Rule 55 (b) (2).
- Guardian ad litem, Rule 17 (c).
- Injunctions.
 - Rule not applicable to maintenance or custody, Rule 65 (h).
- In rem proceedings.
 - Guardian ad litem not necessary, Rule 17 (c).
- Next friend, Rule 17 (c).
- Parties.
 - Action by guardian, Rule 17 (c).
- Pleading.
 - Capacity of parties, Rule 9 (a) (1).
- Service of process.
 - Father, Rule 4 (e) (2).
 - Guardian, Rule 4 (e) (2).

INFANTS (Cont'd)

- Service of process (Cont'd)
 - Mother, Rule 4 (e) (2).
 - Person in whose service infant employed, Rule 4 (e) (2).
 - Person over 18 years, Rule 4 (e) (1).
 - Person under 18 years, Rule 4 (e) (2).
 - Person with whom infant resides, Rule 4 (e) (2).

INFERIOR TRIBUNAL

- Compelling relief from, Rule 106 (a) (2).

INFORMATION

- Pleading.
 - Allegations may be made upon information and belief, Rule 8 (e) (1).

INJUNCTIONS, Rule 65.

- Affidavit.
 - Required, Rule 11 (Note).
 - Temporary restraining order, Rule 65 (b).
- Alimony.
 - Rule not applicable, Rule 65 (h).
- Amount in controversy.
 - Stay of proceedings, appx. B, § 9.
- Attorney general.
 - State courts jurisdiction when suit commenced in federal court, Rule 65 (i).
- Clerks of court.
- Filing temporary restraining order, Rule 65 (b).
- Complaint.
 - Temporary restraining order, Rule 65 (b).
- Costs.
 - Security, Rule 65 (c).
- Counties.
 - Security not required, Rule 65 (c).
- Damages.
 - Security, Rule 65 (c).
- Divorce.
 - Rule not applicable, Rule 65 (h).
- Evidence.
 - Evidence on motion, Rule 43 (e).
- Federal courts.
 - State courts jurisdiction when suit commenced in federal court, Rule 65 (i).
- Findings of court.
 - Setting forth findings in granting or refusing interlocutory injunctions, Rule 52 (a).

RULES OF CIVIL PROCEDURE

INJUNCTIONS (Cont'd)

- Form, Rule 65 (d).
- Fraud.
 - Restoration of property taken by fraud, Rule 65 (f).
- Hearing.
 - Temporary restraining order, Rule 65 (b).
- Infants.
 - Rule not applicable to maintenance or custody, Rule 65 (h).
- Interlocutory injunctions.
 - Findings of court, Rule 52 (a).
- Jurisdiction.
 - State courts jurisdiction when suit commenced in federal court, Rule 65 (i).
- Justices of the peace.
 - Stay of proceedings, appx. B, § 9.
- Mandatory, Rule 65 (f).
- Motion.
 - Time of motion, Rule 65 (g).
- Municipal corporations.
 - Security not required, Rule 65 (c).
- Notice.
 - Preliminary, Rule 65 (a).
 - State courts jurisdictional when suit commenced in federal court, Rule 65 (i).
 - Temporary restraining order, Rule 65 (b).
- Orders.
 - Temporary restraining order, Rule 65 (b).
 - Writ of error from order granting or denying temporary injunction, Rule 111 (a) (3).
- Parent and child.
 - Rule not applicable to maintenance or custody of infants, Rule 65 (h).
- Preliminary injunction.
 - Notice, Rule 65 (a).
- Public officers.
 - State courts jurisdiction when suit commenced in federal court against state official, Rule 65 (i).
- Restoration of property, Rule 65 (f).
- Restraining order, Rule 65 (b).
 - Form, Rule 65 (d).
 - Scope, Rule 65 (d).
- Scope, Rule 65 (d).
- Security, Rule 65 (c).
- State.
 - Security not required, Rule 65 (c).

INJUNCTIONS (Cont'd)

- Stay of proceedings, Rule 62 (a).
- Justice of the peace, appx. B, § 9.
- State courts jurisdiction when suit commenced in federal court, Rule 65 (i).
- Temporary injunction.
 - Writ of error from order granting or denying, Rule 111 (a) (3).
- Temporary restraining order, Rule 65 (b).
 - Form, Rule 65 (d).
 - Scope, Rule 65 (d).
- Threats.
 - Restoration of property taken by threats, Rule 65 (f).
- Vacation of restraining order or preliminary injunction.
 - Impairment of security, Rule 65 (c).
- Venue.
 - Injunction to stay proceedings at law, Rule 98 (d).
- Verification.
 - Required, Rule 11 (Note).
- Writ of error.
 - Order granting or denying temporary injunction, Rule 111 (a) (3).
 - State courts jurisdiction when suit commenced in federal court, Rule 65 (i).

INQUIRY OF DAMAGES

- Default, Rule 55 (b) (2).

IN REM PROCEEDINGS

- Guardian ad litem.
 - Not necessary, Rule 17 (c).
- Infants.
 - Guardian ad litem not necessary, Rule 17 (c).
- Insane persons.
 - Guardian ad litem not necessary, Rule 17 (c).
- Service of process.
 - Mail or publication, Rule 4 (g).
 - Personal service outside the state, Rule 4 (f).

INSANITY

- Declaratory judgments.
 - Purposes for which declaration may be had, Rule 57 (d).
- Default.
 - No judgment by default against insane person unless represented, Rule 55 (b) (2).

INDEX

INSANITY (Cont'd)

Depositions.

Deposition before action.

Use of deposition, Rule 27 (a) (4).

Examination, Rule 35. See Physical and Mental Examination of Persons.

Guardian ad litem, Rule 17 (c).

Not necessary in in rem proceedings, Rule 17 (c).

Guardian and ward.

Action, Rule 17 (c).

In rem proceedings.

Guardian ad litem not necessary, Rule 17 (c).

Mental examination of persons, Rule 35. See Physical and Mental Examination of Persons.

Next friend, Rule 17 (c).

• Pleading.

Capacity of parties, Rule 9 (a) (1).

Substitution of parties.

Incompetency of parties, Rule 25 (b).

INSOLVENCY. See Bankruptcy and Insolvency.

INSPECTION

Discovery and production, Rule 34.

Docket.

Judgment docket, appx. B, § 10.

INSTRUCTIONS, Rule 51.

Clerks of court.

Filing with clerk of court, Rule 51.

Courts.

Holidays, appx. B, § 23.

Evidence.

Judge shall read instructions but not comment on evidence, Rule 51.

Indorsement, Rule 51.

Jury.

Additional instructions after jury has retired, Rule 47 (n).

Taking instructions on retirement, Rule 51.

New trial.

Only grounds of objections specified considered on new trial, Rule 51.

Numbering, Rule 51.

Objections, Rule 51.

Reading instructions, Rule 51.

Special instructions, Rule 51.

Special verdict, Rule 49 (a).

INSTRUCTIONS (Cont'd)

Tender to court in duplicate, Rule 51.

Verdict.

As to special verdict, Rule 49 (a).

General verdict accompanied by answer to interrogatories, Rule 49 (b).

Writ of error.

Only grounds of objections stated considered on writ of error, Rule 51.

INSULT

Damages.

Exemplary damages, Rule 101 (d).

INTENT

Pleading.

General averment sufficient, Rule 9 (b).

INTEREST

Attachment.

Rebatement in case of debts not due, Rule 102 (o).

INTERLOCUTORY PROCEEDING

Depositions.

Use of depositions, Rule 26 (d).

INTERPLEADER, Rule 22.

Complaint.

Form, appx. A, Form 14.

Counterclaim.

Defendant obtaining interpleader by counterclaim, Rule 22.

Cross-claim.

Defendant obtaining interpleader by cross-claim, Rule 22.

Forms.

Answer to complaint for money had and received, appx. A, Form 17.

Third-party practice generally, Rule 14. See Third-party Practice.

INTERROGATORIES

Agents.

Managing agent, Rule 33.

Answers, Rule 33.

Failure to serve answers, Rule 37 (d).

Application for order compelling answer, Rule 37 (a).

Associations, Rule 33.

Attendance.

Failure of party to attend, Rule 37 (d).

Attorney's fees.

Upon refusal to answer, Rule 37 (a).

RULES OF CIVIL PROCEDURE

INTERROGATORIES (Cont'd)

- Contempt, Rule 37 (b) (1).
 - Failure to comply with order, Rule 37 (b) (1).
- Corporations, Rule 33.
- Counties, Rule 33.
- Cross-interrogatories, Rule 31 (a).
- Dismissal.
 - Failure of party to attend or serve answers, Rule 37 (d).
- Expenses.
 - Upon refusal to answer, Rule 37 (a).
- Failure of party to attend or serve answers, Rule 37 (d).
- Garnishment.
 - Answer under oath, Rule 103 (f).
- Form, appx. A, Form 23.
- Interrogatories to parties, Rule 33.
- Judgments.
 - Entry of appropriate verdict on answers to interrogatories, Rule 49 (b).
 - Failure of party to attend or serve answers, Rule 37 (d).
- Jury.
 - General verdict accompanied by answer to interrogatories, Rule 49 (b).
 - Special verdict, Rule 49 (a).
- Masters.
 - Statement of accounts, Rule 53 (d) (3).
- Municipal corporations, Rule 33.
- Notice, Rule 31 (a).
 - Notice of filing, Rule 31 (c).
- Oaths, Rule 33.
- Objections.
 - Time, Rule 33.
- Officers to take responses and prepare record, Rule 31 (b).
- Orders.
 - Application for order compelling answer, Rule 37 (a).
 - For protection of parties and deponents, Rule 31 (d).
- Parties.
 - Interrogatories to parties, Rule 33.
- Partnership, Rule 33.
- Redirect interrogatories, Rule 31 (a).
- Requiring written interrogatories, Rule 30 (b).
- Service of process, Rule 31 (a).
 - Objections, Rule 33.
 - Service of copies of answers, Rule 33.
- Signing, Rule 33.

INTERROGATORIES (Cont'd)

- Time.
 - Objections, Rule 33.
 - Service of copies of answers, Rule 33.
- Unincorporated association, Rule 33.
- Verdict.
 - General verdict accompanied by answer to interrogatories, Rule 49 (b).
- Waiver.
 - Objection, Rule 32 (c) (3).

INTERVENTION, Rule 24.

- Attachment, Rule 102 (r).
 - Intervener or attachment creditor, Rule 102 (n) (2).
- Distribution of property, Rule 24 (a).
- Forms.
 - Motion to intervene as defendant under Rule 24, appx. A, Form 19.
- Garnishment.
 - Motions, Rule 103 (n).
- Intervention of right, Rule 24 (a).
- Judgment.
 - Applicant inadequately represented bound by judgment, Rule 24 (a).
- Motions, Rule 24 (c).
 - Form of motion to intervene as defendant under Rule 24, appx. A, Form 19.
- Permissive intervention, Rule 24 (b).
- Pleading, Rule 24 (c).
- Procedure, Rule 24 (c).
- Questions of law and fact.
 - When applicant's claim or defense and main action have question of law or fact in common, Rule 24 (b).
- Representation.
 - Representation of applicant's interest inadequate, Rule 24 (a).
- Statutes.
 - Permissive intervention, Rule 24 (b).
 - When statute confers an unconditional right to intervene, Rule 24 (a).
- Third-party practice generally, Rule 14.
 - See Third-party Practice.

IRRIGATION. See Waters and Water-courses.

ISSUES

- Agreed case, Rule 7 (d).
- By court, Rule 39 (b).
- Declaratory judgments.
 - Issues of fact, Rule 57 (i).

INDEX

ISSUES (Cont'd)

- Formulating, Rule 16.
- Issues of law disposed of before issues of fact, Rule 39 (d).
- Master.
 - Pre-trial conference to determine advisability of reference, Rule 16 (5).
- Pre-trial conference, Rule 16 (l).
- Reference, Rule 53 (b). See Masters.
 - Pre-trial conference to determine advisability, Rule 16 (5).
- Trial by jury, Rule 39 (a).

JAILS

- Commitment.
 - Body executions, Rule 101 (b).

JOINDER

- Motions, Rule 12 (g).

JOINDER OF CLAIMS, Rule 18.

- Answer.
 - Counterclaim, Rule 18 (a).
- Complaint, Rule 18 (a).
- Counterclaim, Rule 18 (a).
- Equity.
 - Joinder of legal and equitable claims, Rule 18 (a).
- Parties.
 - When there are multiple parties, Rule 18 (a).
- Third-party practice, Rule 18 (a).

JOINDER OF PARTIES

- Absent party not affected by judgment, Rule 19 (b).
- Effect of failure to join, Rule 19 (b).
- Joint liability, Rule 20 (c).
- Judgment, Rule 20 (a).
 - Absent person not affected, Rule 19 (b).
- Misjoinder, Rule 21.
- Names of omitted persons and reasons for nonjoinder to be pleaded, Rule 19 (c).
- Necessary joinder, Rule 19 (a).
- Negotiable instruments, Rule 20 (c).
- Nonjoinder, Rules 19, 21.
- Orders, Rule 19 (b).
- Permissive joinder, Rule 20.
- Pleading.
 - Names of omitted persons and reasons for nonjoinder to be pleaded, Rule 19 (c).

JOINDER OF PARTIES (Cont'd)

- Separate trials, Rule 20 (b).
- Several liability, Rule 20 (c).
- Suretyship, Rule 20 (c).
- When not necessary, Rule 17 (a).

JOINDER OF REMEDIES, Rule 18 (b).

- Fraudulent and voluntary conveyances, Rule 18 (b).

JOINT INDEBTEDNESS

- Proceedings against party not originally served, Rule 106 (a) (5).

JOINT JUDGMENTS

- Proceedings against persons not originally served, Rule 106 (a) (5).

JUDGES

- Acknowledgments, appx. B, § 16.
- Affidavits.
 - Affidavits for change of judge, Rule 97.
- Attorney and client.
 - Judge may not act as attorney, appx. B, § 29.
 - Judge not to have law partner, appx. B, § 30.
 - When judge shall not act unless by consent, appx. B, § 28.
- Canon of ethics.
 - Selection of judges, appx. C, § 2.
- Chambers.
 - Proceedings in chambers, Rule 77 (b).
- Change of judge.
 - Waiver, Rule 98 (k).
- Change of venue, Rule 97.
 - Change of judge, Rule 97.
- Clerks of court.
 - Adjournment by clerk in absence of judge, appx. B, § 24.
- Consent.
 - When judge shall not act unless by consent, appx. B, § 28.
- Conservators of the peace.
 - Judges to conserve the peace, appx. B, § 33.
- County courts.
 - Powers, appx. B, § 34.
- Disability of judge, Rule 63.
- Disqualification, Rule 97.
- Motions.
 - Change of venue, Rule 97.
- New trial.
 - Disability of judge, Rule 63.

RULES OF CIVIL PROCEDURE

JUDGES (Cont'd)

- Oaths.
 - Who may administer, appx. B, § 13.
- Prejudice, Rule 97.
- Relationship.
 - When judge shall not act unless by consent, appx. B, § 28.
- Relation to parties, Rule 97.
- Vacancy in office.
 - Action not affected by vacancy, appx. B, § 17.

JUDGMENTS, Rules 54-64.

- Abatement, revival and survival.
 - Entry after verdict or decision regardless of death, Rule 54 (f).
- Acknowledgment.
 - Satisfaction, Rule 58 (b).
- Amendments, Rule 110 (a).
- Arbitration and award, Rule 109 (e).
- Associations.
 - Judgment against association, Rule 54 (e).
- Attachment.
 - Final judgment prorated, Rule 102 (l).
 - Judgment creditors, Rule 102 (j) (2).
 - No final judgment until 30 days after levy, Rule 102 (j).
 - Order by which attachment is released or sustained is final judgment, Rule 102 (aa).
 - Procedure when judgment is for defendant, Rule 102 (v).
 - Satisfaction of judgment, Rule 102 (t).
- Claims.
 - Disposition of claim, Rule 54 (b).
- Clerks of court.
 - Docket open for inspection, appx. B, sec. 10.
 - Entry, Rule 58 (a).
- Conditions.
 - Separate judgments, Rule 54 (b).
- Confession of judgment.
 - Summary judgment rule does not apply, Rule 56 (Note).
- Contempt.
 - Interference, Rule 107 (a).
- Costs, Rule 54 (d).
 - Entry, Rule 58 (a).
- Counterclaim.
 - Separate judgment, Rule 13 (i).
- Cross-claim.
 - Separate judgment, Rule 13 (i).

JUDGMENTS (Cont'd)

- Death.
 - Entry after verdict or decision regardless of death, Rule 54 (f).
 - Liens, Rule 54 (f).
- Death by wrongful act.
 - Interest of father and mother, Rule 17 (b).
- Declaratory judgments, Rule 57. See Declaratory judgments.
- Deeds.
 - Direction to deliver deeds, Rule 70.
- Default, Rule 55. See Default.
- Definition, Rule 54 (a).
- Demand.
 - Demand for judgment, Rule 54 (c).
- Depositions.
 - After judgment, Rule 27 (b).
 - Deposition in aid of judgment, Rule 69 (h).
 - Failure of party to attend or serve answers, Rule 37 (d).
- Directed verdict.
 - Entry of judgment on directed verdict, Rule 50 (b).
- Docket.
 - Entry, Rule 58 (a).
 - Judgment docket, Rule 79 (d).
 - Open for inspection, appx. B, sec. 10.
 - Revival, Rule 54 (h).
 - Satisfaction, Rule 58 (b).
- Entry, Rule 58 (a).
 - Clerk of court, Rule 58 (a).
 - Docket, Rule 58 (a).
- Executions, Rule 69. See Executions.
 - Where order or judgment is for delivery of possession, Rule 70.
- Findings of court.
 - Entry of judgment on findings, Rule 52 (a).
- Form, 54 (a).
- Garnishment, Rule 103 (i).
 - Effect of judgment against garnishee, Rule 103 (q).
 - Order by which garnishment is released or sustained is final judgment, Rule 102 (aa).
 - Plaintiff failing to reply to garnishee's answer, Rule 103 (l).
 - Refusal of garnishee to answer, Rule 103 (k).
 - Remedies of judgment creditor, Rule 103 (y).
 - Set-off of judgment by garnishee, Rule 103 (o).
 - Trial of traverse, Rule 103 (m).

INDEX

JUDGMENTS (Cont'd)

- Harmless error, Rule 61.
- In rem proceedings.
 - Against unknown defendants, Rule 54 (g).
- Interrogatories.
 - Entry of appropriate verdict on answers to interrogatories, Rule 49 (b).
 - Failure of party to attend or serve answers, Rule 37 (d).
- Intervention.
 - Applicant inadequately represented bound by judgment, Rule 24 (a).
- Joinder of parties, Rule 20 (a).
 - Absent person not affected, Rule 19 (b).
- Joint judgments.
 - Proceedings against persons not originally served, Rule 106 (a) (5).
- Justices of the peace.
 - Transcript filed in district court, appx. B, sec. 11.
- Liens.
 - Effect of revival, Rule 54 (h).
 - Judgment after death of party, Rule 54 (f).
- Limitation of actions.
 - Limitation of actions to set aside, appx. B, sec. 1.
- Masters.
 - Report of master not recited in judgment, Rule 54 (a).
- Mistake.
 - Clerical mistakes, Rule 60 (a).
 - Relief from judgment, Rule 60 (b).
- Modifying.
 - Harmless error, Rule 61.
- Motions.
 - Motion for judgment after failure to raise objection in answer or reply, Rule 12 (h).
 - Motion for judgment on pleading, Rule 12 (b).
 - Relief from judgment, Rule 60.
 - Revival, Rule 54 (h).
 - Stay of proceedings on motion for judgment, Rule 62 (b).
- New trials, Rule 59. See New Trials.
- Offer of judgment, Rule 68.
 - Service of process, Rule 5 (a).
- Orders.
 - Order for property to be applied on judgment, Rule 69 (f).
 - Summary judgments, Rule 56 (d).
- Parties.
 - Proceedings against parties not originally served, Rule 106 (a) (5).

JUDGMENTS (Cont'd)

- Partnership.
 - Judgment against partnership, Rule 54 (e).
- Pleading, Rule 9 (e).
 - Demand, Rule 8 (a).
 - Motion for judgment on pleading, Rule 12 (c).
 - Not necessary to show jurisdiction in pleading judgment, Rule 9 (e).
 - Not recited, Rule 54 (a).
- Proceedings subsequent to judgment, Rule 69. See Executions.
- Public officers.
 - Usurpation of office, Rule 106 (a) (3).
- Receivers.
 - Appointment before judgment, Rule 66 (a) (1).
 - Appointment by or after judgment, Rule 66 (a) (2).
 - Stay of proceedings, Rule 62 (a).
- Relief from judgment, Rule 60.
- Replevin, Rule 104 (m).
- Revival of judgments, Rule 54 (h). See Abatement, Revival and Survival.
- Satisfaction, Rule 58 (b).
- Separate judgments.
 - Disposing of claim, Rule 54 (b).
- Service of process.
 - Judgment in personam upon service of process outside of state, Rule 4 (f) (Note).
 - Offer of judgment, Rule 5 (a).
- Specific acts, Rule 70.
- Stay of proceedings.
 - Automatic stay, Rule 62 (a).
 - Exceptions, Rule 62 (a).
 - Injunctions, Rule 62 (a).
 - Stay of proceedings on motion for judgment, Rule 62 (b).
 - Stay on motion for judgment, Rule 62 (b).
 - Supersedeas, Rule 62 (a).
- Stay of proceedings to enforce, Rule 62.
- Substitution of parties.
 - Either before or after judgment, Rule 25 (e).
- Summary judgment, Rule 56. See Summary Judgment.
- Summons.
 - Relief from judgment where defendant has not been personally served, Rule 60 (b).
- Surprise.
 - Relief from judgment, Rule 60 (b).

RULES OF CIVIL PROCEDURE

JUDGMENTS (Cont'd)

- Time.
 - Entry of judgment disposing of claim, Rule 54 (b).
 - Offer of judgment, Rule 68.
 - Revival, Rule 54 (h).
- Title.
 - Judgment divesting title, Rule 70.
- Unincorporated association, Rule 54 (e).
- Unknown parties.
 - Against unknown defendants, Rule 54 (g).
 - Limitation on action to set aside, appx. B, § 1.
- Vacating.
 - Harmless error, Rule 61.
- Various stages, Rule 54 (b).
- Verdict.
 - Entry of appropriate judgment upon verdict and answers to interrogatories, Rule 49 (b).
 - Entry of judgment on directed verdict, Rule 50 (b).
 - Entry of judgment on special verdict, Rule 58 (a).
- Writ of error.
 - Court may enter final judgment, Rule 118 (f).
 - Entry of judgment.
 - Record, Rule 112 (a).
 - Failure to prosecute, Rule 118 (a).
 - Final judgment, Rule 111 (a).
 - Joint of several writs, Rule 111 (d).
 - Review of revived judgment, Rule 54 (h).
 - Supplemental record showing proceedings subsequent to judgment, Rule 112 (a).

JUDICIAL NOTICE

- Pleading.
 - Statutes, Rule 9 (h).

JURISDICTION

- Affidavit.
 - Relief when jurisdiction exceeded, Rule 106 (a) (4).
- Complaint.
 - Allegation, appx. A, Forms, Introductory Statement, Paragraph 3.
 - Relief when jurisdiction exceeded, Rule 106 (a) (4).
 - Time of filing complaint determines jurisdiction, Rule 3 (b).
- Concurrent jurisdiction.
 - Transfers, Rule 98 (h).

JURISDICTION (Cont'd)

- County court.
 - Allegation, appx. A, Forms, Introductory Statement, Paragraph 3.
 - Counterclaim and cross-claim claimed in excess of \$2,000.00 certified to district court, Rule 13 (l).
 - Transfer where concurrent jurisdiction, Rule 98 (h).
- Courts.
 - Inferior tribunal exceeding jurisdiction, Rule 106 (a) (4).
 - Jurisdiction not extended or limited by rules, Rule 82.
- Dismissal.
 - Suggestion of the lack of jurisdiction, Rule 12 (h).
- District court.
 - Counterclaims and cross-claims in excess of \$2,000.00 certified to district courts, Rule 13 (1).
 - Transfer where concurrent jurisdiction, Rule 98 (h).
- Forms.
 - Allegations, appx. A, Form 2.
- Garnishment.
 - When jurisdiction acquired, Rule 103 (e).
- Injunctions.
 - State courts jurisdiction when suit commenced in federal court, Rule 65 (i).
- Motions.
 - Lack of jurisdiction over persons, Rule 12 (b).
 - Lack of jurisdiction over subject matter, Rule 12 (b).
- Pleading.
 - Denial should be made specifically, Rule 9 (e).
 - Denial should be made with particularity, Rule 9 (e).
 - Form, appx. A, Form 2.
 - Not necessary to show jurisdiction in pleading judgment, Rule 9 (e).
 - Statement of grounds upon which court's jurisdiction depends, Rule 8 (a).
- Prohibition.
 - Relief in nature of prohibition not granted except in matters of great public importance, Rule 116.
- Public officers.
 - Relief when jurisdiction exceeded, Rule 106 (a) (4).
- Service of process.
 - Time of service determines jurisdiction, Rule 3 (b).

INDEX

JURISDICTION (Cont'd)

- Stay of proceedings.
 - Relief when jurisdiction exceeded, Rule 106 (a) (4).
- Stipulations.
 - Transfer where concurrent jurisdiction, Rule 98 (h).
- Summons.
 - Time of service determines, Rule 3 (b).
- Supreme court proceedings.
 - Original jurisdiction, Rule 116.
- Time.
 - Complaint or service determines, Rule 3 (b).
- Transfer, Rule 98 (h).

JURY

- Additional instructions, Rule 47 (n).
- Additional jurors.
 - Costs, Rule 48.
- Advisory jury, Rule 39 (c).
- Affinity.
 - Challenge for cause, Rule 47 (e) (2).
- Agency.
 - Challenge for cause when relationship of principal or agent exists, Rule 47 (e) (3).
- Alternate jurors, Rule 47 (b).
- Array.
 - Challenge to array, Rule 47 (c).
- Canons of ethics.
 - Attitude toward jury, appx. C, § 23.
- Cause.
 - Challenges for cause, Rule 47 (e). See within this title, "Challenges."
- Challenges.
 - Alternate jurors, Rule 47 (b).
 - Cause.
 - Challenges for cause, Rule 47 (e).
 - Challenge for cause.
 - Affinity, Rule 47 (e) (2).
 - Consanguinity, Rule 47 (e) (2).
 - Expression of unqualified opinion, Rule 47 (e) (6).
 - Filling vacancy, Rule 47 (g).
 - Interest, Rule 47 (e) (5).
 - Member of family, Rule 47 (e) (3).
 - Order, Rule 47 (f).
 - Partner, Rule 47 (e) (3).
 - Relationship of employer and clerk, Rule 47 (e) (3).
 - Relationship of guardian and ward, Rule 47 (e) (3).
 - Relationship of master and servant, Rule 47 (e) (3).
 - Relationship of principal or agent, Rule 47 (e) (3).

JURY (Cont'd)

- Challenges (Cont'd)
 - Challenges for cause (Cont'd)
 - Security on bond, Rule 47 (e) (3).
 - Serving in previous trial, Rule 47 (e) (4).
 - State of mind evincing enmity, Rule 47 (e) (7).
 - Want of qualifications, Rule 47 (e) (1).
 - Challenge to array, Rule 47 (c).
 - Individual jurors, Rule 47 (d).
 - Order, Rule 47 (f).
 - Peremptory challenge, Rule 47 (h).
 - Alternate jurors, Rule 47 (b).
 - Individual jurors, Rule 47 (d).
- Clerks of court.
 - Administration of oath, Rule 47 (g).
 - Selecting, Rule 47 (g).
- Consanguinity.
 - Challenge for cause, Rule 47 (e) (2).
- Consent to trial by court without jury, Rule 39 (a).
- Contracts.
 - Jury trial on issues of fact, Rule 38 (a).
- Copies.
 - Taking of papers by jury, Rule 47 (m).
- Costs.
 - Additional jurors, Rule 48.
- Damages.
 - Breach of contract, Rule 38 (a).
- Deliberation, Rule 47 (l).
- Demand.
 - Demand for jury trial, Rule 38 (b).
 - Specification of issues, Rule 38 (c).
- Discharge.
 - Alternate jurors, Rule 47 (b).
 - Final adjournment, Rule 47 (p).
 - When juror discharged, Rule 47 (j).
- Docket.
 - Designation of action as jury action, Rule 39 (a).
- Employer and clerk.
 - Challenge for cause when relationship exists, Rule 47 (e) (3).
- Enmity.
 - Challenge for cause for existence of state of mind evincing enmity, Rule 47 (e) (7).
- Examination, Rule 47 (a).
 - Examination of premises by jury, Rule 47 (k).
- Expression of opinion.
 - Challenge for cause, Rule 47 (e) (6).

RULES OF CIVIL PROCEDURE

JURY (Cont'd)

- Family.
 - Challenge for cause of member of family, Rule 47 (e) (3).
- Form.
 - Oath, Rule 47 (i).
- Guardian and ward.
 - Challenge for cause when relationship exists, Rule 47 (e) (3).
- Instructions, Rule 51. See Instructions.
- Interest.
 - Challenge for cause, Rule 47 (e) (5).
- Interrogatories.
 - General verdict accompanied by answer to interrogatories, Rule 49 (b).
 - Special verdict, Rule 49 (a).
- Issues of fact.
 - Where jury right exists, Rule 38 (a).
- Master and servant.
 - Challenge for cause when relationship exists, Rule 47 (e) (3).
- Motions.
 - Challenge to array, Rule 47 (c).
- New trials.
 - Misconduct of jury, Rule 59 (a) (2).
- Number, Rule 48.
- Oaths, Rule 47 (g).
 - Form, Rule 47 (i).
- Opinion.
 - Challenge for cause, Rule 47 (e) (6).
- Orders.
 - Examination of premises by jury, Rule 47 (k).
- Papers.
 - Papers taken by jury, Rule 47 (m).
- Partnership.
 - Challenge for cause of partner, Rule 47 (e) (3).
- Peremptory challenges, Rule 47 (h).
 - Alternate jurors, Rule 47 (b).
 - Individual jurors, Rule 47 (d).
- Pleading.
 - Indorsement of demand upon pleading, Rule 38 (b).
- Polling jury, Rule 47 (q).
- Qualifications.
 - Challenge for cause, Rule 47 (e) (1).
- Retirement of jury, Rule 47 (l).
 - Additional instructions, Rule 47 (n).
 - Taking instructions, Rule 51.
- Right to jury, Rule 38.
 - Waiver by not demanding submission on special verdict, Rule 49 (a).

JURY (Cont'd)

- Selecting, Rule 47 (g).
- Separation from other persons, Rule 47 (l).
- State.
 - No trial with advisory jury, Rule 39 (c).
- Stipulations.
 - Consent to trial by court sitting without jury, Rule 39 (a).
- Suretyship.
 - Challenge for cause for security on bond, Rule 47 (e) (3).
- Time.
 - Demand for jury, Rule 38 (b).
- Unqualified opinion.
 - Challenge for cause, Rule 47 (e) (6).
- Vacancy.
 - Filling vacancy, Rule 47 (g).
- Verdict. See Verdict.
- View by jury, Rule 47 (k).
- Waiver.
 - Failure to demand jury, Rule 38 (d).
 - Motion for directed verdict does not waive right to trial by jury, Rule 50 (a).
 - Right to jury trial unless waived, Rule 38 (a).
 - Special verdict, Rule 49 (a).

JUSTICES OF THE PEACE

- Acknowledgments, appx. B, § 16.
- Attorney and client.
 - Justice not to have law partner, appx. B, § 30.
- District court.
 - Transcript of justice's judgment filed in district court, appx. B, § 11.
- Execution, appx. B, § 11.
- Injunctions.
 - Stay of proceedings, appx. B, § 9.
- Judgment.
 - Transcript filed in district court, appx. B, § 11.
- Liens, appx. B, § 11.
- Oaths.
 - Who may administer, appx. B, § 13.
- Vacancy in office.
 - Action not affected by vacancy, appx. B, § 17.

JUVENILE COURT

- Procedure governed, Rule 1 (a).
- Writ of error.
 - Final judgment, Rule 111 (a) (1).

INDEX

KNOWLEDGE

- Pleading.
 - General averment sufficient, Rule 9 (b).

LACHES

- Defenses.
 - Pleadings, Rule 8 (c).
- Pleading.
 - Affirmative defenses, Rule 8 (c).

LEADING QUESTIONS, Rule 43 (b).

LEGAL HOLIDAYS

- Time.
 - Exclusion, Rule 6 (a).

LEGATION

- Depositions.
 - Before secretary of legation, Rule 28 (b).

LETTERS

- Discovery, Rule 34.
- Production, Rule 34.

LIBEL AND SLANDER

- Answer, appx. B, § 3.
- Complaint, appx. B, § 2.
- Damages.
 - Reduction, appx. B, § 3.
- Evidence.
 - Mitigating circumstances, appx. B, § 3.
- Mitigating circumstances, appx. B, § 3.
- Pleading, appx. B, § 2.
 - Answer, appx. B, § 3.
 - Truth, appx. B, § 3.
- Truth, appx. B, § 3.

LIBERAL CONSTRUCTION OF RULES, Rule 1 (a).

LIBERTY

- Illegal detention of person, Rule 106 (a) (1).

LIBRARY

- Abstracts, Rule 261.
- Abuse of privileges, Rule 262.
- Briefs, Rule 261.
- Copies.
 - Certified copies of laws of other states, Rule 264.

LIBRARY (Cont'd)

- Silence, Rule 263.
- Statutes.
 - Certified copies of laws of other states, Rule 264.
- Withdrawal of books, Rule 262.

LICENSES

- Defenses.
 - Pleading, Rule 8 (c).
- Pleading.
 - Affirmative defenses, Rule 8 (c).

LIENS

- Garnishment.
 - Plaintiff may pay lien and be subrogated, Rule 103 (t).
 - Subrogation where pledge held under condition, Rule 103 (u).
- Judgments.
 - Effect of revival, Rule 54 (h).
 - Judgment after death of party, Rule 54 (f).
- Justices of the peace, appx. B, § 11.
- Supersedeas.
 - Release of lien in giving bond, Rule 113 (g).

LIMITATION OF ACTIONS

- Defenses.
 - Pleading, Rule 8 (c).
- Judgments.
 - Limitations of actions to set aside, appx. B, § 1.
- Motion.
 - Cannot be raised under Rule 12 (b), Rule 12 (b). (Note).
- Pleading.
 - Affirmative defenses, Rule 8 (c).
 - Cannot be raised by motion under Rule 12 (b), Rule 12 (b). (Note).
- Writ of error.
 - Time of issuance, Rule 111 (b).
- Writ of error.
 - Time of issuance, Rule 111 (b).

LIQUIDATORS

- Parties, Rule 17 (a).
- Service of process, Rule 4 (e) (3).

LIS PENDENS

- Notice, Rule 105 (f).
- Supersedeas, Rule 113 (g).
- Pending actions, Rule 105 (f).

RULES OF CIVIL PROCEDURE

LIS PENDENS (Cont'd)

- Pleading, Rule 105 (f).
- Real property, Rule 105 (f).
- Supersedeas.
 - Notice of lis pendens, Rule 113 (g).
- Writ of error, Rule 105 (f).

LOST OR DESTROYED INSTRUMENTS

- Evidence.
 - Secondary evidence, Rule 43 (f) (1).

MAIL

- Service of process, Rule 4 (g).
 - Additional time on service by mail, Rule 6 (e).
- Certificate of clerk to prove service, Rule 4 (i) (3).
- Completion on date of filing of clerk's proof, Rule 4 (g) (1).
- Corporations.
 - Copy to last known address when service not upon executive officer, secretary, etc., Rule 4 (e) (5).
- Direction of clerk to serve process, Rule 4 (g) (1).
- Motion, Rule 4 (g) (1).
 - Address of person to be served, Rule 4 (g) (1).
 - Ex parte hearing, Rule 4 (g) (1).
 - Statement of facts, Rule 4 (g) (1).
- Municipal corporations, Rule 4 (e) (6).
- Oath, Rule 4 (g) (1).
- Pleadings and other papers, Rule 5 (b) (1).
- Return receipt, Rule 4 (g) (1).

MALICE

- Damages.
 - Exemplary damages, Rule 101 (d).
- Executions.
 - Body executions, Rule 101 (a).
- Pleading.
 - General averment sufficient, Rule 9 (b).

MANDAMUS

- Abolished, Rule 106 (a).

MARK

- Signing, Rule 110 (b).

MARRIAGE

- Deposition before action, Rule 27 (a) (1).

MARRIED WOMEN

- Parties, Rule 17 (b).

MARSHAL

- Definitions.
 - Use of term, Rule 110 (b).
- Service of process.
 - Certificate of United States marshal to prove service, Rule 4 (i) (1).
 - United States marshal, Rule 4 (d) (2).

MASCULINE INCLUDES FEMININE, Rule 110 (b).

MASTER AND SERVANT

- Jury.
 - Challenge for cause when relationship exists, Rule 47 (e) (3).

MASTERS

- Accounts.
 - Statement of accounts, Rule 53 (d) (3).
- Appointment, Rule 53 (a).
- Clerks of court.
 - Filing report with clerk of court, Rule 53 (e) (1).
- Compensation, Rule 53 (a).
- Contempt.
 - Definition, Rule 107 (a).
 - Punishment of witness, Rule 53 (d) (2).
- Default.
 - Reference, Rule 55 (b) (2).
- Diligence.
 - Procedure with diligence, Rule 53 (d) (1).
- Evidence.
 - Admissibility of master's findings of fact in jury action, Rule 53 (e) (3).
 - Master not directed to report evidence in jury action, Rule 53 (e) (3).
 - Record, Rule 53 (c).
 - Ruling upon admissibility, Rule 53 (c).
- Execution.
 - Order for appearance of judgment debtor, Rule 69 (d).
 - Writ of execution against delinquent party for compensation, Rule 53 (a).
- Findings.
 - Admissible as evidence in jury action, Rule 53 (e) (3).
 - Considered as findings of court, Rule 52 (a).
 - Court accepts master's findings unless clearly erroneous, Rule 53 (e) (2).
 - Stipulation, Rule 53 (e) (4).
- Interrogatories.
 - Statement of accounts, Rule 53 (d) (3).
- Issues.
 - Pre-trial conference to determine advisability of reference, Rule 16 (5).

INDEX

MASTERS (Cont'd)

- Judgments.
 - Report of master not recited in judgment, Rule 54 (a).
- Meetings, Rule 53 (d) (1).
- Notice of filing report, Rule 53 (e) (1).
- Oaths.
 - Witnesses, Rule 53 (c).
- Orders.
 - Application to court for order to speed proceedings, Rule 53 (d) (1).
- Powers, Rule 53 (c).
- Production of documents, Rule 53 (c).
- Reference, Rule 53 (b).
- Report.
 - Adoption, Rule 53 (e) (2).
 - Contents, Rule 53 (e) (1).
 - Draft of report, Rule 53 (e) (5).
 - Filing, Rule 53 (e) (1).
 - Judgment.
 - Not recited in judgment, Rule 54 (a).
 - Jury action, Rule 53 (e) (3).
 - Modification, Rule 53 (e) (2).
 - Non-jury actions, Rule 53 (e) (2).
 - Objection, Rule 53 (e) (2).
 - Stipulation as to findings, Rule 53 (e) (4).
- Statement of accounts, Rule 53 (d) (3).
- Stipulations.
 - As to findings, Rule 53 (e) (4).
- Witnesses, Rule 53 (d) (2).
 - Contempt, Rule 53 (d) (2).
 - Oaths, Rule 53 (c).
- Writ of error.
 - Report, Rule 112 (a).

MILITARY SERVICE

- Powers, Rule 120. See Powers.
- Sales.
 - Powers, Rule 120. See Powers.

MISCELLANEOUS RULES, Rule 110.

MISJOINDER

- Parties, Rule 21.

MISTAKE

- Arbitration and award.
 - Relief, Rule 109 (g).
- Complaint.
 - Form of complaint for money paid by mistake, appx. A, Form 7.

MISTAKE (Cont'd)

- Judgment.
 - Clerical mistakes, Rule 60 (a).
 - Relief from judgment, Rule 60 (b).
- Pleading.
 - Form of complaint for money paid by mistake, appx. A, Form 7.
 - Particularity, Rule 9 (b).

MITIGATING CIRCUMSTANCES

- Libel and slander, appx. B, § 3.
- Pleading, Rule 8 (c).

MITTIMUS, Rule 101 (b).

MONEY HAD AND RECEIVED

- Answer.
 - Form, appx. A, Form 17.
- Complaint.
 - Form, appx. A, Form 8.

MONEY LENT

- Complaint.
 - Forms, appx. A, Form 6.

MONEY PAID BY MISTAKE

- Complaint.
 - Forms, appx. A, Form 7.

MORTGAGES

- Bond.
 - Supersedeas in action to foreclose mortgage, Rule 113 (c).
- Conveyances.
 - Mortgage not deemed a conveyance, appx. B, § 12.
- Deeds of trust.
 - Fact of deed being a mortgage may be proved by parol evidence, appx. B, § 12.
- Evidence.
 - Fact of deed being a mortgage may be proved by parol evidence, appx. B, § 12.
- Parol evidence.
 - Fact of deed being a mortgage may be proved by parol evidence, appx. B, § 12.

MOTHER

- Parties.
 - Suit for injury or death of child, Rule 17 (b).
- Service of process.
 - Service on infant, Rule 4 (e) (2).

RULES OF CIVIL PROCEDURE

MOTIONS, Rules 7-16; appx. A, Forms, Introductory Statement, Paragraph 2.

Adoption by reference.

Statements in other pleadings, Rule 10 (c).

Affidavits.

Service when motion is supported by affidavit, Rule 6 (d).

Appeal and error.

Overruling motion preserves point for consideration on review, Rule 12 (b). (Note).

Attachment.

Amendment of affidavit, Rule 102 (q).
New trial, Rule 102 (aa).

Attorney and client.

Signing, appx. A, Forms, Introductory Statement, Paragraph 4.

Briefs, Rule 115 (f).

Change of venue, Rule 98 (g).

Clerks of court.

Granted as of course, Rule 77 (c).

Consolidation, Rule 12 (g).

Costs.

Motions for cost bonds not excluded by Rule 12, Rule 12 (Note).

Courts always open for making and directing interlocutory motions, Rule 77 (a).

Day.

Motion day, Rule 78.

Defenses.

Not waived by joinder with motion permitted under Rule 12, Rule 12 (b).
Preliminary hearing, Rule 12 (d).

Definiteness.

Motion for more definite statement, Rule 12 (e).

Denial of motions.

Effect on responsive pleading, Rule 12 (a).

Depositions.

Enlarging or shortening time for taking, Rule 30 (a).

Leave to take depositions after judgment or after writ of error, Rule 27 (b).

Limiting examination, Rule 30 (d).

Motion to suppress deposition for errors and irregularities as to completion and return, Rule 32 (d).

Termination of examination, Rule 30 (d).

Use of depositions, Rule 26 (d).

Determination without oral hearing, Rule 78.

MOTIONS (Cont'd)

Directed verdict, Rule 50.

Discovery, Rule 34.

Dismissal.

Form, appx. A, Form 15.

Involuntary dismissal, Rule 41 (b) (1).

Evidence, Rule 43 (e).

Ex parte.

Hearing.

Service of process, Rule 4 (g) (1).

Third-party practice, Rule 14 (a).

Findings of court.

Amendment, Rule 52 (b).

Forms.

Bringing in third party defendant, appx. A, Form 18.

Dismissal, appx. A, Form 15.

Intervention, appx. A, Form 19.

Motion for production of documents under Rule 34, appx. A, Form 20.

Pleading, appx. A, Forms, Introductory Statement, Paragraph 2.

Signing by attorney, appx. A, Forms, Introductory Statement, Paragraph 4.

Frauds, statute of.

Defense cannot be raised under Rule 12 (b), Rule 12 (b). (Note).

Garnishment.

Intervention, Rule 103 (n).

Grant of motions.

Effect on responsive pleading, Rule 12 (a).

Injunctions.

Time of motion, Rule 65 (g).

Intervention, Rule 24 (c).

Form of motion to intervene as defendant under Rule 24, appx. A Form 19.

Joinder, Rule 12 (g).

Judges.

Change of venue, Rule 97.

Judgment.

Motion for judgment after failure to raise objection in answer or reply, Rule 12 (h).

Motion for judgment on pleading, Rule 12 (b).

Relief from judgment, Rule 60.

Revival, Rule 54 (h).

Stay of proceedings on motion for judgment, Rule 62 (b).

Jurisdiction.

Lack of jurisdiction over persons, Rule 12 (b).

Lack of jurisdiction over subject matter, Rule 12 (b).

INDEX

MOTIONS (Cont'd)

- Jury.
 - Challenge to array, Rule 47 (c).
- Limitation of action.
 - Cannot be raised under Rule 12 (b), Rule 12 (b). (Note).
- New trials. See New Trials.
- Orders.
 - Application for order by motion, Rule 7 (b) (1).
 - Contents of application, Rule 7 (b) (1).
 - Writing, Rule 7 (b) (1).
- Particulars, bill of, Rule 12 (e).
 - Effect of granting motion on time for filing pleading, Rule 12 (a).
- Parties.
 - Dropping or adding parties, Rule 21.
- Pleadings, appx. A, Forms, Introductory Statement, Paragraph 2.
 - Motion for judgment on pleading, Rule 12 (c).
 - Separate count, Rule 12 (e).
- Powers.
 - Sale under powers, Rule 120 (a).
- Production of documents.
 - Form of motion for production of documents under Rule 34, appx. A, Form 20.
- Separate statement.
 - Motion for separate statement, Rule 12 (e).
- Service of process.
 - Mail, Rule 4 (g) (1).
 - Address of person to be served, Rule 4 (g) (1).
 - Ex parte hearing, Rule 4 (g) (1).
 - Statement of facts, Rule 4 (g) (1).
 - Motion supported by affidavit served with affidavit, Rule 6 (d).
 - Pleading insufficiency of process, Rule 12 (b).
 - Publication, Rule 4 (h).
 - Address or last known address, Rule 4 (h).
 - Ex parte hearing, Rule 4 (h).
 - Statement of facts, Rule 4 (h).
 - Statement that party unknown, Rule 4 (h).
 - Written motion other than one heard ex parte, Rule 5 (a).
- Signing.
 - Attorney, appx. A, Forms, Introductory Statement, Paragraph 4.
 - Party, appx. A, Forms, Introductory Statement, Paragraph 5.
- Striking pleadings, Rule 12 (f).

MOTIONS (Cont'd)

- Substitution of parties.
 - In case of death, Rule 25 (a).
 - Transfer of interest, Rule 25 (c).
- Summary judgment, Rule 56 (c).
 - Case not fully adjudicated on motion, Rule 56 (d).
 - For claimant, Rule 56 (a).
- Supplemental pleading, Rule 15 (d).
- Technical forms.
 - Not required, Rule 8 (e) (1).
- Third-party practice.
 - Ex parte motion to bring in third-party, Rule 14 (a).
 - Form of motion to bring in third-party defendant, appx. A, Form 18.
- Time.
 - Effect of motions on time required for pleading, Rule 12 (a).
 - Enlargement, Rule 6 (b).
 - Motion day, Rule 78.
 - Permitting act to be done after expiration, Rule 6 (b).
 - Service, Rule 6 (d).
- Venue.
 - Improper venue, Rule 12 (b).
- Waiver.
 - Defenses waived by failure to make motion, Rule 12 (h).
- Writ of error, Rule 115 (f).

MULTIPLE PARTIES

- Joinder of claims, Rule 18 (a).

MUNICIPAL CORPORATIONS

- Clerk.
 - Service of process, Rule 4 (e) (6).
- Declaratory judgments.
 - Legal relations affected by ordinance, Rule 57 (b).
 - Ordinances, Rule 57 (j).
- Depositions.
 - Use of deposition of officer, Rule 26 (d) (2).
- Garnishment.
 - Funds, appx. B, §§ 4-8.
 - Public officials, Rule 103 (c).
- Injunctions.
 - Security not required, Rule 65 (c).
- Interrogatories, Rule 33.
- Service of process, Rule 4 (e) (6).
- Supersedeas.
 - When bond not required, Rule 113 (d).

RULES OF CIVIL PROCEDURE

NAMES

- Pleading.
- Omitted persons, Rule 19 (c).

NE EXEAT

- Courts, appx. B, § 31.

NEGLIGENCE

- Arbitration and award.
- Relief, Rule 109 (g).
- Complaint.
- Forms, appx. A, Form 9.
- Responsibility of two parties, appx. A, Form 10.
- Where plaintiff is unable to determine whether person responsible is C. D. or E. F., appx. A, Form 10.
- Wilfulness or recklessness, appx. A, Form 10.
- Executions.
- Body executions, Rule 101 (a).

NEGOTIABLE INSTRUMENTS

- Complaint.
- Forms, appx. A, Form 3.
- Garnishment.
- Garnishee not liable on instruments not due, Rule 103 (p).
- Joinder of parties, Rule 20 (c).
- Venue.
- Actions upon notes or bills of exchange, Rule 98 (c).

NEWLY DISCOVERED EVIDENCE

- New trials, Rule 59 (a) (4).
- Time for motion, Rule 59 (b).

NEWSPAPERS

- Canons of ethics.
- Discussion of pending litigation, appx. C, § 20.
- Service of process.
- Publication, Rule 4 (h).

NEW TRIALS

- Accident.
- Ground, Rule 59 (a) (3).
- Affidavits.
- Reply affidavit, Rule 59 (c).
- Supporting motion by affidavit, Rule 59 (a).
- Time for filing, Rule 59 (c).
- Time for serving, Rule 59 (c).
- Appeal and error.
- Necessity for motion, Rule 59 (e).

NEW TRIALS (Cont'd)

- Attachment, Rule 102 (aa).
- Damages.
- Excessive or inadequate damages, Rule 59 (a) (5).
- Error in law, Rule 59 (a) (7).
- Evidence.
- Insufficiency of evidence, Rule 59 (a) (6).
- Newly discovered evidence, Rule 59 (a) (4).
- Time for motion, Rule 59 (b).
- Excessive damages.
- Ground, Rule 59 (a) (5).
- Findings of court.
- Motion for amendment of findings made with motion for new trial, Rule 52 (b).
- Grounds, Rule 59 (a).
- Harmless error, Rule 61.
- Inadequate damages.
- Grounds, Rule 59 (a) (5).
- Initiative of court, Rule 59 (d).
- Instructions.
- Only grounds of objections specified considered on new trial, Rule 51.
- Judges.
- Disability of judge, Rule 63.
- Jury.
- Misconduct of jury, Rule 59 (a) (2).
- Motions.
- Joinder of motion for directed verdict with motion for new trial, Rule 50 (b).
- Necessity for motion for appeal, Rule 59 (e).
- Stay of proceedings, Rule 62 (b).
- Supported by affidavit, Rule 59 (a).
- Time for motion, Rule 59 (b).
- Newly discovered evidence, Rule 59 (a) (4).
- Time for motion, Rule 59 (b).
- Stay of proceedings.
- Stay on motion for new trial, Rule 62 (b).
- Surprise.
- Ground, Rule 59 (a) (3).
- Time.
- Filing affidavit, Rule 59 (c).
- Initiative of court, Rule 59 (d).
- Motion, Rule 59 (b).
- Serving affidavit, Rule 59 (c).
- Verdict.
- Joinder of motion for new trial with motion for directed verdict, Rule 50 (b).
- New trial if no verdict, Rule 47 (o).

INDEX

NEXT FRIEND

- Infants, Rule 17 (c).
- Insane person, Rule 17 (c).

NEXT OF KIN

- Declaratory judgments.
 - Purposes for which declaration may be had, Rule 57 (d).

NONJOINDER, Rules 19, 21. See Joinder of Parties.

NONRESIDENTS

- Attachment.
 - Torts, Rule 102 (a).
- Depositions.
 - Giving notice by mail, Rule 30 (h).
- Service of process.
 - Publication, Rule 4 (g) (2) (iv).
- Torts.
 - Attachment, Rule 102 (a).
- Venue.
 - Defendant a non-resident, Rule 98 (c).

NOTARIES PUBLIC

- Oaths.
 - Who may administer, appx. B, § 13.

NOTES. See Negotiable Instruments.

NOTICE

- Class actions.
 - Dismissal or compromise, Rule 23 (c).
- Depositions.
 - Absent parties, Rule 30 (h).
 - Deposition before action, Rule 27 (a) (1).
 - Examination, Rule 30 (a).
 - Failure of party to give notice to attend, Rule 30 (g) (1).
 - Filing, Rule 30 (f).
 - Mail, Rule 30 (h).
 - Unknown parties, Rule 30 (h).
 - Waiver of errors and irregularities, Rule 32 (a).
 - Written interrogatories.
 - Notice of filing, Rule 31 (c).
- Dismissal.
 - Voluntary dismissal, Rule 41 (a) (1).
- Injunctions.
 - Preliminary, Rule 65 (a).
 - State courts jurisdiction when suit commenced in federal court, Rule 65 (i).
 - Temporary restraining order, Rule 65 (b).

NOTICE (Cont'd)

- Lis pendens, Rule 105 (f).
- Supersedeas, Rule 113 (g).
- Masters.
 - Notice of filing report, Rule 53 (e) (1).
- Offer of judgment, Rule 68.
- Powers.
 - Sale under powers, Rule 120 (a).
- Service of process, Rule 5 (a). See Service of Process.
- Substitution of parties.
 - Notice of hearing in case of death, Rule 25 (a) (1).
- Supersedeas.
 - Lis pendens, Rule 113 (g).
- Time.
 - Service, Rule 6 (d).

OATHS

- Admission to the bar. See Attorney and Client.
- Affidavits, Rule 108.
- Affirmation.
 - Affirmation in lieu of oaths, Rule 43 (d).
 - Use of term, Rule 110 (b).
- Arbitration and award.
 - Oaths of arbitrators, Rule 109 (c).
- Clerks of court.
 - Who may administer, appx. B, § 13.
- Definition.
 - Use of term, Rule 110 (b).
- Depositions.
 - Deposition before action, Rule 27 (a) (2).
 - Examination, Rule 30 (c).
- Garnishment.
 - Interrogatories answered under oath, Rule 103 (f).
- Interrogatories, Rule 33.
- Judges.
 - Who may administer, appx. B, § 13.
- Jury, Rule 47 (g).
 - Form, Rule 47 (i).
- Justices of the peace.
 - Who may administer, appx. B, § 13.
- Masters.
 - Witnesses, Rule 53 (c).
- Notaries public.
 - Who may administer, appx. B, § 13.
- Receivers, Rule 66 (b).

RULES OF CIVIL PROCEDURE

OATHS (Cont'd)

- Service of process.
 - Mail, Rule 4 (g) (1).
 - Publication, Rule 4 (h).
- Who may administer, appx. B, § 13.

OBJECTIONS. See Exceptions and Objections.

OFFER OF JUDGMENT, Rule 68.

- Costs, Rule 68.
- Evidence.
 - Offer not admissible when withdrawn, Rule 68.
- Notice, Rule 68.
- Service of process, Rule 5 (a).

OFFICERS. See Public Officers.

OFFICIAL DOCUMENT OR ACT

- Pleading, Rule 9 (d).

OPINIONS OF COURT

- Supreme court proceedings, Rule 118 (f).
 - Copies of opinion, Rule 118 (h).
- Writ of error.
 - Copies of opinion, Rule 118 (h).
 - Judgment may be affirmed without written opinion, Rule 118 (f).

ORDERS

- Adjournment, Rule 119 (b).
- Advancement of causes, Rule 78.
- Amendments, Rule 110 (a).
- Answer, Rule 12 (a).
- Attorney and client.
 - Discipline of attorney, Rule 246.
- Clerical mistakes, Rule 60 (a).
- Clerks of court.
 - Orders by clerk, Rule 77 (d).
- Consolidation of actions, Rule 42 (a).
- Contempt.
 - Failure to comply with order, Rule 37 (b) (1).
 - Interference with orders, Rule 107 (a).
 - Presence of court, Rule 107 (b).
- Costs.
 - Previously-dismissed action, Rule 41 (d).
- Court always open for making orders, Rule 77 (a).

ORDERS (Cont'd)

- Courts.
 - Adjournment, Rule 119 (b).
 - Courts always open for making orders, Rule 77 (a).
- Depositions.
 - After judgment or after writ of error, Rule 27 (b).
 - Application for order compelling answer to written interrogatories, Rule 37 (a).
 - Contempt on failure to comply with order, Rule 37 (b) (1).
 - Deposition before action, Rule 27 (a) (1).
 - Deposition in aid of judgment or execution, Rule 69 (h).
 - Failure of party giving notice to attend, Rule 30 (g) (1).
 - Payment by party giving notice who fails to serve subpoena upon witness, Rule 30 (g) (2).
 - Protection of parties and deponents, Rule 30 (b).
 - Resumption of examination, Rule 30 (d).
 - Terminating or limiting examination, Rule 30 (d).
 - Written interrogatories.
 - Orders for the protection of parties and deponents, Rule 31 (d).
- Discovery, Rule 34.
 - Application for order compelling answer, Rule 37 (a).
 - Failure to comply with order, Rule 37 (b).
- Dismissal.
 - Voluntary dismissal by order of court, Rule 41 (a) (2).
- Entry upon land, Rule 34.
- Examinations.
 - Physical and mental examinations of persons, Rule 35 (a).
- Exceptions.
 - Unnecessary, Rule 46.
- Executions.
 - Order for appearance of debtor of judgment debtor, Rule 69 (e).
 - Order for appearance of judgment debtor, Rule 69 (d).
 - Order for property to be applied on judgment, Rule 69 (f).
- Ex parte orders in county, Rule 77 (d).
- Garnishment.
 - Funds of state and municipal corporations, appx. B, § 8.
- Harmless error, Rule 61.
- Injunctions.
 - Temporary restraining order, Rule 65 (b).

INDEX

ORDERS (Cont'd)

Injunctions (Cont'd)

Writ of error from order granting or denying temporary injunction, Rule 111 (a) (39).

Interrogatories.

Application for order compelling answer, Rule 37 (a).

Joinder of parties, Rule 19 (b).

Judgment.

Order for property to be applied on judgment, Rule 69 (f).

Summary judgments, Rule 56 (d).

Jury.

Examination of premises by jury, Rule 47 (k).

Masters.

Application to court for order to speed proceedings, Rule 53 (d) (1).

Motions.

Application for order by motion, Rule 7 (b) (1).

Contents of application, Rule 7 (b) (1).

Writing, Rule 7 (b) (1).

Parties.

Dropping or adding parties, Rule 21.

Separate trials, Rule 20 (b).

Perishable property.

Proceeds of sale, Rule 102 (s).

Physical and mental examination of persons, Rule 35 (a).

Failure to comply with order, Rule 37 (b) (2).

Powers.

Sales, Rule 120 (c).

Pre-trial conference.

Result, Rule 16.

Process in behalf of and against persons not parties, Rule 71.

Production of documents, Rule 34.

Real property.

Complete adjudication of rights, Rule 105 (a).

Receivers.

Writ of error from order appointing or discharging, Rule 111 (a) (4).

Relief from order, Rule 60.

Service of process, Rule 5 (a).

Publication, Rule 4 (h).

Summary judgment.

Specification of facts appearing without substantial controversy, Rule 56 (d).

Supplemental pleading.

Ordering adverse party to plead, Rule 15 (d).

ORDERS (Cont'd)

Time, Rule 6 (a).

Enlargement of time, Rule 6 (b).

Notice, motion and affidavits, Rule 6 (d).

ORDINANCES

Declaratory judgments, Rule 57 (j).

Legal relations affected by, Rule 57 (b).

PAPERS

Copies. See Copies.

Discovery, Rule 34.

Filing papers, Rule 5.

Jury.

Papers taken by jury, Rule 47 (m).

Production, Rule 34.

Subpoenas, Rule 45 (b).

PARENT AND CHILD

Injunctions.

Rule not applicable to maintenance or custody of infants, Rule 65 (h).

Parties, Rule 17 (c).

PAROL EVIDENCE

Fact of deed being a mortgage may be proved by parol evidence, appx. B, § 12.

Unwritten or common law of another state or country, Rule 44 (f).

PARTICULARITY

Pleading.

Denial of jurisdiction, Rule 9 (e).

Denial of performance or occurrence, Rule 9 (c).

Fraud, Rule 9 (b).

Mistake, Rule 9 (b).

Motion for more particularity, Rule 12 (e).

PARTICULARS, BILL OF

Motion, Rule 12 (e).

Effect of granting motion on time for filing pleading, Rule 12 (a).

Pleading.

Bill of particulars becomes a part of the pleading which it supplements, Rule 12 (e).

Time of motions, Rule 12 (e).

PARTIES

Associations, Rule 17 (b).

Secondary action by shareholders, Rule 23 (b).

RULES OF CIVIL PROCEDURE

PARTIES (Cont'd)

- Attachment.
 - Creditors, Rule 102 (j) (1).
- Bringing in third-parties, Rule 14. See Third-Party Practice.
- Caption, Rule 10 (a).
 - Naming parties, appx. A, Forms, Introductory Statement, Paragraph 2.
- Class actions, Rule 23.
- Common origin.
 - Claims not identical or with common origin, Rule 22.
- Complaint.
 - Caption, Rule 10 (a).
 - Naming parties, appx. A, Forms, Introductory Statement, Paragraph 2.
- Conservators, Rule 17 (a).
 - Action by conservators for infants or incompetents, Rule 17 (c).
- Corporations.
 - Secondary action by shareholders, Rule 23 (b).
- Counterclaim.
 - Additional parties may be brought in, Rule 13 (h).
 - Counterclaimant has rights and remedies of plaintiff, Rule 110 (d).
 - When plaintiff may bring in third-party, Rule 14 (b).
- Cross-claim.
 - Additional parties may be brought in, Rule 13 (h).
 - Cross-claim against co-party, Rule 13 (g).
 - Cross-claimant has rights and remedies of plaintiff, Rule 110 (d).
- Death.
 - Substitution of parties, Rule 25 (a). See Substitution of Parties.
- Death by wrongful act.
 - Interest of father and mother in judgment, Rule 17 (b).
 - Suit by father or mother, Rule 17 (b).
- Declaratory judgments, Rule 57 (j).
- Deposit in court.
 - By party, Rule 67 (a).
- Depositions.
 - Interrogatories to parties, Rule 33.
 - Unknown parties, Rule 30 (h).
- Dismissal.
 - Misjoinder not ground for dismissal, Rule 21.
- Executors and administrators, Rule 17 (a).
- Father.
 - Suit for injury or death of child, Rule 17 (b).

PARTIES (Cont'd)

- Fiduciary.
 - Infants or incompetent persons, Rule 17 (c).
- Forms.
 - Allegation of reason for omitting party, appx. A, Form 22.
- Guardian and wards, Rule 17 (a).
 - Injury or death of ward, Rule 17 (b).
- Husband and wife, Rule 17 (b).
- Infants.
 - Action by guardian, Rule 17 (c).
- Interest.
 - Real party in interest, Rule 17 (a).
- Interpleader, Rule 22.
- Interrogatories.
 - Interrogatories to parties, Rule 33.
- Joinder of claims.
 - When there are multiple parties, Rule 18 (a).
- Joinder of parties.
 - Absent person not affected by judgment, Rule 19 (b).
 - Effect of failure to join, Rule 19 (b).
 - Joint liability, Rule 20 (c).
 - Judgment, Rule 20 (a).
 - Absent parties not affected, Rule 19 (b).
 - Misjoinder, Rule 21.
 - Names of omitted persons and reasons for nonjoinder to be pleaded, Rule 19 (c).
 - Necessary joinder, Rule 19 (a).
 - Negotiable instruments, Rule 20 (c).
 - Nonjoinder, Rules 19, 21.
 - Orders, Rule 19 (b).
 - Permissive joinder, Rule 20.
- Pleading.
 - Names of omitted persons and reasons for nonjoinder to be pleaded, Rule 19 (c).
 - Separate trials, Rule 20 (c).
 - Several liability, Rule 20 (c).
 - Suretyship, Rule 20 (c).
 - When joinder not necessary, Rule 17 (a).
- Judgments.
 - Proceedings against parties not originally served, Rule 106 (a) (5).
- Liquidators, Rule 17 (a).
- Married women, Rule 17 (b).
- Misjoinder, Rule 21.
- Mother.
 - Suit for injury or death of child, Rule 17 (b).

INDEX

PARTIES (Cont'd)

Motions.

Dropping or adding parties, Rule 21.

Multiple parties.

Joinder of claims, Rule 18 (a).

Negotiable instruments.

Parties jointly or severally liable, Rule 20 (c).

Nonjoinder, Rules 19, 21. See within this title, "Joinder of Parties."

Numerous defendants.

Service of pleadings, Rule 5 (c).

Orders.

Dropping or adding parties, Rule 21.

Separate trials, Rule 20 (b).

Parent and child, Rule 17 (c).

Partnership, Rule 17 (b).

Permissive joinder, Rule 20.

Pleading.

Names of parties, caption, Rule 10 (a).

Real party in interest, Rule 17 (a).

Real property.

Actual possession requires occupant to be party, Rule 105 (b).

Record interest, Rule 105 (b).

Receivers, Rule 17 (a).

Suit on receiver's bond, Rule 66 (b).

Representation, Rule 23 (a).

Separate trials, Rules 20 (b), 21.

Service of process.

Parties subject to service, Rule 4 (g) (2).

Unknown parties, Rule 4 (g) (2) (i).

Shareholders.

Secondary action by shareholders, Rule 23 (b).

State.

Action against public officers, Rule 106 (a) (3).

When action brought in name of people of state of Colorado, Rule 17 (a).

Substitution of parties, Rule 25. See Substitution of Parties.

Summons.

Names or designation, Rule 4 (c).

Proceedings against parties not originally served on joint indebtedness, Rule 106 (a) (5).

Suretyship.

Parties jointly or severally liable, Rule 20 (c).

Third-party practice, Rule 14. See Third-Party Practice.

PARTIES (Cont'd)

Title.

Joinder of claims based on different titles, Rule 22.

Trustees.

Trustee of express trust, Rule 17 (a).

Unincorporated associations, Rule 17 (b).

Secondary action by shareholders, Rule 23 (b).

Unknown parties.

Caption, Rule 10 (a).

Depositions.

Notice, Rule 30 (h).

Statement in petition for deposition before action, Rule 27 (a) (1).

Identification in pleading, Rule 9 (a) (2).

In rem proceedings, Rule 10 (a).

Interest of unknown parties in pleading, Rules 9 (a) (3), 9 (a) (4).

Judgment against unknown defendants, Rule 54 (g).

Limitation of actions to set aside, appx. B, § 1.

Service by publication, Rule 4 (g) (2) (1).

PARTNERSHIP

Interrogatories, Rule 33.

Judgments.

Judgment against partnership, Rule 54 (e).

Jury.

Challenge for cause of partner, Rule 47 (e) (3).

Parties, Rule 17 (b).

Service of process, Rule 4 (e) (4).

PAUPERS

Costs.

Supreme court proceedings, Rule 114 (b).

PAYMENT

Defenses.

Pleading, Rule 8 (c).

Pleading.

Affirmative defenses, Rule 8 (c).

PENDING ACTIONS

Actions.

Effect of rules, Rule 1 (b).

Amicus curiae.

Supreme court proceedings, Rule 115 (g).

Depositions, Rule 26. See Depositions.

Lis pendens, Rule 105 (f).

RULES OF CIVIL PROCEDURE

PERFORMANCE

Pleading, Rule 9 (c).

PERISHABLE PROPERTY

Attachment.

Sale, Rule 102 (s).

Executions.

Sale, Rule 102 (s).

Garnishment.

Sale, Rule 102 (s).

Order of court.

Proceeds of sale, Rule 102 (s).

Replevin.

Sale, Rule 102 (s).

Waste.

Sale when property taken under order of court, Rule 102 (s).

PERJURY, appx. B, § 14.

Witnesses, appx. B, § 14.

PERMISSIVE INTERVENTION, Rule 24 (b).

PERPETUATION OF TESTIMONY

Depositions.

After judgment or after writ of error, Rule 27 (b).

Deposition before action, Rule 27 (a) (1).

PERSONAL PROPERTY

Attachment.

Taking into custody, Rule 102 (g) (3).

Perishable property. See Perishable Property.

Replevin, Rule 104. See Replevin.

PERSONAL REPRESENTATIVES

Counterclaims, Rule 13 (k).

Cross-claims, Rule 13 (k).

Declaratory judgments.

Purposes for which declaration may be had, Rule 57 (d).

Parties, Rule 17 (a).

Supersedeas.

When bond not required, Rule 113 (d).

PETITION

Declaratory judgments.

Application for further relief, Rule 57 (h).

Depositions.

Deposition before action, Rule 27 (a) (1).

Rehearing, Rule 118 (c).

Remittitur on denial, Rule 118 (g).

PHOTOGRAPHS

Discovery, Rule 34.

Production, Rule 34.

PHYSICAL AND MENTAL EXAMINATION OF PERSONS

Orders, Rule 35 (a).

Failure to comply with order, Rule 37 (b) (2).

Report of findings, Rule 35 (b).

PLACE

Place of trial, Rule 98. See Venue.

Pleading.

Averment of place, Rule 9 (f).

PLAINTIFF. See Parties.

PLEADING, Rules 7-16.

Abbreviations, appx. B, sec. 18.

Accord and satisfaction.

Defenses, Rule 8 (c).

Setting forth affirmatively, Rule 8 (c).

Admissions.

Effect of failure to deny, Rule 8 (d).

Adoption by reference, Rule 10 (c).

Affidavits.

Generally as to affidavits. See Affidavits. Need not be accompanied by affidavit unless provided by rule of statute, Rule 11.

Agents.

Capacity of party, Rule 9 (a) (1).

Allowance of pleadings, Rule 7.

Alternative pleading.

Party may set forth two or more statements of claim or defense alternately, Rule 8 (e) (2).

Alternative relief, Rule 8 (a).

Amendments, Rules 15, 110 (a). See Amendments.

Arbitration and award, Rules 8 (c), 109. See Arbitration and Award.

Associations.

Legal existence of association need not be averred, Rule 9 (a) (1).

Assumption of risk.

Affirmative defenses, Rule 8 (c).

Attorney and client.

Discipline of attorney, Rule 242.

Indecent matter, Rule 11.

Scandalous matter.

Punishment of attorney, Rule 11.

Service on resident attorney, Rule 5 (b) (2).

INDEX

PLEADING (Cont'd)

- Attorney and client (Cont'd)
 - Signing, Rule 11; appx. A, Forms, Introductory Statement, Paragraph 4.
 - Violation of rule requiring signing of pleading, Rule 11.
- Belief.
 - Allegations may be made upon information and belief, Rule 8 (e) (1).
- Bill of particulars.
 - Bill becomes part of pleading which it supplements, Rule 12 (e).
 - Motion, Rule 12 (e).
 - Effect of granting motion on time for filing pleading, Rule 12 (a).
 - Time of motions, Rule 12 (e).
- Capacity, Rule 9 (a) (1).
- Caption, Rule 10 (a); appx. A, Forms, Introductory Statement, Paragraph 2.
 - Applicability of rules, Rule 7 (b) (2).
 - File number, Rule 10 (a).
 - Name of court, Rule 10 (a).
 - Number of action, appx. A, Forms, Introductory Statement, Paragraph 1.
 - Parties, Rule 10 (a).
 - Naming parties, appx. A, Forms, Introductory Statement, Paragraph 2.
 - Service of process.
 - Summons, appx. A, Forms, Introductory Statement, Paragraph 2.
 - Title of action, Rule 10 (a).
 - When party is designated in caption as one "whose true name is unknown", Rule 9 (a) (2).
- Certification.
 - Grounds for certification, Rule 8 (a).
- Claims.
 - Separate claims regardless of consistency, Rule 8 (e) (2).
 - Statement of claims, Rule 8 (a).
 - Two or more statements, Rule 8 (e) (2).
- Complaint. See Complaint.
- Conciseness, Rule 8 (e).
- Conclusions of law.
 - Failure to state ultimate facts as distinguished from conclusions of law, Rule 8 (e) (1).
- Condition.
 - Conditions precedent, Rule 9 (c).
- Consistency, Rule 8 (e).
 - Separate claims or defenses stated regardless of consistency, Rule 8 (e) (2).
- Construction, Rule 8 (f).
- Contracts.
 - Failure of consideration, Rule 8 (c).

PLEADING (Cont'd)

- Counterclaim, Rule 13. See Counterclaim.
- Counts.
 - Separate counts, Rule 10 (b).
 - Motion, Rule 12 (e).
- Cross-claim. See Cross-Claim.
- Damages.
 - Mitigating circumstances to reduce amount, Rule 8 (c).
 - Special damages, Rule 9 (g).
- Default, Rule 55. See Default.
- Defenses.
 - Affirmative defenses, Rule 8 (c).
 - Denials, Rule 8 (b). See within this title, "Denials."
 - Form of denials, Rule 8 (b).
 - Service, Rule 5 (c).
 - Statement, Rule 8 (b).
- Definiteness.
 - Motion for more definite statement, Rule 12 (e).
- Demand.
 - Judgment, Rule 8 (a).
- Demurrers.
 - Abolished, Rule 7 (c).
- Denials.
 - Admissions by failure to deny, Rule 8 (d).
 - Effect of failure to deny, Rule 8 (d).
 - Form, Rule 8 (b).
 - General denial, Rule 8 (b).
 - Jurisdiction, Rule 9 (e).
 - Lack of knowledge or information, Rule 8 (b).
 - Meeting substance of averments, Rule 8 (b).
 - Part of averment denied, Rule 8 (b).
 - Specific denial, Rule 8 (b).
- Different types of relief, Rule 8 (a).
- Directness, Rule 8 (e).
- Discharge in bankruptcy, Rule 8 (c).
- Documents.
 - Official document or act, Rule 9 (d).
- Duress, Rule 8 (c).
- English.
 - Proceedings in English, appx. B, § 18.
- Equity.
 - Joinder of legal and equitable claims, Rule 18 (a).
 - Laches as affirmative defenses, Rule 8 (c).
 - Procedure governed, Rule 1 (a).
 - Separate claims or defenses stated whether based on legal or equitable grounds, Rule 8 (e) (2).

RULES OF CIVIL PROCEDURE

PLEADING (Cont'd)

- Estoppel.
 - Affirmative defenses, Rule 8 (c).
- Exceptions and objections.
 - Evidence.
 - Amendment to pleading, Rule 15 (b).
 - Exceptions for insufficiency of pleading. Shall not be used, Rule 7 (c).
- Exhibits.
 - Exhibit to pleading part thereof, Rule 10 (c).
 - Supreme court proceedings.
 - Remittitur, Rule 118 (g).
 - Writ of error.
 - Record, Rule 112 (a).
- Failure of consideration.
 - Affirmative defenses, Rule 8 (c).
- Fellow servant.
 - Injury by fellow servant, Rule 8 (c).
- Filing pleadings and papers, Rule 5. See Filing Pleadings and Papers.
- Form of pleading, Rule 10.
 - Technical forms not required, Rule 8 (e) (1).
- Forms, appx. A. See Forms.
- Fraud.
 - Affirmative defenses, Rule 8 (c).
 - Particularity, Rule 9 (b).
- Fraud, statute of.
 - Affirmative defenses, Rule 8 (c).
- General denial, Rule 8 (b).
- General rules of pleading, Rule 8.
- Hypothetical pleading.
 - Party may set forth two or more statements hypothetically, Rule 8 (e) (2).
- Illegality.
 - Affirmative defenses, Rule 8 (c).
- Immateriality.
 - Striking, Rule 12 (f).
- Impertinency.
 - Motion to strike, Rule 12 (f).
- Indecent matter.
 - Punishment of attorney, Rule 11.
- Infants.
 - Capacity of parties, Rule 9 (a) (1).
 - Generally as to infants. See Infants.
- Information.
 - Allegations may be made upon information and belief, Rule 8 (e) (1).
- In rem proceedings.
 - Unknown parties, Rule 10 (a).
- Insanity.
 - Capacity of parties, Rule 9 (a) (1).
 - Generally as to insanity. See Insanity.

PLEADING (Cont'd)

- Intent.
 - General averment sufficient, Rule 9 (b).
- Interpleader, Rule 22. See Interpleader.
- Intervention, Rule 24. See Intervention.
- Joinder of claims, Rule 18. See Joinder of Claims.
- Joinder of parties, Rules 19-21. See Joinder of Parties.
- Judgments, Rule 9 (e).
 - Demand, Rule 8 (a).
 - Generally as to judgments, Rules 54-64. See Judgments.
 - Motion for judgment on pleading, Rule 12 (c).
 - Not necessary to show jurisdiction in pleading judgment, Rule 9 (e).
 - Not recited, Rule 54 (a).
- Judicial notice.
 - Statutes, Rule 9 (h).
- Jurisdiction.
 - Denial should be made specifically, Rule 9 (e).
 - Denial should be made with particularity, Rule 9 (e).
 - Form, appx. A, Form 2.
 - Not necessary to show jurisdiction in pleading judgment, Rule 9 (e).
 - Statement of grounds upon which court's jurisdiction depends, Rule 8 (a).
- Knowledge.
 - General averment sufficient, Rule 9 (b).
- Laches.
 - Affirmative defenses, Rule 8 (c).
- Legal claims.
 - Separate claims stated whether based on legal or equitable grounds, Rule 8 (e) (2).
- Libel and slander, appx. B, § 2.
 - Answer, appx. B, § 3.
 - Truth, appx. B, § 3.
- Licenses.
 - Affirmative defenses, Rule 8 (c).
- Limitation of actions.
 - Affirmative defenses, Rule 8 (c).
 - Cannot be raised by motion under Rule 12 (b), Rule 12 (b). (Note).
 - Writ of error.
 - Time of issuance, Rule 111 (b).
- Lis pendens, Rule 105 (f). See Lis Pendens.
- Malice.
 - General averment sufficient, Rule 9 (b).

INDEX

PLEADING (Cont'd)

- Mistake.
 - Form of complaint for money paid by mistake, appx. A, Form 7.
 - Particularity, Rule 9 (b).
- Mitigating circumstances, Rule 8 (c).
- Motion. See Motions.
- Names.
 - Omitted persons, Rule 19 (c).
- Numbering paragraph, Rule 10 (b).
- Official document or act, Rule 9 (d).
- Paragraph, Rule 10 (b).
- Particularity.
 - Condition of mind, Rule 9 (b).
 - Denial of jurisdiction, Rule 9 (e).
 - Denial of performance or occurrence, Rule 9 (c).
 - Fraud, Rule 9 (b).
 - Mistake, Rule 9 (b).
 - Motion for more particularity, Rule 12 (e).
- Particulars, bill of.
 - Bill of particulars becomes a part of the pleading which it supplements, Rule 12 (e).
 - Time of motions, Rule 12 (e).
- Parties.
 - Names of parties, caption, Rule 10 (a).
- Payment.
 - Affirmative defenses, Rule 8 (c).
- Performance, Rule 9 (c).
- Petition.
 - Declaratory judgments.
 - Application for further relief, Rule 57 (h).
 - Depositions before action 27 (a) (1).
 - Rehearing, Rule 118 (c).
 - Remittitur on denial, Rule 118 (g).
- Place.
 - Averment of place, Rule 9 (f).
- Pleas.
 - Abolished, Rule 7 (c).
- Precedent condition, Rule 9 (c).
- Public Officers.
 - Official document or act, Rule 9 (d).
- Redundancy.
 - Motion to strike, Rule 12 (f).
- Release.
 - Affirmative defenses, Rule 8 (c).
- Reply.
 - Reply to counterclaim, Rule 7 (a).
- Representative capacity, Rule 9 (a) (1).

PLEADING (Cont'd)

- Res judicata.
 - Affirmative defenses, Rule 8 (c).
- Responsive pleading, Rule 12 (a).
 - After amendment, Rule 15 (a).
- Scandalous matter.
 - Motion to strike, Rule 12 (f).
 - Punishment of attorney, Rule 11.
- Separate claims.
 - Two or more statements or claims or defenses, Rule 8 (e) (2).
- Separate count, Rule 10 (b).
 - Motion, Rule 12 (e).
- Separate statement, Rule 10 (b).
 - Motion for separate statement, Rule 12 (e).
- Service.
 - Counterclaim, Rule 5 (c).
 - Cross-claim, Rule 5 (c).
 - Defenses, Rule 5 (c).
 - How made, Rule 5 (b) (1).
 - Numerous defendants, Rule 5 (c).
 - Resident attorney, Rule 5 (b) (2).
 - Service of process generally. See Service of Process.
 - Subsequent to original complaint, Rule 5 (a).
 - Time, Rule 5 (d).
- Signing, Rules 7 (b) (2), 11.
 - Attorney, appx. A, Forms, Introductory Statement, Paragraph 4.
 - Party, appx. A, Forms, Introductory Statement, Paragraph 5.
- Special damage, Rule 9 (g).
- Special matters, Rule 9.
- Specific denial, Rule 8 (b).
- Statement.
 - Claims, Rule 8 (a).
 - Grounds upon which court's jurisdiction depends, Rule 8 (a).
- Statutes, Rule 9 (h).
 - Reference, Rule 9 (h).
- Striking.
 - Immateriality, Rule 12 (f).
 - Impertinency, Rule 12 (f).
 - Motions to strike, Rule 12 (f).
 - On failure to comply with order as to discovery, Rule 37 (b) (2) (iii).
 - Order for separate statement, more definite statement of bill of particulars, Rule 12 (e).
 - Redundancy, Rule 12 (f).
 - Scandalous matter, Rule 12 (f).
 - Unsigned pleading, Rule 11.

RULES OF CIVIL PROCEDURE

PLEADING (Cont'd)

- Supplemental pleading, Rule 15.
- Counterclaim matured or acquired after pleading, Rule 13 (e).
- Death or separation from public office, Rule 25 (d).
- Motions, Rule 15 (d).
- Ordering adverse party to plead, Rule 15 (d).
- Technical forms.
 - Not required, Rule 8 (e) (1).
- Time.
 - Averment of time, Rule 9 (f).
 - Motion for separate statement, Rule 12 (e).
 - Motion to strike, Rule 12 (f).
 - When cross-claim is filed, Rule 12 (a).
- Ultimate facts.
 - Failure to state ultimate facts as distinguished from conclusions of law, Rule 8 (e) (1).
- Unknown parties.
 - In rem proceedings, Rule 10 (a).
 - Interest of unknown parties, Rules 9 (a) (3), 9 (a) (4).
- Verification.
 - Contempt, Rule 11 (Note).
- Depositions.
 - Perpetuation of testimony, Rule 11 (Note).
 - Petition for deposition before action, Rule 27 (a) (1).
- Injunction.
 - Required, Rule 11 (Note).
- Not necessary unless provided by rule of statute, Rule 11.
- Signature.
 - Required, Rule 11 (Note).
- Stay of proceedings.
 - Supreme court proceedings, Rule 113 (b).
- Waiver.
 - Affirmative defenses, Rule 8 (c).
 - Generally as to waiver. See Waiver.
- Writ of error.
 - Record, Rule 112 (a).

PLEAS

- Abolished, Rule 7 (c).

PLEDGE AND COLLATERAL SECURITY

- Garnishment.
 - Plaintiff may pay lien and be subrogated, Rule 103 (t).
 - Subrogated where pledge held under condition, Rule 103 (u).

PLURIES WRITS

- Garnishment, Rule 103 (d).

POLLING JURY, Rule 47 (q).

POOR PERSONS

- Costs.
 - Supreme court proceedings, Rule 114 (b).
- Counsel for indigent prisoners, appx. C, § 4.

POWERS

- Deeds of trust.
 - Sale under powers, Rule 120 (b).
- Docket.
 - Docket fee, Rule 120 (e).
- Fees.
 - Docket fees, Rule 120 (e).
- Hearing.
 - Sales, Rule 120 (c).
- Motions.
 - Sale under powers, Rule 120 (a).
- Notice.
 - Sale under powers, Rule 120 (a).
- Orders.
 - Sales, Rule 120 (c).
- Real estate.
 - Sale under powers, Rule 120 (b).
- Sales.
 - Hearing, Rule 120 (c).
 - Motion, Rule 120 (a).
 - Notice, Rule 120 (a).
 - Return of sale, Rule 120 (d).
- Supersedeas.
 - Bond, Rule 113 (c).

PRAECIPE

- Writ of error, Rule 111 (c).

PRELIMINARY HEARING, Rule 12 (d).

PRESENT TENSE INCLUDES FUTURE, Rule 110 (b).

PRE-TRIAL PROCEDURE, Rule 16.

PRIORITIES

- Attachment, Rule 102 (l).
- Writ of error.
 - Review of adjudication of water priorities, Rule 111 (g).

INDEX

PRISONS AND PRISONERS

- Canons of ethics.
 - Counsel for an indigent prisoner, appx. C, § 4.
- Depositions.
 - Leave of court to take deposition, Rule 26 (a).
 - Use of deposition where witness imprisoned, Rule 26 (d) (3).
- Executions.
 - Body executions, Rule 101 (b).

PROCEEDINGS SUBSEQUENT TO JUDGMENT, Rule 69. See Executions.

PROCESS, Rule 4. See Service and Process.

PRODUCTION OF DOCUMENTS, Rule 34.

- Failure to produce, Rule 37 (b) (2).
- Forms.
 - Motion for production of documents under Rule 34, appx. A, Form 20.
- Masters, Rule 53 (c).
- Motion.
 - Form of motion for production of documents under Rule 34, appx. A, Form 20.
- Orders, Rule 34.
- Subpoenas, Rules 45 (a), 45 (b).

PROHIBITION

- Abolished, Rule 106 (a).
- Jurisdiction.
 - Relief in nature of prohibition not granted except in matters of great public importance, Rule 116.

PUBLICATION

- Default.
 - Judgment on substituted service, Rule 55 (f).
- Depositions.
 - Notice of deposition before action, Rule 27 (a) (1).
- Service of process, Rules 4 (g), 4 (h).
 - Completion on last day of publication, Rule 4 (h).
 - Corporations, Rule 4 (g) (2) (ii).
 - Ex parte hearing, Rule 4 (h).
 - Foreign corporations, Rule 4 (g) (2) (iii).
 - Four weeks means five publications, Rule 4 (g). (Note).
 - Judgment by default, Rule 55 (f).

PUBLICATION (Cont'd)

- Service of process (Cont'd)
 - Mailing copy to person whose address has been stated in motion, Rule 4 (h).
 - Manner of proof, Rule 4 (i) (4).
 - Motion, Rule 4 (h).
 - Address or last known address, Rule 4 (h).
 - Oath, Rule 4 (h).
 - Statement of facts, Rule 4 (h).
 - Statement that party unknown, Rule 4 (h).
 - Newspapers, Rule 4 (h).
 - Non-residents, Rule 4 (g) (2) (iv).
 - Ordering publication of process in newspaper, Rule 4 (h).
 - Proof of service, Rule 4 (i) (4).
 - Substitution of parties in case of death, Rule 25 (a) (1).
 - Unknown parties, Rule 4 (g) (2) (i).
 - Substitution of parties, Rule 25 (a) (1).

PUBLIC OFFICERS

- Affidavits.
 - Who may administer oaths, Rule 108.
- Bonds.
 - Supersedeas bond in action to determine office, Rule 113 (c).
- Certificates.
 - Made by officer or deputy, Rule 110 (c).
- Contempt.
 - Obstructing administration of justice, Rule 107 (a).
- Damages.
 - Relief sought to compel officer to act, Rule 106 (a) (2).
- Default.
 - Judgment against officer of state, Rule 55 (e).
- Depositions.
 - Deposition used for any purpose, Rule 26 (d) (2).
 - Persons before whom taken, Rule 28 (b).
- Garnishment, Rule 103 (c).
 - Funds of state and municipal corporations, appx. B, §§ 4-8.
- Injunctions.
 - State court's jurisdiction when suit commenced in federal court against state officials, Rule 65 (i).
- Judgment.
 - Usurpation of office, Rule 106 (a) (3).
- Jurisdiction.
 - Relief when jurisdiction exceeded, Rule 106 (a) (4).

RULES OF CIVIL PROCEDURE

PUBLIC OFFICERS (Cont'd)

- Pleading.
 - Official document or act, Rule 9 (d).
- Relief sought to compel officer to act, Rule 106 (a) (2).
- Seals.
 - How seal attached, appx. B, § 15.
- State.
 - Action in name of state, Rule 106 (a) (3).
- Statutes.
 - Review under statutes, Rule 106 (b).
- Substitution of parties.
 - Death or resignation, Rule 25 (d).
 - Separation from office, Rule 25 (d).
- Usurpation.
 - Relief, Rule 106 (a) (3).
- Venue.
 - Actions against, Rule 98 (b) (2).

PUNISHMENT

- Contempt, Rule 107 (d).

PUNITIVE DAMAGES, Rule 101 (d).

QUESTIONS OF LAW AND FACT, Rule 39.

- Findings of court, Rule 52. See Findings of Court.
- Intervention.
 - When applicant's claim or defense and main action have question of law or fact in common, Rule 24 (b).
- Issues of law disposed of first, Rule 39 (d).

QUO WARRANTO

- Abolished, Rule 106 (a).

REAL PROPERTY, Rule 105.

- Attachment, Rules 102 (g) (1), 102 (g) (2).
- Complete adjudication of rights, Rule 105 (a).
- Costs.
 - Disclaimer saves cost, Rule 105 (c).
 - Execution of quit claim deed saves costs, Rule 105 (d).
- Counterclaim.
 - Improvements, Rule 105 (e).
- Deeds.
 - Conveyances generally. See Conveyances.
 - Declaratory judgments.
 - Persons interested may obtain, Rule 57 (b).

REAL PROPERTY (Cont'd)

Deeds (Cont'd)

- Judgments.
 - Direction to deliver deeds, Rule 70.
- Quit claim deeds.
 - Execution saves costs, Rule 105 (d).

Deeds of trust.

Evidence.

- Fact of deed being mortgage may be proved by parol evidence, appx. B, § 12.

Powers.

- Sales under power, Rule 120 (b).

Default.

- Default allowing judgment to be taken against him without answer saves cost, Rule 105 (c).

Description, Rule 105 (f).

Disclaimer, Rule 105 (c).

Forms.

- Complaint for specific performance of contract to convey land, appx. A, Form 12.

Improvements, Rule 105 (e).

Lis pendens, Rule 105 (f).

Orders.

- Complete adjudication of rights, Rule 105 (a).

Parties.

- Actual possession requires occupant to be party, Rule 105 (b).
- Record interest, Rule 105 (b).

Powers.

- Sale under powers, Rule 120 (b).

Quit claim deed.

- Execution saves costs, Rule 105 (d).

Set-off, Rule 105 (e).

REBUTTAL

Depositions.

- Rebuttal of relevant evidence contained in depositions whether introduced by rebutter or not, Rule 26 (f).

RECEIPTS

Service of process.

- Mail, Rule 4 (g) (1).

RECEIVERS, Rule 66.

Appointment.

- When appointed, Rule 66 (a).
- Writ of error from order appointing or denying appointment, Rule 111 (a) (4).

Bonds, Rule 66 (b).

- Suit on bond, Rule 66 (b).

INDEX

RECEIVERS (Cont'd)

- Clerks of court.
 - Approval of bond, Rule 66 (b).
- Discharge.
 - Writ of error from order sustaining or overruling motion, Rule 111 (a) (4).
- Evidence.
 - Evidence on motion for appointment or discharge, Rule 43 (e).
- Judgment.
 - Appointment before judgment, Rule 66 (a) (1).
 - Appointment by or after judgment, Rule 66 (a) (2).
- Oaths, Rule 66 (b).
- Orders.
 - Writ of error from order appointing or discharging, Rule 111 (a) (4).
- Parties, Rule 17 (a).
 - Suit on receiver's bond, Rule 66 (b).
- Service of process, Rule 4 (e) (3).
- Stay of proceedings, Rule 62 (a).
- Suretyship.
 - Bond, Rule 66 (b).
- Writ of error.
 - Sustaining or overruling motion to discharge, Rule 111 (a) (4).

RECORD

- Record on error.
 - Writ of error, Rule 112. See Writ of Error.

RECORDING ACTS

- Verdict recorded, Rule 47 (s).

REDUNDANCY

- Pleading.
 - Motion to strike, Rule 12 (f).

REFEREES AND REFERENCE, Rule 53. See Masters.

REHEARING

- Petition, Rule 118 (c).
 - Remittitur on denial, Rule 118 (g).
- Supreme court proceedings, Rule 118 (c).
- Writ of error, Rule 118 (c).

RELATION BACK

- Amendment, Rule 15 (c).

RELATIONSHIP

- Judges.
 - When judge shall not act unless by consent, appx. B, § 28.

RELEASE

- Defenses.
 - Pleading, Rule 8 (c).
- Pleading.
 - Affirmative defenses, Rule 8 (c).

REMEDIES

- Joinder, Rule 18 (b).

REMITTITUR

- Clerks of court.
 - Duty, Rule 69 (b).
- Costs.
 - Execution, Rule 69 (b).
- Rehearings.
 - On denial of petition, Rule 118 (g).
- Supreme court proceedings, Rule 118 (g).
- Time, Rule 118 (g).

REMOVAL OF CAUSES

- Courts.
 - Counterclaim and cross-claim of third-party claim.
 - County court claim in excess of \$2,000.00 certified to district courts, Rule 13 (l).

REPLEVIN, Rule 104.

- Additional bonds, Rule 104 (g).
- Affidavits.
 - Causes, Rule 104 (b).
- Amendments.
 - Bonds, Rule 104 (g).
- Attachment.
 - Affidavits, Rule 104 (b) (3).
- Bonds, Rule 104 (c).
 - Additional bond, Rule 104 (g).
 - Amended bonds, Rule 104 (g).
 - Custodian of property, Rule 104 (k).
 - Defendant's bond on exception to sureties, Rule 104 (e).
 - Exceptions to sureties. Rule 104 (d).
 - New bond, Rule 104 (f).
 - Qualification of sureties, Rule 104 (f).
- Return.
 - When defendant excepts to sureties, Rule 104 (e).
- Supersedeas bond, Rule 113 (c).
- Causes, Rule 104 (b).
- Clerks of court.
 - Approval of bond, Rule 104 (c).
 - Issuance of writ, Rule 104 (c).
 - Liability of clerk to exception to sureties, Rule 104 (d).

RULES OF CIVIL PROCEDURE

REPLEVIN (Cont'd)

- Counterclaim, Rule 13 (a). (Note).
- Custodian of property, Rule 104 (k).
- Damages.
 - Judgment for damages for detention, Rule 104 (m).
- Executions.
 - Affidavits, Rule 104 (b) (3).
- Filing of pleadings and other papers.
 - Sheriffs, Rule 104 (l).
- Fines.
 - Affidavit, Rule 104 (b) (3).
- Indemnity.
 - Indemnity to sheriff, Rule 104 (j).
- Issuance of writ, Rule 104 (c).
- Judgments, Rule 104 (m).
- New bonds, Rule 104 (f).
- Perishable property.
 - Sale, Rule 102 (s).
- Sale.
 - Perishable property, Rule 102 (s).
- Service of process, Rule 104 (c).
- Sheriffs.
 - Breaking into buildings, Rule 104 (h).
 - Claim by third person, Rule 104 (j).
 - Demand of delivery, Rule 104 (h).
 - Duty in holding goods, Rule 104 (i).
 - Service of process, Rule 104 (c).
 - When sheriff files papers, Rule 104 (l).
- Suretyship.
 - Exception to sureties, Rule 104 (d).
 - Qualification of sureties, Rule 104 (f).
- Taxation.
 - Affidavit, Rule 104 (b) (3).
- Time, Rule 104 (a).

REPORTERS

- Courts, Rule 80 (b).

REPORTS

- Evidence, Rule 80 (c).
- Masters, Rule 53 (e). See Masters.

REPRESENTATION

- Intervention.
 - Representation of applicant's interest inadequate, Rule 24 (a).

REPRESENTATIVE

- Default.
 - Representation of incompetent, Rule 55 (b) (2).

REPRESENTATIVE CAPACITY

- Pleading, Rule 9 (a) (1).

RES ADJUDICATA. See Former Adjudication or Res Adjudicata.

RESPONSIVE PLEADING, Rule 12 (a).

- Amendment.
 - Responsive pleading after amendments, Rule 15 (a).
- Answer. See Answer.

RESTRAINING ORDER, Rule 65 (b).

REVIEW. See Writ of Error.

REVISION COMMITTEE

- Addresses, appx. D.

REWARDS

- Canons of ethics, appx. C, § 28.

RUNNERS

- Canons of ethics, appx. C, § 28.

SALARIES

- Garnishment.
 - Funds of state and municipal corporations, appx. B, §§ 4-8.

SALES

- Attachment.
- Dissatisfied judgment, Rule 102 (t).
- Perishable property, Rule 102 (s).
- Executions.
 - Perishable property, Rule 102 (s).
- Garnishment, Rule 103 (i).
- Perishable property, Rule 102 (s).
- Powers.
 - Hearing, Rule 120 (c).
 - Motion, Rule 120 (a).
 - Notice, Rule 120 (a).
 - Return of sale, Rule 120 (d).
- Replevin.
 - Perishable property, Rule 102 (s).

SATISFACTION

- Judgments, Rule 58 (b).

SCANDALOUS MATTER

- Pleading.
 - Motion to strike, Rule 12 (i).
 - Punishment of attorney, Rule 11.

INDEX

SCHOOLS

- Service of process.
 - Clerk or director of school district, Rule 4 (e) (8).
- Supersedeas.
 - When bond not required, Rule 113 (d).

SCIRE FACIAS

- Abolished, Rule 106 (a).

SCOPE OF RULES, Rule 1 (a).

SEALS

- Clerks of court.
 - Clerk to keep seal, appx. B, § 20.
- County courts, appx. B, § 19.
- Courts.
 - Courts with seal, appx. B, § 19.
- District courts, appx. B, § 19.
- Documents.
 - How seal attached, appx. B, § 15.
- How seal affixed, appx. B, § 21.
- Public officers.
 - How seal attached, appx. B, § 15.
- Service of process.
 - How seal attached, appx. B, § 15.
- Summons, Rule 4 (b).
- Supreme court, appx. B, § 19.
- Verdict.
 - Sealed verdict, Rule 47 (p).

SECONDARY EVIDENCE, Rule 43 (f).

- See Evidence.

SENTENCES

- Preliminary hearing, Rule 12 (d).

SEPARATE MAINTENANCE

- Rules not applicable, Rule 81 (b).

SEPARATE TRIALS, Rule 20 (b).

SERVICE OF PROCESS, Rule 4.

- Acknowledgement.
 - Written admission or waiver of service, Rule 4 (i) (5).
- Admission.
 - Proof of service, Rule 4 (i) (5).
- Affidavit.
 - Affidavit of publication, Rule 4 (i) (4).
- Attachment.
 - Traverse of affidavit, Rule 102 (p).
- Motion and affidavit served together, Rule 6 (d).

SERVICE OF PROCESS (Cont'd)

- Affidavit (Cont'd)
 - Opposing affidavits, Rule 6 (d).
 - Proof of service, Rule 4 (i) (2).
 - Publication, Rule 4 (i) (4).
- Age.
 - Delivering or leaving copy with person over 18, Rule 4 (e) (1).
 - Person over age of 18 appointed by consul in foreign country, Rule 4 (d) (3).
 - Person over 18 may serve process, Rule 4 (d) (1).
- Agent.
 - Managing or general agent of corporation, Rule 4 (e) (5).
 - Managing or general agent of partnership or association, Rule 4 (e) (4).
 - Process agent for corporation, Rule 4 (e) (5).
 - Service of process authorized by appointment or by law to receive, Rule 4 (e) (1).
- State.
 - Agent of state, Rule 4 (e) (9).
- Amendments, Rule 110 (a).
 - Proof of service, Rule 4 (j).
 - Terms, Rule 4 (j).
 - Time, Rule 4 (j).
- Appearances, Rule 5 (a).
 - No service or pleading of process need be made on parties in default for failure to appear, Rule 5 (a).
- Applicability.
 - Applies to all process except as otherwise provided, Rule 4 (a).
- Associations, Rule 4 (e) (4).
- Attachment, Rule 102 (f).
 - Return, Rule 102 (h).
 - Traverse of affidavit, Rule 102 (p).
- Attorney and client, Rule 5 (b) (1).
 - Discipline of attorney, Rule 242.
 - Issuance of summons by attorney, Rule 4 (b).
- Bookkeeper, Rule 4 (e) (1).
- By whom served, Rule 4 (d).
- Certificate.
 - Deputy, Rule 4 (i) (1).
 - Mail, Rule 4 (i) (2).
 - Certificate of clerk as to mailing copies, Rule 4 (i) (4).
 - Sheriff, Rule 4 (i) (1).
 - United States marshal, Rule 4 (i) (1).
- Chief clerk.
 - Personal service, Rule 4 (e) (1).

RULES OF CIVIL PROCEDURE

SERVICE OF PROCESS (Cont'd)

- Clerk of court.
 - Issuance of summons by clerk, Rule 4 (b).
 - Issuing granted as of course, Rule 77 (c).
 - Mail, Rule 4 (g) (1).
 - Proof of service, Rule 4 (i) (3).
 - Publication.
 - Proof of service, Rule 4 (i) (4).
- Clerk of municipal corporation, Rule 4 (e) (6).
- Commencement of action, Rule 3 (a).
- Complaint.
 - Must be filed within 10 days after summons is served, Rule 3 (a).
- Conservators, Rule 4 (e) (3).
- Consul.
 - In foreign country, Rule 4 (d) (3).
- Contempt.
 - Interference with process, Rule 107 (a).
 - Service of citation.
 - Copy of motion and affidavit, Rule 107 (c).
- Corporations.
 - Agent, Rule 4 (e) (5).
 - Foreign corporations.
 - Publication, Rule 4 (g) (2) (iii).
 - Mailing copy to last known address of corporation, Rule 4 (e) (5).
 - Managing or general agent, Rule 4 (e) (5).
 - Municipal corporations, Rule 4 (e) (6).
 - Principal employee, Rule 4 (e) (5).
 - Process agent, Rule 4 (e) (5).
 - Publication, Rule 4 (g) (2) (ii).
 - Foreign corporation, Rule 4 (g) (2) (iii).
 - Stockholders, Rule 4 (e) (5).
- Counties.
 - Delivery to county clerk or chief deputy, Rule 4 (e) (7).
- Courts.
 - Courts always open, Rule 77 (a).
- Default.
 - Judgment on substituted service, Rule 55 (f).
- Delivery.
 - Attorney, Rule 5 (b) (1).
 - Subpoenas, Rule 45 (c).
- Demand, Rule 5 (a).
- Depositions.
 - Notice in case of deposition before action, Rule 27 (a) (1).
 - Written interrogatories, Rule 31 (a).

SERVICE OF PROCESS (Cont'd)

- Deputies.
 - Certificate of deputy to prove service, Rule 4 (i) (1).
 - Delivery to chief deputy or county clerk, Rule 4 (e) (7).
 - In another state or United States territory, Rule 4 (d) (2).
 - United States marshal, Rule 4 (d) (2).
 - Within state, Rule 4 (d) (1).
- Districts.
 - Clerk or director of school district, Rule 4 (e) (8).
- Domestic corporations, see within this title, "Domestic Corporations."
- Evidence, Rule 4 (i).
 - Admission, Rule 4 (i) (5).
 - Affidavit, Rule 4 (i) (2).
 - Amendment of proof of service, Rule 4 (j).
 - Certificate of sheriff, United States marshal or deputy, Rule 4 (i) (1).
- Mail.
 - Certificate of clerk, Rule 4 (i) (3).
 - Proof of service of subpoenas, Rule 45 (c).
- Publication.
 - Affidavit of publication, Rule 4 (i) (4).
 - Certificate of clerk as to mailing copy, Rule 4 (i) (4).
 - Waiver of service, Rule 4 (i) (5).
- Father.
 - Service on infant, Rule 4 (a) (2).
- Foreign corporations.
 - Publication, Rule 4 (g) (2) (iii).
- Foreign country.
 - Consul, Rule 4 (d) (3).
- Forms.
 - Motion to dismiss for lack of service, appx. A, Form 15.
 - Summons, appx. A, Form 1.
- Garnishment.
 - Funds of state and municipal corporations, appx. B, § 6.
 - Public officials, Rule 103 (c).
 - When garnishee summoned, Rule 103 (b).
- Guardian.
 - Service on infant, Rule 4 (e) (2).
- Hearing.
 - Ex parte hearing, Rule 4 (g) (1).
- Infants.
 - Father, Rule 4 (e) (2).
 - Guardian, Rule 4 (e) (2).
 - Mother, Rule 4 (e) (2).

INDEX

SERVICE OF PROCESS (Cont'd)

Infants (Cont'd)

- Person in whose service infant employed, Rule 4 (e) (2).
- Person over 18 years, Rule 4 (e) (1).
- Person under 18 years, Rule 4 (e) (2).
- Person with whom infant resides, Rule 4 (e) (2).

In rem proceedings.

- Mail or publication, Rule 4 (g).
- Personal service outside the state, Rule 4 (f).

Interrogatories, Rule 31 (a).

- Objections, Rule 33.
- Service of copies of answers, Rule 33.

Issuance, Rule 4 (b).

Judgment.

- Judgment in personam upon service of process outside of state, Rule 4 (f). (Note).
- Offer of judgment, Rule 5 (a).

Jurisdiction.

- Time of service determines jurisdiction, Rule 3 (b).

Liquidators, Rule 4 (e) (3).

Mail, Rule 4 (g).

- Additional time on service by mail, Rule 6 (e).
- Certificate of clerk to prove service, Rule 4 (i) (3).
- Completion on date of filing of clerk's proof, Rule 4 (g) (1).

Corporations.

- Copy to last known address when service not upon executive officer, secretary, etc., Rule 4 (e) (5).

Direction of clerk to serve process, Rule 4 (g) (1).

Motion, Rule 4 (g) (1).

- Address of person to be served, Rule 4 (g) (1).
- Ex parte hearing, Rule 4 (g) (1).
- Statement of facts, Rule 4 (g) (1).
- Municipal corporations, Rule 4 (e) (6).
- Oath, Rule 4 (g) (1).
- Pleadings and other papers, Rule 5 (b) (1).
- Return receipt, Rule 4 (g) (1).

Manner of proof, Rule 4 (i). See within this title, "Evidence."

Marshal.

- Certificate of United States marshal to prove service, Rule 4 (i) (1).
- United States marshal, Rule 4 (d) (2).

Mother.

- Service on infant, Rule 4 (e) (2).

SERVICE OF PROCESS (Cont'd)

Motion.

- Mail, Rule 4 (g) (1).
- Address of person to be served, Rule 4 (g) (1).
- Ex parte hearing, Rule 4 (g) (1).
- Statement of facts, Rule 4 (g) (1).
- Motion supported by affidavit served with affidavit, Rule 6 (d).
- Pleading insufficiency of process, Rule 12 (b).
- Publication, Rule 4 (h).
- Address or last known address, Rule 4 (h).
- Ex parte hearing, Rule 4 (h).
- Statement of facts, Rule 4 (h).
- Statement that party unknown, Rule 4 (h).
- Written motion other than one heard ex parte, Rule 5 (a).

Municipal corporations, Rule 4 (e) (6).

Newspapers.

- Publication, Rule 4 (h).

Non-residents.

- Publication, Rule 4 (g) (2) (iv).

Notice, Rule 5 (a).

Oaths.

- Mail, Rule 4 (g) (1).
- Publication, Rule 4 (h).

Offer to deliver when copy refused, Rule 4 (k).

Orders, Rule 5 (a).

- Publication, Rule 4 (h).

Parties.

- Parties subject to service, Rule 4 (g) (2).
- Unknown parties, Rule 4 (g) (2) (i).

Partnership, Rule 4 (e) (4).

Personal service, Rule 4 (e).

- Agent or person authorized by appointment or by law to receive, Rule 4 (e) (1).
- Bookkeeper, Rule 4 (e) (1).
- Chief clerk, Rule 4 (e) (1).
- Delivering copy, Rule 4 (e) (1).
- Leaving copy at usual places of abode, Rule 4 (e) (1).
- Outside the state, Rule 4 (f).
- Stenographer, Rule 4 (e) (1).

Pleadings, Rule 5. See Pleading.

Publication, Rules 4 (g), 4 (h).

- Completion on last day of publication, Rule 4 (h).
- Corporations, Rule 4 (g) (2) (ii).

Depositions.

- Notice of deposition before action, Rule 27 (a) (1).

RULES OF CIVIL PROCEDURE

SERVICE OF PROCESS (Cont'd)

Publication (Cont'd)

- Ex parte hearing, Rule 4 (h).
 - Foreign corporations, Rule 4 (g) (2) (iii).
 - Four weeks means five publications, Rule 4 (g). (Note).
 - Judgment by default, Rule 55 (f).
 - Mailing copy to person whose address has been stated in motion, Rule 4 (h).
 - Manner of proof, Rule 4 (i) (4).
 - Motion, Rule 4 (h).
 - Address or last known address, Rule 4 (h).
 - Oath, Rule 4 (h).
 - Statement of facts, Rule 4 (h).
 - Statement that party unknown, Rule 4 (h).
 - Newspapers, Rule 4 (h).
 - Non-residents, Rule 4 (g) (2) (iv).
 - Ordering publication of process in newspaper, Rule 4 (h).
 - Proof of service, Rule 4 (i) (4).
 - Substitution of parties in case of death, Rule 25 (a) (1).
 - Unknown parties, Rule 4 (g) (2) (i).
- #### Receipts.
- Mail, Rule 4 (g) (1).
- #### Receivers, Rule 4 (e) (3).
- #### Refusal of copy, Rule 4 (k).
- #### Replevin, Rule 104 (c).
- #### Schools.
- Clerk or director of school district, Rule 4 (e) (8).
- #### Seals.
- How seal attached, appx. B, § 15.
- #### Sheriffs.
- Certificate to prove service, Rule 4 (i) (1).
 - In another state, Rule 4 (d) (2).
 - Process within state, Rule 4 (d) (1).
 - Replevin, Rule 104 (c).
- #### Specific property.
- Mail or publication, Rule 4 (g).
- #### State.
- Department or agency of state, Rule 4 (e) (9).
- #### Status.
- Mail or publication, Rule 4 (g).
- #### Stenographer.
- Personal service, Rule 4 (e) (1).
- #### Stockholders, Rule 4 (e) (5).
- #### Subpoenas, Rule 45 (c). See Subpoenas.
- #### Substitution of parties.
- In case of death, Rule 25 (a) (1).

SERVICE OF PROCESS (Cont'd)

Summons, appx. A, Form 1.

Additional summons issued against defendant at any time, Rule 4 (b).

Amendments.

Amended summons issued against defendant at any time, Rule 4 (b).

Appearances.

Notice in summons that judgment by default will be rendered on failure to appear, Rule 4 (c).

Attorney and client.

Issuance by attorney, Rule 4 (b).

Caption, appx. A, Forms, Introductory Statement, Paragraph 2.

Clerk of court.

Issuance by clerk, Rule 4 (b).

Complaint must be filed within 10 days after summons, Rule 3 (a).

Contents, Rule 4 (c).

Counties.

Designation of county in which brought, Rule 4 (c).

Default.

Judgment on substituted service, Rule 55 (f).

Forms, appx. A, Form 1.

Garnishment.

Funds of state and municipal corporations, appx. B, § 6.

Public officials, Rule 103 (c).

When garnishee summoned, Rule 103 (b).

Issuance, Rule 4 (b).

Additional summons issued against defendant at any time, Rule 4 (b).

Amended summons issued against defendant at any time, Rule 4 (b).

Joinder of parties, Rule 19 (b).

Judgment.

Judgment by default, Rule 55 (f).

Notice in summons that judgment will be rendered on failure to appear, Rule 4 (c).

Relief when summons has not been personally served, Rule 60 (b).

Jurisdiction.

Time of service determines, Rule 3 (b).

Name.

Court, Rule 4 (c).

Parties, Rule 4 (c).

Notice that judgment by default will be rendered on failure to appear, Rule 4 (c).

Parties.

Names or designation, Rule 4 (c).

Proceedings on joint indebtedness against party not originally served with summons, Rule 106 (a) (5).

Seal, Rule 4 (b).

INDEX

SERVICE OF PROCESS (Cont'd)

Summons (Cont'd)

Separate summons issued against defendant at any time, Rule 4 (b).

Signature, Rule 4 (b).

Third-party practice, Rule 14 (a).

Writ of error, Rule 111 (e).

Time.

Service not later than 24 hours before time specified in notice, Rule 6 (d).

Unincorporated association, Rule 4 (e) (4).

United States marshal, Rule 4 (d) (2).

Certificate to prove service, Rule 4 (i) (1).

United States territory, Rule 4 (d) (3).

Unknown parties.

Publication, Rule 4 (g) (2) (i).

Waiver.

Proof of service, Rule 4 (i) (5).

Within state, Rule 4 (d) (1).

Without state, Rule 4 (d) (2).

Writ of error, Rules 111 (e), 112 (a).

Written admission, Rule 4 (i) (5).

SESSIONS OF COURT

Public, Rule 42 (c).

SET-OFF

Counterclaim. See Counterclaim.

Garnishment.

Garnishee may claim, Rule 103 (o).

Improvements, Rule 105 (e).

SHERIFFS

Actions against sheriff, appx. B, § 26.

Arrest.

Judgment debtor, Rule 69 (d).

Attachment.

Delivery of balance due, Rule 102 (u).

Direction of writ to sheriff, Rule 102 (d).

Direction to sheriff, Rule 102 (e).

Execution of proceeds, Rule 102 (h).

Execution of writ, Rule 102 (g).

Liability of sheriff for release to defendant, Rule 102 (x).

Return, Rule 102 (h).

Sale, Rule 102 (t).

Taking money or undertaking in lieu of property, Rule 102 (e).

Contempt.

Duties, Rule 107 (c).

SHERIFFS (Cont'd)

Definitions.

Use of term, Rule 110 (b).

Deputies.

Service in another state, Rule 4 (d) (2).

Service of process within state, Rule 4 (d) (1).

Use of term, Rule 110 (b).

Executions.

Debtor of judgment debtor may pay sheriff, Rule 69 (c).

Garnishment.

Issuance, Rule 103 (d).

Replevin.

Breaking into buildings, Rule 104 (h).

Claim by third person, Rule 104 (j).

Demand of delivery, Rule 104 (h).

Duty in holding goods, Rule 104 (i).

Service of process, Rule 104 (c).

When sheriff files papers, Rule 104 (l).

Service of process.

Certificate to prove service, Rule 4 (i) (1).

In another state, Rule 4 (d) (2).

Process within state, Rule 4 (d) (1).

SIGNING

Definition.

Use of term, Rule 110 (b).

Depositions, Rule 30 (e).

Deposition taken before action, Rule 27 (a) (2).

Stipulation waiving, Rule 30 (e).

Waiver of errors and irregularities, Rule 32 (d).

Interrogatories, Rule 33.

Mark, Rule 110 (b).

Motion.

Attorney, appx. A, Forms, Introductory Statement, Paragraph 4.

Party, appx. A, Forms, Introductory Statement, Paragraph 5.

Pleading, Rules 7 (b) (2), 11.

Attorney, appx. A, Forms, Introductory Statement, Paragraph 4.

Party, appx. A, Forms, Introductory Statement, Paragraph 5.

Summons, Rule 4 (b).

Witnesses.

Mark, Rule 110 (b).

SINGULAR INCLUDES PLURAL, Rule 110 (b).

RULES OF CIVIL PROCEDURE

SOLDIERS AND SAILORS

Powers, Rule 120. See Powers.

Sales.

Powers, Rule 120. See Powers.

SPECIAL DAMAGE

Pleading, Rule 9 (g).

SPECIFIC DENIAL, Rule 8 (b).

SPECIFIC PERFORMANCE

Attachment, Rule 70.

Complaint.

Form.

Contract to convey land. appx. A
Form 12.

Contempt, Rule 70.

Costs, Rule 70.

Garnishment.

Subrogation where plaintiff held under
condition, Rule 103 (u).

Judgment, Rule 70.

SPECIFIC PROPERTY

Service of process.

Mail or publication, Rule 4 (g).

STATE

Costs against the state of Colorado, Rule
54 (d).

Garnishment.

Funds of state, appx. B, §§ 4-8.

Public officials, Rule 103 (c).

Injunctions.

Security not required, Rule 65 (c).

Jury.

No trial with advisory jury, Rule 39
(c).

Parties.

Action against public officers, Rule 106
(a) (3).

When action brought in name of people
of state of Colorado, Rule 17 (a).

Public officers.

Action in name of state, Rule 106 (a)
(3).

Service of process.

Department or agency of state, Rule
4 (e) (9).

Supersedeas.

When bond not required, Rule 113 (d).

STATUTE OF FRAUD. See Frauds, Statute of.

STATUTE OF LIMITATIONS. See Limitation of Actions.

STATUTES

Applicability of rules of special statutory
proceedings, Rule 81 (a).

Boards.

Review under statutes, Rule 106 (b).

Commissions.

Review under statutes, Rule 106 (b).

Courts.

Review under statutes, Rule 106 (b).

Declaratory judgments.

Legal relations affected by, Rule 57 (b).

Evidence.

Other states and countries, Rule 44 (i).

Intervention.

Permissive intervention, Rule 24 (b).

When statute confers an unconditional
right to intervene, Rule 24 (a).

Library.

Certified copies of laws of other states.
Rule 264.

Pleading, Rule 9 (h).

Reference, Rule 9 (h).

Public officers.

Review under statutes, Rule 106 (b).

STAY OF PROCEEDINGS

Directed verdict.

On motion for directed verdict, Rule 62
(b).

Executions.

Motion for new trial or judgment, Rule
62 (b).

Supreme court proceedings.

Review of stay, Rule 113 (b).

Injunctions, Rule 62 (a).

Justice of the peace, appx. B, § 9.

State courts jurisdiction when suit com-
menced in federal court, Rule 65 (i).

Judgment.

Automatic stay, Rule 62 (a).

Exceptions, Rule 62 (a).

Injunctions, Rule 62 (a).

Stay of proceedings on motion for judg-
ment, Rule 62 (b).

Stay on motion for judgment, Rule 62
(b).

Supersedeas, Rule 62 (a).

Jurisdiction.

Relief when jurisdiction exceeded, Rule
106 (a) (4).

New trial.

Stay on motion for new trial, Rule 62
(b).

INDEX

STAY OF PROCEEDINGS (Cont'd)

- Receivers, Rule 62 (a).
- Supersedeas.
 - Supreme court proceedings, Rule 113.
 - See Supersedeas.
- Verification.
 - Supreme court proceedings.
 - Review of stay, Rule 113 (b).
- Writ of error.
 - Stay of execution, Rule 113 (j).

STENOGRAPHER

- Service of process.
 - Personal service, Rule 4 (e) (1).

STIPULATIONS

- Briefs.
 - Not to suspend operation of rules, Rule 115 (e).
- Depositions.
 - Stipulations regarding the taking of depositions, Rule 29.
 - Waiving signatures, Rule 30 (e).
- Dismissal.
 - Voluntary dismissal, Rule 41 (a) (1).
- Jurisdiction.
 - Transfer where concurrent jurisdiction, Rule 98 (h).
- Jury.
 - Consent to trial by court sitting without jury, Rule 39 (a).
- Masters.
 - As to findings, Rule 53 (e) (4).
- Verdict.
 - Findings of a stated majority of jurors as verdict, Rule 48.
- Writ of error.
 - Not to suspend operation of rules as to filing abstract, Rule 115 (e).
 - Record, Rules 112 (a), 112 (c).

STOCK AND STOCKHOLDERS

- Complaint.
 - Secondary action by shareholders, Rule 23 (b).
- Service of process, Rule 4 (e) (5).

STRIKING

- Pleading.
 - Immateriality, Rule 12 (f).
 - Impertinency, Rule 12 (f).
 - Motions to strike, Rule 12 (f).
 - On failure to comply with order as to discovery, Rule 37 (b) (2) (iii).

STRIKING (Cont'd)

- Pleading (Cont'd)
 - Order for separate statement, more definite statement of bill of particulars, Rule 12 (e).
 - Redundancy, Rule 12 (f).
 - Scandalous matter, Rule 12 (f).
 - Unsigned pleading, Rule 11.

SUBPOENAS

- Arbitration and award, Rule 109 (d).
- Attendance compelled, Rule 26 (a).
- Books, Rule 45 (b).
- Clerks of court.
 - Issuance, Rule 45 (a).
- Depositions, Rule 45 (d).
 - Use when party has been unable to procure attendance by subpoena, Rule 26 (d) (3).
- Documents, Rule 45 (b).
- Form, Rule 45 (a).
- Hearing.
 - Subpoena for hearing or trial, Rule 45 (e).
- Issuance, Rule 45 (a).
- Masters, Rule 53 (d) (2).
- Papers, Rule 45 (b).
- Production of documents, Rules 45 (a), 45 (b).
- Service of process, Rule 45 (c).
- Trial.
 - Subpoena for trial, Rule 45 (e).

SUBROGATION

- Garnishment.
 - Plaintiff may pay lien and be subrogated, Rule 103 (t).
 - Subrogation where pledge held under condition, Rule 103 (u).

SUBSTITUTION OF PARTIES, Rule 25.

- Assignments.
 - Transfer of interest, Rule 25 (c).
- At any stage, Rule 25 (e).
- Depositions.
 - Does not affect right to use depositions previously taken, Rule 26 (d) (4).
- Incompetency, Rule 25 (b).
- Insanity.
 - Incompetency of parties, Rule 25 (b).
- Interest transferred, Rule 25 (c).
- Judgments.
 - Either before or after judgment, Rule 25 (e).

RULES OF CIVIL PROCEDURE

SUBSTITUTION OF PARTIES (Cont'd)

- Motions.
 - In case of death, Rule 25 (a).
 - Transfer of interest, Rule 25 (c).
- Notice.
 - Notice of hearing in case of death, Rule 25 (a) (1).
- Publication, Rule 25 (a) (1).
- Public officers.
 - Death or resignation, Rule 25 (d).
 - Separation from office, Rule 25 (d).
- Service of process.
 - In case of death, Rule 25 (a) (1).
- Suggestion of death, Rule 25 (a) (2).
- Surviving plaintiffs.
 - Suggestion of death, Rule 25 (a) (2).
- Time.
 - At any stage, Rule 25 (e).
- Transfer of interest, Rule 25 (c).
- Writ of error.
 - By Supreme court in proceedings on writ of error, Rule 25 (e).

SUGGESTION OF DEATH, Rule 25 (a) (2).

SUMMARY JUDGMENTS, Rule 56.

- Affidavits.
 - Made in bad faith, Rule 56 (g).
 - Opposing affidavits, Rule 56 (c).
 - Supporting and opposing affidavits, Rule 56 (e).
 - When affidavits are unavailable, Rule 56 (f).
 - With or without supporting affidavits, Rule 56 (a).
- Attorney's fees.
 - Payment by party making affidavit in bad faith, Rule 56 (g).
- Case not fully adjudicated, Rule 56 (d).
- Claimant.
 - Summary judgment for claimant, Rule 56 (a).
- Confession of judgment.
 - Rule does not affect, Rule 56. (Note).
- Contempt, Rule 107 (b).
- Affidavits made in bad faith, Rule 56 (g).
- Continuance.
 - Ordering continuance to permit affidavit to be obtained or depositions to be taken, Rule 56 (f).
- Counterclaim.
 - Motion, Rule 56 (b).

SUMMARY JUDGMENTS (Cont'd)

- Cross-claim.
 - Motion, Rule 56 (b).
- Declaratory judgment.
 - Motion, Rule 56 (b).
- Defending party.
 - Summary judgment for defending party, Rule 56 (b).
- Depositions.
 - Continuance to permit taking depositions, Rule 56 (f).
 - Permitting affidavits to be supplemented or opposed by depositions, Rule 56 (e).
- Discovery.
 - Continuance to permit discovery, Rule 56 (f).
- Motions, Rule 56 (c).
 - Case not fully adjudicated on motion, Rule 56 (d).
 - For claimant, Rule 56 (a).
- Orders.
 - Specification of facts appearing without substantial controversy, Rule 56 (d).
- Supporting affidavits, Rule 56 (e).
- Time.
 - Motion, Rule 56 (c).

SUMMONS. See Service of Process.

SUNDAYS

- Attachment.
 - Execution or writ on Sunday, Rule 102 (i).
- Courts, appx. B, § 23.
- Time.
 - Exclusion, Rule 6 (a).

SUPERSEDEAS

- After record filed, Rule 113.
- Amendments.
 - Bond, Rule 113 (e).
- Application, Rule 113 (a).
- Bond, Rule 113 (c).
 - Amendment, Rule 113 (e).
 - Effective as to parties filing same, Rule 113 (h).
 - Liability of surety, Rule 113 (f).
 - Public officers, Rule 113 (c).
 - Release of lien, Rule 113 (g).
 - When bond not required, Rule 113 (d).
- Clerks of court.
 - Endorsement, Rule 113 (i).

INDEX

SUPERSEDEAS (Cont'd)

- Conservators.
 - When bond not required, Rule 113 (d).
- County.
 - When bond not required, Rule 113 (d).
- Endorsement, Rule 113 (i).
- Executors and administrators.
 - When bond not required, Rule 113 (d).
- Guardian and ward.
 - When bond not required, Rule 113 (d).
- Liens.
 - Release of lien in giving bond, Rule 113 (g).
- Lis pendens.
 - Notice of lis pendens, Rule 113 (g).
- Municipal corporations.
 - When bond not required, Rule 113 (d).
- Notice.
 - Lis pendens, Rule 113 (g).
- Power of attorney.
 - Bond, Rule 113 (c).
- Schools.
 - When bond not required, Rule 113 (d).
- State.
 - When bond not required, Rule 113 (d).
- Suretyship.
 - Liability of surety on bond, Rule 113 (f).
- Time.
 - Application, Rule 113 (a).

SUPPLEMENTAL PLEADINGS, Rule 15.

- Counterclaim matured or acquired after pleading, Rule 13 (e).
- Death or separation from public office, Rule 25 (d).
- Motions, Rule 15 (d).
- Ordering adverse party to plead, Rule 15 (d).
- Substitution of parties.
 - Death or separation from public office, Rule 25 (d).

SUPREME COURT

- Clerks of court.
 - Office shall close at noon Saturday, Rule 77 (c).
- Library, Rules 261-264. See Library.
- Procedure governed, Rule 1 (a).
- Proceedings, Rules 111-119. See Supreme Court Proceedings.
- Seals, appx. B, § 19.

SUPREME COURT PROCEEDINGS, Rules 111-119.

- Abstract of record, Rule 115 (a).
- Amicus curiae, Rule 115 (g).
- Arguments, Rule 117.
- Attorney and client.
 - Oral arguments, Rule 117.
- Briefs, Rules 115 (b), 115 (c). See Briefs.
- Costs, Rule 114. See Costs.
- Department sessions, Rule 119 (a).
- Docket.
 - Advancement on docket, Rule 118 (b).
- En banc sessions, Rule 119 (a).
- Exhibits
 - Remittitur, Rule 118 (g).
- Jurisdiction.
 - Original jurisdiction, Rule 116.
- Opinion of court, Rule 118 (f).
 - Copies of opinion, Rule 118 (h).
- Oral arguments, Rule 117.
- Record on error, Rule 112. See Writ of Error.
- Rehearings, Rule 118 (c).
- Remittitur, Rule 118 (g).
- Sessions en banc and in departments, Rule 119 (a).
- Supersedeas, Rule 113. See Supersedeas.
- Withdrawal of papers from files, Rule 115 (j).
- Writ of error, Rule 111. See Writ of Error.

SURETYSHIP

- Joinder of parties, Rule 20 (c).
- Jury.
 - Challenge for cause for security on bond, Rule 47 (e) (3).
- Parties.
 - Parties jointly or severally liable, Rule 20 (c).
- Receivers.
 - Bond, Rule 66 (b).
- Replevin.
 - Qualification of sureties, Rule 104 (f).
- Supersedeas.
 - Liability of surety on bond, Rule 113 (f).

SURPRISE

- Arbitration and award.
 - Relief, Rule 109 (g).

RULES OF CIVIL PROCEDURE

SURPRISE (Cont'd)

- Judgment.
 - Relief from judgment, Rule 60 (b).
- New trials.
 - Ground, Rule 59 (a) (3).

TAXATION

- Replevin.
 - Affidavit, Rule 104 (b) (3).

TECHNICAL FORMS

- Motions.
 - Not required, Rule 8 (e) (1).
- Pleading.
 - Not required, Rule 8 (e) (1).

TEMPORARY RESTRAINING ORDER, Rule 65 (b).

TERMS OF COURT, Rule 119 (b); appx. B, § 32.

- Time.
 - Unaffected by expiration of term, Rule 6 (c).

THIRD-PARTY PRACTICE

- Amendments.
 - Amendment to pleading, Rule 14 (a).
- Bringing in plaintiff, Rule 14 (b).
- Complaint.
 - Serving complaint on third-party, Rule 14 (a).
- Counterclaim, Rule 14 (a).
 - Plaintiff may cause third-party to be brought in, Rule 14 (b).
- County court.
 - Claim in excess of \$2,000.00 certified to district courts, Rule 13 (l).
- Cross-claims, Rule 14 (a).
- Default, Rule 55 (d).
- Defenses, Rule 14 (a).
- Dismissal, Rule 41 (c).
- District courts.
 - Claim in excess of \$2,000.00 certified to district courts, Rule 13 (l).
- Forms.
 - Motion to bring in third-party defendant, appx. A, Form 18.
- Garnishment.
 - Garnishee not required to defend claims of third persons, Rule 103 (h).
- Interpleader, Rule 22. See Interpleader.
- Intervention, Rule 24. See Intervention.
- Joinder of claims, Rule 18 (a).

THIRD-PARTY PRACTICE (Cont'd)

- Motions.
 - Ex parte motion to bring in third-party, Rule 14 (a).
 - Form of motion to bring in third-party defendant, appx. A, Form 18.
- Parties.
 - Third-party claimant has rights and remedies of plaintiff, Rule 110 (d).
- Rights and remedies.
 - Third-party claimant has rights and remedies of plaintiff, Rule 110 (d).
- Time.
 - When defendant may bring in third-party, Rule 14 (a).
- Trial.
 - Separate trials, Rule 42 (b).

THREATS

- Injunctions.
 - Restoration of property taken by threats, Rule 65 (f).

TIME, Rule 6.

- Affidavits.
 - Service, Rule 6 (d).
- Amendments.
 - Amendment of pleading, Rule 15 (a).
- Answer.
 - Time of filing, Rule 12 (a).
 - When counterclaim is filed, Rule 12 (a).
 - When cross-claim is filed, Rule 12 (a).
- Application.
 - Enlargement, Rule 6 (b).
- Attachment.
 - No final judgment until 30 days after levy, Rule 102 (j).
- Briefs.
 - Enlargement of time for filing, Rule 115 (e).
 - Time for filing, Rule 115 (b).
- Computation, Rule 6 (a).
- Default, Rule 6 (a).
- Depositions.
 - After judgment or after writ of error, Rule 27 (b).
 - Enlargement of time for taking, Rule 30 (a).
 - Objections, Rule 26 (e).
 - Written interrogatories, Rule 31 (a).
- Enlargement, Rule 6 (b).
- Execution.
 - No execution to issue until 10 days after judgment, Rule 62 (a).

INDEX

TIME (Cont'd)

- Findings of court.
 - Amendment, Rule 52 (b).
- Holidays.
 - Exclusion, Rule 6 (a).
 - Half holidays, Rule 6 (a).
- Interrogatories.
 - Objections, Rule 33.
 - Service of copies of answers, Rule 33.
- Judgments.
 - Entry of judgment disposing of claim, Rule 54 (b).
 - Offer of judgment, Rule 68.
 - Revival, Rule 54 (h).
- Jurisdiction.
 - Complaint or service determines, Rule 3 (b).
- Jury.
 - Demand for jury, Rule 38 (b).
- Legal holidays.
 - Exclusion, Rule 6 (a).
- Motions.
 - Effect of motions on time required for pleading, Rule 12 (a).
 - Enlargement, Rule 6 (b).
 - Motion day, Rule 78.
 - Permitting act to be done after expiration, Rule 6 (b).
 - Service, Rule 6 (d).
- New trials.
 - Filing affidavit, Rule 59 (c).
 - Initiative of court, Rule 59 (d).
 - Motion, Rule 59 (b).
 - Serving affidavit, Rule 59 (c).
- Notice.
 - Service, Rule 6 (d).
- Orders, Rule 6 (a).
 - Enlargement of time, Rule 6 (b).
 - Notice, motion and affidavits, Rule 6 (d).
- Particulars, bill of, Rule 12 (e).
- Pleading.
 - Averment of time, Rule 9 (f).
 - Motion for separate statement, Rule 12 (e).
 - Motion to strike, Rule 12 (f).
 - When cross-claim is filed, Rule 12 (a).
- Remittitur, Rule 118 (g).
- Replevin, Rule 104 (a).
- Service of process.
 - Service not later than 24 hours before time specified in notice, Rule 6 (d).
- Summary judgment.
 - Motion, Rule 56 (c).

TIME (Cont'd)

- Sundays.
 - Exclusion, Rule 6 (a).
- Supersedeas.
 - Application, Rule 113 (a).
- Terms of court.
 - Unaffected by expiration of term, Rule 6 (c).
- Third-party practice.
 - When defendant may bring in third party, Rule 14 (a).
- Unaffected by expiration of term, Rule 6 (b).
- Writ of error.
 - Abstract of record, Rule 115 (a).
 - Period in which writ of error may be sued out, not enlarged, Rule 6 (b).
 - Time of issuance, Rule 111 (b).

TITLE

- Citation of rules, Rule 85.
- Judgment divesting title, Rule 70.
- Parties.
 - Joinder of claims based on different titles, Rule 22.

TORTS

- Attachment.
 - Non-residents, Rule 102 (a).
- Executions.
 - Body executions, Rule 101 (a).
- Non-residents.
 - Attachment, Rule 102 (a).
- Venue, Rule 98 (c).

TRANSCRIPT

- Evidence, Rules 80 (a), 80 (c).
- Writ of error.
 - Record, Rule 112 (a).

TRAVERSE

- Amendments, Rule 110 (a).
- Attachment.
 - Affidavit, Rule 102 (p).

TRIAL

- Actions concerning real property, Rule 105. See Real Property.
- Assignment of cases for trial, Rule 40.
- Canons of ethics.
 - Right of lawyer to control incidents, appx. C, § 24.
- Consolidation, Rule 42.

RULES OF CIVIL PROCEDURE

TRIAL (Cont'd)

- Contempt, Rule 107 (d).
- Counterclaim.
 - Separate trials, Rule 42 (b).
- Cross-claim.
 - Separate trials, Rule 42 (b).
- Directed verdict, Rule 50. See Verdict.
- Dismissal, Rule 41. See Dismissal.
- Elections.
 - Contested elections, Rule 100 (b).
- Exceptions unnecessary, Rule 46.
- Findings of court, Rule 52. See Findings of Court.
- Instructions, Rule 51. See Instructions.
- Jury, Rules 38, 39, 47. See Jury.
- Masters, Rule 53. See Masters.
- New trials, Rule 59. See New Trials.
- Place of trial, Rule 98. See Venue.
- Questions of law and fact, Rule 39.
- Separate trials, Rules 42, 42 (b).
- Subpoenas, Rule 45.
 - Subpoena for trial, Rule 45 (e).
- Third-party action.
 - Separate trials, Rule 42 (b).
- Venue, Rule 98. See Venue.

TRUSTS AND TRUSTEES

- Canons of ethics.
 - Dealing with trust property, appx. C, § 11.
- Declaratory judgments.
 - Purposes for which declaration may be had, Rule 57 (d).
- Parties.
 - Trustee of express trust, Rule 17 (a).

TRUTH

- Libel and slander, appx. B, § 3.

ULTIMATE FACTS

- Pleading.
 - Failure to state ultimate facts as distinguished from conclusions of law, Rule 8 (e) (1).

UNDUE INFLUENCE

- Venue.
 - Change of venue, Rule 98 (g).

UNINCORPORATED ASSOCIATION

- Depositions.
 - Use of deposition of officer, Rule 26 (d) (2).

UNINCORPORATED ASSOCIATION (Cont'd)

- Interrogatories, Rule 33.
- Judgments, Rule 54 (e).
- Parties, Rule 17 (b).
 - Secondary action by shareholders, Rule 23 (b).

UNITED STATES MARSHAL

- Service of process, Rule 4 (d) (2).
- Certificate to prove service, Rule 4 (i) (1).

UNKNOWN PARTIES

- Caption, Rule 10 (a).
- Depositions.
 - Notice to unknown parties, Rule 30 (h).
 - Statement in petition for deposition before action, Rule 27 (a) (1).
- Identification in pleading, Rule 9 (a) (2).
- In rem proceedings.
 - Pleadings, Rule 10 (a).
- Judgment.
 - Against unknown defendants, Rule 54 (g).
 - Limitation on action to set aside, appx. B, § 1.
- Pleading.
 - Identification in pleading, Rule 9 (a) (2).
 - In rem proceedings, Rule 10 (a).
 - Interest of unknown parties, Rules 9 (a) (3), 9 (a) (4).
- Service of process.
 - Publication, Rule 4 (g) (2) (i).

UNLAWFUL DETAINER

- Replevin, Rule 104. See Replevin.

USE OF TERMS, Rule 110 (b).

USURPATION

- Franchise.
 - Relief, Rule 106 (a) (3).
- Public officers.
 - Relief, Rule 106 (a) (3).

UTILITIES

- Venue.
 - Actions affecting, Rule 98 (a).

VACANCY IN OFFICE

- Judges.
 - Action not affected by vacancy, appx. B, § 17.
- Justices of the peace.
 - Action not affected by vacancy, appx. B, § 17.

INDEX

VENUE

- Accounts.
 - Actions on book accounts, Rule 98 (c).
- Affidavits.
 - Change of venue, Rule 98 (g).
- Bills of exchange.
 - Actions on, Rule 98 (c).
- Change of venue.
 - Affidavit for change, Rule 98 (g).
 - Agreement, Rule 98 (i).
 - Causes of change, Rule 98 (f).
 - Change from county, Rule 98 (g).
 - Change of judge, Rule 97.
 - Motions, Rule 98 (g).
 - Only one change, Rule 98 (k).
 - Parties must agree on change, Rule 98 (j).
 - Power to change, Rule 98 (e).
 - Supreme court proceedings.
 - Original jurisdiction, Rule 116.
 - Waiver.
 - No waiver, Rule 98 (k).
- Contracts, Rule 98 (c).
- Forfeiture.
 - Actions for recovery, Rule 98 (b) (1).
- Franchises.
 - Actions affecting, Rule 98 (a).
- Injunctions.
 - Injunction to stay proceedings at law, Rule 98 (d).
- Motions.
 - Improper venue, Rule 12 (b).
- Negotiable instruments.
 - Actions upon notes or bills of exchange, Rule 98 (c).
- Non-residents.
 - Defendant a non-resident, Rule 98 (c).
- Notes.
 - Actions on notes, Rule 98 (c).
- Penalties.
 - Recovery, Rule 98 (b).
- Property.
 - Actions affecting, Rule 98 (a).
- Public officers.
 - Actions against, Rule 98 (b) (2).
- Public utilities.
 - Actions affecting, Rule 98 (a).
- Recovery of penalty, Rule 98 (b).
- Stay of proceedings.
 - Injunctions to stay proceedings at law, Rule 98 (d).
- Torts, Rule 98 (c).

VENUE (Cont'd)

- Undue influence.
 - Change of venue, Rule 98 (g).
- Utilities.
 - Actions affecting, Rule 98 (a).
- Waters and watercourses.
 - Offenses committed on lakes, rivers, streams, etc., Rule 98 (b) (1).

VERDICT

- Amendment.
 - Correction of verdict, Rule 47 (r).
- Concurrence.
 - Sending out jury again where there is no concurrence, Rule 47 (s).
- Correction of verdict, Rule 47 (r).
- Courts.
 - Holidays, appx. B, § 23.
- Declaration, Rule 47 (q).
- Directed verdict.
 - Effect, Rule 50 (a).
 - Entry of judgment, Rule 50 (b).
 - Joinder of motion for new trial with motion for directed verdict, Rule 50 (b).
 - Motion, Rule 50.
 - Reservation of decision on motion, Rule 50 (b).
 - Stay of proceedings on motion for directed verdict, Rule 62 (b).
- Waiver.
 - Motion for directed verdict does not waive right to trial by jury, Rule 50 (a).
 - When made, Rule 50 (a).
- General verdict.
 - Entry of judgment, Rule 58 (a).
- Harmless error, Rule 61.
- Instructions.
 - As to special verdict, Rule 49 (a).
 - General verdict accompanied by answer to interrogatories, Rule 49 (b).
- Interrogatories.
 - General verdict accompanied by answer to interrogatories, Rule 49 (b).
- Judgments.
 - Entry of appropriate judgment upon verdict and answers to interrogatories, Rule 49 (b).
 - Entry of judgment on directed verdict, Rule 50 (b).
- New trial.
 - Joinder of motion of new trial with motion for directed verdict, Rule 50 (b).
 - New trial if no verdict, Rule 47 (o).

RULES OF CIVIL PROCEDURE

VERDICT (Cont'd)

- Recording acts.
 - Verdict recorded, Rule 47 (s).
- Seals.
 - Sealed verdict, Rule 49 (p).
- Setting aside.
 - Harmless error, Rule 61.
- Special verdicts, Rule 49.
 - Entry of judgment, Rule 58 (a).
- Stipulations.
 - Finding of a stated majority of jurors as verdict, Rule 48.
- Writ of error.
 - Record, Rule 112 (a).

VERIFICATION

- Certiorari.
 - Required, Rule 11. (Note).
- Contempt, Rule 11. (Note).
- Depositions.
 - Perpetuation of testimony, Rule 11. (Note).
 - Petition for deposition before action, Rule 27 (a) (1).
- Injunction.
 - Required, Rule 11. (Note).
- Pleading.
 - Not necessary unless provided by rule of statute, Rule 11.
- Stay of proceedings.
 - Supreme court proceedings.
 - Review of stay, Rule 113 (b).

VEXATIOUS COMMENCEMENT OF ACTION

- Costs, Rule 3 (a).

VIEW BY JURY, Rule 47 (k).

WAGES

- Garnishment.
 - Funds of state and municipal corporations, appx. B, § 5.

WAIVER

- Acknowledgment.
 - Proof of service, Rule 4 (i) (5).
- Change of venue.
 - No waiver, Rule 98 (k).
- Defenses, Rule 12 (h).
 - Not waived by being joined with one or more other defenses in responsive pleading, Rule 12 (b).
- Pleading, Rule 8 (c).

WAIVER (Cont'd)

- Depositions.
 - As to completion and return of deposition, Rule 32 (d).
 - As to taking of deposition, Rule 32 (c).
 - Disqualification of officer, Rule 32 (b).
 - Errors and irregularities in notice, Rule 32 (a).
 - Errors in commission or letters rogatory, Rule 28 (d).
 - Objections as to competency not waived by taking deposition, Rule 26 (f).
 - Stipulations regarding the taking of depositions, Rule 29.
 - Written interrogatories, Rule 32 (c) (3).
- Directed verdict.
 - Motion for directed verdict does not waive right to trial by jury, Rule 50 (a).
- Interrogatories.
 - Objection, Rule 32 (c) (3).
- Jury.
 - Failure to demand jury, Rule 38 (d).
 - Motion for directed verdict does not waive right to trial by jury, Rule 50 (a).
 - Right to jury trial unless waived, Rule 38 (a).
 - Special verdict, Rule 49 (a).
- Motions.
 - Defenses waived by failure to make motion, Rule 12 (h).
- Pleading.
 - Affirmative defenses, Rule 8 (c).
- Service of process.
 - Proof of service, Rule 4 (i) (5).

WARRANT

- Contempt, Rule 107 (c).

WASTE

- Perishable property.
 - Sale when property taken under order of court, Rule 102 (s).

WATERS AND WATERCOURSES

- Abandonment.
 - Actions to change the point of diversion of water, Rule 99.
- Diversion.
 - Proof of abandonment, Rule 99.
- Venue.
 - Offenses committed on lakes, rivers, streams, etc., Rule 98 (b) (1).

INDEX

WATERS AND WATERCOURSES (Cont'd)

- Writ of error.
 - Order refusing, granting or cancelling water priorities, Rule 111 (a) (2).
 - Review of adjudication of water priorities, Rule 111 (g).

WILLS

- Declaratory judgments.
 - Person interested may obtain, Rule 57 (b).

WITNESSES

- Affirmation, Rule 43 (d); appx. B, § 14.
- Arbitration and award.
 - Subpoenas, Rule 109 (d).
- Canons of ethics.
 - Appearance of lawyer as witness for client, appx. C, § 19.
 - Treatment of witnesses, appx. C, § 18.
- Contempt. See Contempt.
 - Punishment of witnesses by masters, Rule 53 (d) (2).
- Cross-examination, Rule 43 (b).
- Depositions, Rules 26-37. See Depositions.
- Examination.
 - Scope, Rule 43 (b).
- Executions, Rule 69 (g).
- Expert witnesses.
 - Pre-trial conference to limit, Rule 16 (4).
- Impeachment, Rule 43 (b).
- Leading questions, Rule 43 (b).
- Masters, Rule 53 (d) (2).
 - Contempt, Rule 53 (d) (2).
 - Oaths, Rule 53 (c).
- Oaths, Rule 43 (d).
- Objection to question sustained.
 - Record of excluded evidence, Rule 43 (c).
- Oral testimony, Rule 43 (a).
- Perjury, appx. B, § 14.
- Proceedings subsequent to judgment, Rule 69 (g).
- Record of excluded testimony, Rule 43 (c).
- Signing.
 - Mark, Rule 110 (b).
- Subpoenas.
 - Arbitrators, Rule 109 (d).
 - Attendance compelled, Rule 26 (a).
 - Books, Rule 45 (b).

WITNESSES (Cont'd)

- Subpoenas (Cont'd)
 - Clerk of court, Rule 45 (a).
 - Depositions, Rule 45 (d).
 - Use when party has been unable to procure attendance by subpoena, Rule 26 (d) (3).
 - Documents, Rule 45 (b).
 - Form, Rule 45 (a).
 - Hearing, Rule 45 (e).
 - Issuance, Rule 45 (a).
 - Masters, Rule 53 (d) (2).
 - Papers, Rule 45 (b).
 - Production of documents, Rules 45 (a), 45 (b).
 - Service, Rule 45 (c).
 - Trial.
 - Subpoena for trial, Rule 45 (e).
- Sustaining objection to question.
 - Record of excluded evidence, Rule 43 (c).

WRIT OF ERROR

- Abstract of record, Rule 115 (a).
 - Enlargement of time for filing, Rule 115 (e).
 - Failure to file, Rule 115 (d).
 - Printing or typewriting, Rule 115 (h).
- Affirmation, Rule 118 (d).
 - Equally divided court, Rule 118 (f).
- Agreed case.
 - Agreed record, Rule 112 (d).
 - Agreed statement, Rule 112 (e).
- Agreed record, Rule 112 (d).
- Agreed statement, Rule 112 (e).
- Amicus curiae, Rule 115 (g).
- Assignment of error.
 - Not required, Rule 111 (f).
- Attachment, Rule 102 (aa).
- Briefs, Rules 115 (b), 115 (c). See Briefs.
- Certification, Rule 112 (a).
 - Record on error, Rule 112 (f).
 - Transcript, Rule 111 (c).
- Clerks of court.
 - Duty of clerk of supreme court as to record, Rule 112 (a).
 - Obtaining through clerk, Rule 111 (c).
 - Summons, Rule 111 (e).
- Conclusions of law.
 - Record, Rule 112 (a).
- Copies.
 - Record, Rule 112 (a).

RULES OF CIVIL PROCEDURE

WRIT OF ERROR (Cont'd)

Costs, Rule 114.
 Additional costs, Rule 114 (c).
 Amount, Rule 114 (c).
 Fees of clerk, Rule 114 (a).
 Motion to review action of court in taxing costs, Rule 54 (d).
 Proceedings by poor person, Rule 114 (b).
 Record on error, Rule 112 (b).
 Reversal, Rule 118 (e).
 Statement to trial court, Rule 114 (d).
 County court.
 Final judgment, Rule 111 (a) (1).
 Cross error.
 Assignment of cross error not required, Rule 111 (f).
 Cross specification of points, Rule 111 (f).
 Briefs, Rule 115 (c) (7).
 Declaratory judgments.
 Review of judgments and decrees, Rule 57 (g).
 Depositions, Rule 27 (b).
 Detainer.
 Failure to prosecute, Rule 118 (a). (Note).
 Dismissal.
 Affirmation, Rule 118 (d).
 By plaintiff in error does not affect right of reversal or modification on cross-specification, Rule 111 (i).
 Failure to prosecute, Rule 118 (a).
 Not dismissed for technical defect, Rule 111 (f).
 Disposition of cause, Rule 118.
 District court.
 Final judgment, Rule 111 (a) (1).
 Docket.
 Advancement on docket, Rule 118 (b).
 Costs, Rule 114 (a).
 Docketing case in supreme court, Rule 111 (c).
 Fee, Rule 111 (e).
 Execution.
 Affirmation, Rule 118 (d).
 On final judgment, Rule 118 (f).
 Stay of execution, Rule 113 (j).
 Exhibits.
 Record, Rule 112 (a).
 Failure to prosecute, Rule 118 (a).
 Fees.
 Docket fee, Rule 111 (e).

WRIT OF ERROR (Cont'd)

Filing pleadings and papers, Rule 111 (c).
 Failure to file abstract of record or brief, Rule 115 (d).
 Withdrawal of papers from files, Rule 115 (j).
 Final judgment, Rule 111 (a) (1).
 Finding of court, Rule 52 (a). (Note).
 Findings of fact.
 Record, Rule 112 (a).
 Forcible entry.
 Failure to prosecute writ, Rule 118 (a). (Note).
 Harmless error.
 Error or defect not affecting substantial rights, Rule 118 (i).
 Industrial commission, Rule 115 (k).
 Injunctions.
 Order granting or denying temporary injunction, Rule 111 (a) (3).
 State courts jurisdiction when suit commenced in federal court, Rule 65 (i).
 Instructions.
 Only grounds of objections stated considered on writ of error, Rule 51.
 Issuance.
 Time of issuance, Rule 111 (b).
 Joint writs, Rule 111 (d).
 Judgment.
 Court may enter final judgment, Rule 118 (i).
 Entry of judgment.
 Record, Rule 112 (a).
 Failure to prosecute, Rule 118 (a).
 Final judgment, Rule 111 (a).
 Joint or several writs, Rule 111 (d).
 Review of revived judgment, Rule 54 (h).
 Supplemental record showing proceedings subsequent to judgment, Rule 112 (a).
 Juvenile court.
 Final judgment, Rule 111 (a) (1).
 Limitation of actions.
 Time of issuance, Rule 111 (b).
 Enlargement not permitted, Rule 6 (b).
 Lis pendens, Rule 105 (f).
 Masters.
 Report, Rule 112 (a).
 Matters reviewable, Rule 111 (a).
 More than one writ of error.
 Record, Rule 112 (g).
 Motions, Rule 115 (f).

INDEX

WRIT OF ERROR (Cont'd)

- Objections.
 - Record on error, Rule 112 (f).
- Obtaining.
 - How obtained, Rule 111 (c).
- Opinions of court.
 - Copies of opinion, Rule 118 (h).
 - Judgment may be affirmed without written opinion, Rule 118 (f).
- Partial reversal, Rule 118 (e).
- Pleading.
 - Record, Rule 112 (a).
- Points specified, Rule 111 (f).
- Praecipe, Rule 111 (c).
- Preparation of record, Rule 112 (a).
- Priorities.
 - Review of adjudication of water priorities, Rule 111 (g).
- Receivers.
 - Sustaining or overruling motion to discharge, Rule 111 (a) (4).
- Record on error.
 - Abstract, Rule 115 (a).
 - Failure to file, Rule 115 (d).
 - Printing or typewriting, Rule 115 (h).
 - Advancement on docket, Rule 118 (b).
 - Agreed record, Rule 112 (d).
 - Agreed statement, Rule 112 (e).
 - Certification, Rules 112 (a), 112 (f).
 - Costs, Rule 112 (b).
 - More than one writ of error, Rule 112 (g).
 - Objections, Rule 112 (f).
 - Preparation, Rule 112 (a).
 - Stipulation as to record, Rule 112 (c).
 - Supersedeas, Rule 113. See Supersedeas.
 - Supplemental record, Rule 112 (a).
 - Transcript, Rule 112 (f).
 - Withdrawal of papers from file. Rule 115 (j).
- Rehearing, Rule 118 (c).
- Retrial, Rule 118 (e).
- Reversal, Rule 118 (e).
- Service of process, Rules 111 (e), 112 (a).
- Several writs, Rule 111 (d).
- Specifications of points, Rule 111 (f).
- Briefs, Rule 115 (c) (7).

WRIT OF ERROR (Cont'd)

- Stay of proceedings.
 - Stay of execution, Rule 113 (j).
- Stipulations.
 - Not to suspend operation of rules as to filing abstract, Rule 115 (e).
 - Record, Rules 112 (a), 112 (c).
- Substitution of parties.
 - By supreme court in proceedings on writ of error, Rule 25 (e).
- Summons, Rule 111 (e).
- Supersedeas, Rule 113. See Supersedeas.
- Supplemental record, Rule 112 (a).
- Time.
 - Abstract of record, Rule 115 (a).
 - Period in which writ of error may be sued out, not enlarged, Rule 6 (b).
 - Time of issuance, Rule 111 (b).
- Transcript.
 - Certification, Rule 111 (c).
 - Record on error, Rules 112 (a), 112 (f).
- Verdict.
 - Record, Rule 112 (a).
- Waters and watercourses.
 - Order refusing, granting or cancelling water priorities, Rule 111 (a) (2).
 - Review of adjudication of water priorities, Rule 111 (g).
- Withdrawal of papers from files, Rule 115 (j).

WRITS

- Amendments, Rule 110 (a).
- Attachment, Rule 102. See Attachment.
- Contempt.
 - Interference with lawful writ, Rule 107 (a).
- Courts.
 - Courts may issue proper writs, appx. B, § 31.
- Executions, Rule 69. See Executions.
- Forms of writs abolished, Rule 106.
- Garnishment, Rule 103. See Garnishment.
- Remedial writs abolished, Rule 106.
- Replevin, Rule 104. See Replevin.
- Writ of error, Rule 111. See Writ of Error.



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VOLUME I

This volume of the supplement contains the amendments to the Rules of Civil Procedure and annotations from cases decided since the Replacement Volume was issued. Reference should be made from such volume to the corresponding Rules and Forms contained herein.

Place this supplement in the pocket of the corresponding volume of the main set and discard previous supplement.

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Colorado Reports volumes 98-123.

Pacific Reporter 2nd Series volumes 52-245 (p. 1024).

Federal Reporter 2nd Series volumes 79-196.

Federal Supplement volumes 12-104.

Federal Rules Decisions volumes 1-12 (p. 450).

United States Reports volumes 295-343.

Dicta volumes 13-29 (p. 233).

TABLE OF AMENDMENTS

This table shows the amendments to the Colorado Rules of Civil Procedure, and to the Appendix of Forms, through May 2, 1952. Most of the amendments listed were adopted on May 17, 1951, and made effective August 18, 1951. Amendments to Rules 115(a), 115(b) and 115(c) were adopted May 2, 1952, and became effective May 6, 1952. Rules amended prior to May 17, 1951, are the following: 4(f), 4(g), 4(h), 79(c), 98(c), 111(c), 115(h), 115(i), 117, 201, 204.

	Page
Rule 4. Process.	
(d) By Whom Served.....	1
(f) Personal Service Outside the State.....	2
(g) Other Service.....	2
(h) Publication	2
(i) Manner of Proof.....	3
Rule 6. Time.	
(b) Enlargement	4
(c) Unaffected by Expiration of Term.....	4
Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.	
(a) Responsive Pleadings; When Presented.....	7
(b) Defenses; How Presented.....	7
(c) Motion for Judgment on the Pleadings.....	8
(g) Consolidation of Defenses.....	8
(h) Waiver of Defenses.....	9
Rule 13. Counterclaim and Cross-Claim.	
(a) Compulsory Counterclaims.....	9
(g) Cross-Claim Against Co-Party.....	10
(i) Separate Trials; Separate Judgment.....	10
Rule 14. Third-Party Practice.	
(a) When Defendant May Bring in Third Party.....	10
Rule 24. Intervention.	
(a) Intervention of Right.....	14
(b) Permissive Intervention.....	14
Rule 25. Substitution of Parties.	
(a) Death	15
Rule 26. Depositions Pending Action.	
(b) Scope of Examination.....	16
Rule 28. Persons Before Whom Depositions May Be Taken.	
(a) Within the United States.....	16
Rule 30. Depositions Upon Oral Examination.	
(b) Orders for Protection of Parties and Deponents.....	17
Rule 33. Interrogatories to Parties.....	17
Rule 34. Discovery and Production of Documents and Things for Inspection, Copying or Photographing.....	18
Rule 36. Admission of Facts and of Genuineness of Documents.	
(a) Request for Admission.....	18
Rule 41. Dismissal of Actions.	
(a) Voluntary Dismissal: Effect Thereof.	
(1) By Plaintiff; By Stipulation.....	19
(b) Involuntary Dismissal:	
(1) By Defendant.....	20

	Page
Rule 45. Subpoena.	
(b) For Production of Documentary Evidence.....	21
(d) Subpoena for Taking Depositions: Place of Examination.....	21
Rule 47. Jurors.	
(h) Peremptory Challenges	22
Rule 52. Findings by the Court.	
(a) Effect	23
Rule 54. Judgments; Costs.	
(b) Judgment Upon Multiple Claims.....	24
Rule 56. Summary Judgment.	
(a) For Claimant.....	26
(c) Motion and Proceedings Thereon.....	26
Rule 58. Entry and Satisfaction of Judgment.	
(a) Entry	28
Rule 59. New Trials; Amendment of Judgments.	
(e) Motion to Alter or Amend a Judgment.....	29
(f) No Review Unless Made.....	29
Rule 60. Relief from Judgment or Order.	
(a) Clerical Mistakes.....	30
(b) Mistake; Inadvertence; Surprise; Excusable Neglect; Fraud, etc.	30
Rule 62. Stay of Proceedings to Enforce a Judgment.	
(b) Stay on Motion for New Trial or for Judgment.....	32
(c) Stay of Judgment Upon Multiple Claims.....	32
Rule 65. Injunctions.	
(c) Security	33
Rule 66. Receivers.	
(c) Dismissal of Receivership Action.....	33
Rule 68. Offer of Judgment.....	33
Rule 79. Books Kept by the Clerk and Entries Therein.	
(b) Civil Order Book.....	34
Rule 81. Applicability in General.	
(b) Divorce and Separate Maintenance.....	34
Rule 84. Forms	35
Rule 98. Place of Trial.	
(c) Venue for Tort, Contract and Other Actions.....	35
(e) Motion to Change Venue; When Presented; Waiver; Effect of Filing	35
Rule 111. Writ of Error.	
(c) How Obtained.....	42
(f) Specification of Points.....	42
Rule 115. Abstracts, Statement of Case, Briefs, Motions and Withdrawal of Papers.	
(a) Statement of Case.....	45
(b) Briefs; When Filed.....	45
(c) Briefs; Contents	45
(h) Printed or Typewritten Abstracts and Briefs.....	45
(i) Number of Copies to be Filed and Served.....	46
Rule 117. Oral Arguments.....	47
Rule 120. Orders Authorizing Sales Under Powers.	
(b) Sales of Real Estate.....	48
Rule 121. Effective Date of Amendments.....	48
Prefix "C" Deleted.....	48
Rule 201. Examining Committees	49
Rule 204. Affidavit as to Qualifications; Examination Fees.....	49
Appendix A. Forms.	
Form 18. Motion to Bring in Third-Party Defendant.....	49
Form 21. Request for Admission Under Rule 36.....	50

Rules of Civil Procedure

VOLUME ONE

CHAPTER I

Scope of Rules, One Form of Action, Commencement of Action, Service of Process, Pleadings, Motions and Orders.

Rule 1. Scope of Rules.

I. SCOPE AND PURPOSE OF RULES.

They were adopted to simplify practice.—

Our new Rules of Civil Procedure, adopted almost in their entirety from the new Federal Rules, are intended to simplify pleadings and to eliminate delay. *Berryman v Berryman*, 115 Colo. 281, 172 P. (2d) 446.

And to secure a just, speedy and inexpensive determination of every action.—

In accord with 1st paragraph in original. See *Senne v Conley*, 110 Colo. 270, 133 P. (2d) 381.

Intent ascertained from language of rules.—In construing the Rules of Civil Procedure

applicable to a cause the supreme court will endeavor to ascertain the spirit and intent of the rules as reflected by the language employed. *Bridges v Ingram*, 122 Colo. 501, 223 P. (2d) 1051.

Substantive rights not affected.—The Rules of Civil Procedure are procedural and there is no attempt under them to affect the substantive rights of litigants. *Crowley v Hardman Bros.*, 122 Colo. 489, 223 P. (2d) 1045.

Quoted, in part, in *McKenzie v Crook*, 110 Colo. 29, 129 P. (2d) 906.

Cited in *Chamberlain v Chamberlain*, 108 Colo. 538, 120 P. (2d) 641, 138 A. L. R. 1097.

Rule 2. One Form of Action.

Remedy granted is controlled by pleadings and evidence.—Under this rule the remedy which the court grants is controlled by the pleadings and evidence in support

thereof, independent of any technical distinctions theretofore applicable. *McKenzie v Crook*, 110 Colo. 29, 129 P. (2d) 906, 907.

Rule 3. Commencement of Action.

I. HOW COMMENCED.

Cited in *Yeager v People*, 116 Colo. 379, 181 P. (2d) 442, as to commencement of

bastardy proceedings; *Rogers v Mountain States Royalties*, 116 Colo. 455, 182 P. (2d) 142.

Rule 4. Process.

(d) **By Whom Served.** Process may be served:

(2) In another state or territory of the United States, by the sheriff of the county where the service is made, or by his deputy, or by a United States marshal, or his deputy. [From Code Sec. 45; amendment effective August 18, 1951.]

(3) At any other place by a sheriff, deputy sheriff, constable, deputy constable, bailiff, deputy bailiff, or other officer having like powers and duties of the political subdivision in which the service is made or an officer authorized by the laws of this state to take acknowledgments in such political subdivision to deeds conveying real estate situate in this state or an attorney, counselor at law, solicitor, advocate or barrister duly qualified to practice law in such political subdivision. [Amendment effective August 18, 1951.]

Committee Note.

The amendment to subdivision (d) (2) is to make it clear that the state mentioned therein is a state of the United States and not of a foreign country.

Subdivision (d) (3) as originally adopted followed the language of Section 45 of the Code and provided that service in a foreign country could be made only by a United States consul or by some person over the

age of 18 years appointed by such consul. The Department of State now forbids United States consuls to serve process or to designate any one to do so, thereby rendering it impossible under the original provisions of the rule to secure personal service of process in a foreign country. The

amendment to subdivision (d) (3) authorizes several classes of officials at the place of service and persons authorized to practice law at that place to make the service. It follows closely the provisions in the Civil Code of New York.

(f) Personal Service Outside the State. Personal service outside the state may be made:

(1) In any action, upon a natural person over the age of 18 years who is a resident of this state by delivering a copy of the process, together with a copy of the pleading upon which it was issued, to the person served. [From Wyo. Comp. Stat. 1920, Secs. 5636, 5641.]

(2) In any action, upon a person domiciled in this state, other than a natural person, by delivering a copy of the process, together with a copy of the pleading upon which it was issued, in the manner provided by this rule for personal service in this state upon such person.

(3) In any action affecting specific property or status or in any other proceeding in rem, upon a natural person of any age, without regard to his residence, or upon any other person, without regard to its domicile, by delivering a copy of the pleading and process thereon, in the manner provided by this rule for personal service in this state upon such person. Service under this paragraph 3 upon a natural person under the age of 18 years may be made by delivering a copy of said pleading and process to such person and another copy thereof to the other person designated in subparagraph (e) (2) of this rule, wherever, within or without this state, such other person may be found. [From Code, Sec. 45.]

(4) No provision of this subdivision (f) shall be construed to limit the right to serve process in any other manner authorized by this rule.

(g) Other Service.

(2) Service by publication may be had on the following parties:

(iv) Nonresidents of the state; persons who have departed from the state without intention of returning; persons who conceal themselves to avoid service of process; or persons whose whereabouts are unknown and who cannot be served by personal service in the state. [From Code Sec. 45 (b).]

(h) Publication. The party desiring service of process by publication shall file a motion verified by the oath of such party or of someone in his behalf for an order of publication. It shall state the facts authorizing such service, and shall show the efforts, if any, that have been made to obtain personal service within this state and shall give the address, or last known address, of each person to be served or shall state that his address and last known address are unknown. The court shall hear the motion ex parte and, if satisfied that due diligence has been used to obtain personal service within this state, or that efforts to obtain the same would have been to no avail, shall order publication of the process in a newspaper published in the county in which the action is pending. Such publication shall be made for four weeks. Within 15 days after the order the clerk shall mail a copy of the process to each person whose address or last known address has been stated in the motion. Service shall be complete on the day of the last publication. If no newspaper be published in the county, the court shall designate one in some adjoining county. [From Supreme Court Rule 14A, Code Secs. 45, 46, 47 and 50; amendment effective August 18, 1951.]

Committee Note.

The amendments with respect to address and last known address in the second and fifth sentences in subdivision (h) make no substantial change but clarify and make more easily understood and followed the language of said sentences. With reference to the amendment of said fifth sentence increasing to 15 days the time within which the clerk shall mail copies of the process, it has been found that the 10 days after the

order of publication allowed by the rule as originally adopted are sometimes insufficient for the supplying to the clerk of the copies of the process, where the copies to be mailed by him are printed copies supplied by the publisher after the first publication of the process has been made, particularly where the attorney handling the case lives in a county other than that wherein the case is pending.

(i) **Manner of Proof.**

(1) If served in a state or territory of the United States by a sheriff or United States marshal, or a deputy, by his certificate with a statement as to date, place and manner of service. [From Code Sec. 49; amendment effective August 18, 1951.]

Committee Note.

The amendment of subdivision (i) (1) is necessitated by the provisions added by the amendment to subdivision (d) (3) which authorize a sheriff or deputy sheriff in a foreign country to make the service; this amendment makes it clear that, no matter by whom the service outside of a state or territory of the United States may be made, the proof of the service is to be made by his affidavit under the provisions of Rule 4 (i) (2) and not by his unsworn certificate under Rule 4 (i) (1).

II. CONTENTS OF SUMMONS.**A. In General.**

Cited in *Netland v Baughman*, 114 Colo. 148, 162 P. (2d) 601.

IV. PERSONAL SERVICE IN STATE.**A. General Consideration.**

The rule requires only that a "copy" of the summons be served, not a duplicate original. Thus the rule was satisfied where a transcript of the original summons, bearing the names of the clerk and counsel for the plaintiff in typewriting was served; actual signatures were not necessary. *Hocks v Farmers Union Co-operative Gas, etc., Co.*, 116 Colo. 282, 180 P. (2d) 860.

D. Upon a Partnership.

Ruling denying motion to quash service is appealable order.—The defendant appeared specially and moved to quash the service of summons upon the ground that all the partners of the defendant, a limited partnership, were residents of California, and that the pretended service upon their alleged managing agent under Rule 4 (e) (4) was ineffective and void. The trial court overruled this motion. This ruling, denying the defendants' motion to quash the service of summons, would seem to be an appealable order. *Wells Aircraft Parts Co. v Kayser Co.*, 118 Colo. 197, 194 P. (2d) 326.

Waiver of right to appeal.—Where no appeal was taken from the trial judge's order in which he ruled adversely on a preliminary motion questioning the jurisdiction, it would appear that the right has been waived. *Wells Aircraft Parts Co. v Kayser Co.*, 118 Colo. 197, 194 P. (2d) 326.

VI. PUBLICATION.**A. General Consideration.**

Editor's note.—A recent article by Mr. Donald M. Leshner of the Denver Bar, XXVI Dicta, No. 8, p. 182, discusses the Motion for Publication of Summons in Quiet Title Proceedings with respect to compliance with (g)(2) and (h) of this rule.

Service complete on last day of publication.—By presumption of law a defendant who is served with summons by publication is charged with knowledge that service will be complete on the day of the last publication. *Netland v Baughman*, 114 Colo. 148, 162 P. (2d) 601, 603.

Premature judgment by default.—After constructive service by publication, a judgment by default entered before the expiration of the time allowed to plead or answer is premature. In a direct proceeding to review a judgment shown to have been so entered prematurely, a reversal for error must be granted. *Netland v Baughman*, 114 Colo. 148, 162 P. (2d) 601, 602.

B. When Proper.

Service by publication of summons in actions in rem is not limited to cases involving real estate, but may apply to those involving personal property as well. *Hoff v Armbruster (Colo.)*, 244 P. (2d) 1069.

Where no judgment in personam was sought by plaintiffs against any nonresident defendant, the service of summons by publication was proper. *Hoff v Armbruster (Colo.)*, 244 P. (2d) 1069.

Where an action is brought to enforce an agreement for the execution of mutual and reciprocal wills, by impressing a trust upon the net assets remaining in the hands of the administratrix of the estate of the person who violated the agreement, and where all property subject to such trust, in the hands of the administratrix who is personally served with process in Colorado, is within the state of Colorado, service of summons can be made upon non-resident heirs at law by publication of the summons or by mail. Such an action falls within two of the classes of action in which constructive service of process is authorized under this rule. The action is one which affects specific property, to-wit, that property in the hands of the administratrix upon completion of the administration of the estate which she holds for distribution to those lawfully entitled to receive the same. The action is clearly within the class of cases known to the law as proceedings in rem. *Hoff v Armbruster (Colo.)*, 244 P. (2d) 1069.

C. Proceedings to Obtain.**2. The Affidavit.****D. Affidavits Held Insufficient.**

Where a verified motion filed for publication of a summons contained no statement that defendant was a nonresident of the state, that she had departed the state without intention of returning, or that she concealed herself to avoid service of process, and it was recited in the motion that defendant's whereabouts were unknown, but there was no statement that she could not "be served by personal service in the state," it was held that in the absence of this mandatory requirement the motion was fatally defective and the court was without jurisdiction to proceed to decree a foreclosure of defendant's property. *Sine v Stout*, 119 Colo. 254, 203 P. (2d) 495.

4. The Publication.

Editor's note.—For an interesting article relative to the number of times process must be published, by Mr. Hubert D. Henry, of

the Denver Bar, see Dicta XIX, No. 9, p. 231. For companion article by J. P. Helman

of Grand Junction Bar, see Dicta XXI, No. 3, p. 62.

Rule 5. Service and Filing of Pleadings and Other Papers.

I. IN GENERAL.

Defendant in default in divorce action is entitled to notice of amendment.—Since defendant's right to plead in a divorce action continues after the date beyond which plaintiff can set the cause for trial, he is, although in default in such an action, en-

titled to notice of amendment of complaint under Ch. 46, § 147, in order to plead as contemplated by rule 15 (a), subdivision (a) of this rule notwithstanding. *Myers v Myers*, 110 Colo. 412, 417, 135 P. (2d) 235. Cited in *Holman v Holman*, 114 Colo. 437, 165 P. (2d) 1015.

Rule 6. Time.

(b) **Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 25, 50(b), 52(b), 59(e), and 60(b), except to the extent and under the conditions stated in them, nor shall it extend the period in which a writ of error may be sued out. [Supplants Code Sec. 417; amendment effective August 18, 1951.]

Committee Note.

The amendment of Rule 6 (b) is based on the view that there should be a definite point where it can be said a judgment is final. The next succeeding subdivision (c) abolished the long standing device to produce finality in judgments through expiration of the term, and since that limitation on the jurisdiction of courts to set aside their own judgments has been removed by subdivision (c), some other limitation must be substituted or judgments may never be said to be final. Under the Colorado rule, the court may extend the time for the filing

of a motion for new trial under Rule 59, but as amended may not extend the time for substitution of parties under Rule 25, for a motion for judgment notwithstanding a verdict under Rule 50 (b), for motion to amend the findings of the court or to make additional findings under Rule 52 (b), to amend a judgment under Rules 52 (b) or new 59 (e), or to relieve a party from a judgment under Rule 60 (b), except as stated in those particular rules. Other changes in Rule 6 (b) are merely clarifying and conforming.

The former Committee Note is deleted.

(c) **Unaffected by Expiration of Term.** The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it. [Amendment effective August 18, 1951.]

Committee Note.

The purpose of this amendment is to prevent reliance upon the continued existence of a term as a source of power to disturb the finality of a judgment upon grounds other than those stated in these Rules.

For terms of court, see Rule 77 (a).

I. SUBDIVISION (a).

In lunacy proceedings, where a complaint was filed on Saturday, and an adjudication had on the following Thursday, such adjudication was invalid for failure to comply with the statutory requirement of five days' notice of the commencement of the proceedings, Saturday being the filing date and therefore eliminated, and Sunday being excluded under this rule, whereby the adjudication was held one day less than the minimum requirement of notice. *Okerberg v People*, 119 Colo. 529, 205 P. (2d) 224.

II. SUBDIVISION (b).

Permission of court necessary.—Authority, under this rule, for the court to permit

a paper to be filed upon cause shown and on motion therefor, in the case of excusable neglect, is certainly not authority for such filing without permission of the court, without cause shown, and without motion therefor. *Niles v Shinkle*, 119 Colo. 458, 204 P. (2d) 1077.

Granting of extension rests in discretion of court.—The granting of an extension of the period allowed under Rule 112(f) for the filing of a reporter's transcript with the clerk rests within the sound discretion of the trial court, and the action taken will not be disturbed on review in the absence of a clear showing of abuse of that discretion. *Mitchell v Espinosa* (Colo.), 243 P. (2d) 412.

Presumption on review that extension was properly made.—Where the time for filing a motion for new trial was extended to fifteen days after the entry of judgment, the court of review will assume that the extension was properly made, in the absence

of proper objections to the order of the county court. *Niles v. Shinkle*, 119 Colo. 458, 204 P. (2d) 1077.

Deposit of motion in mail on last day of extension not a sufficient filing.—Where, under this rule, a fifteen-day period was allowed a proponent of a will to make a motion for a new trial, and on the fifteenth day the original motion was deposited in the United States mail for delivery to the

court, such delivery was not a sufficient filing. The deposit of the motion, with the clerk, with intent that he retain it, he being in any sufficient manner notified of this purpose, is the essential thing to constitute a filing. *Niles v. Shinkle*, 119 Colo. 458, 204 P. (2d) 1077.

Stated in *Oldland v. Gray*, 179 F. (2d) 408.

Cited in *Moreau v. Buchholz* (Colo.), 236 P. (2d) 540.

CHAPTER II

Pleadings and Motions.

Rule 7. Pleadings Allowed; Form of Motions.

For comments on nomenclature by Rules Committee, see Dicta XXII, No. 7, p. 154.

I. SUBDIVISION (a).

Plaintiff has no duty to reply to defendant's answer.—

Where neither the pleadings of defendants nor the answers of interveners advanced a counterclaim, plaintiff, under Rule 7(a) had no primary duty to reply to either. *North Poudre Irr. Co. v. Hinderlider*, 112 Colo. 467, 150 P. (2d) 304, 309. See *Aktiebolaget Stille-Werner v. Stille-Scanlan*, 1 F. R. D. 395; *Bender v. Connor*, 28 F. Supp. 903.

And alternative direction to reply is not an unequivocal order to reply.—An alternative direction to plaintiff to reply or elect to stand, was held not to amount to an unequivocal order to reply within the meaning of the final sentence of Rule 7(a). *North Poudre Irr. Co. v. Hinderlider*, 112 Colo. 467, 150 P. (2d) 304, 309.

Defendant must set forth affirmative defense of "lien waiver" in answer.—Under this rule, the only pleadings available are a complaint and answer, unless the trial court should order a reply; and, where no such reply is ordered and defendants desire to rely on a "lien waiver" as an affirmative defense, they must set forth the "lien waiver" in the answer. *Trustee Co. v. Bresnahan*, 119 Colo. 311, 203 P. (2d) 499.

II. SUBDIVISION (b).

Motions made at a hearing need not be reduced to writing.—In accord with origi-

nal. See *Wright v. Wright*, 122 Colo. 179, 220 P. (2d) 881.

Insufficient statement in motion to dismiss.—Where motion to dismiss complaint stated that "the said complaint is not in accordance to the 1935 Colorado Statutes Annotated, and was filed in violation thereof, and contrary to the said statutes in such case made and provided," the statement was insufficient to inform the court concerning the nature of the grounds upon which the dismissal was sought. *Gordon Inv. Co. v. Jones*, 123 Colo. 253, 227 P. (2d) 336.

Oral motion to suspend alimony on hearing of contempt citation.—A husband failed to pay temporary alimony awarded his wife and she filed a motion for citation requiring him to show cause why he should not be punished for contempt for such failure. On the hearing on the citation an order suspending the monthly payments of alimony was made on oral motion. It was held that the oral motion under the circumstances could not properly be considered by the trial court, and its action in suspending the order for temporary alimony was clearly an abuse of discretion. *Wright v. Wright*, 122 Colo. 179, 220 P. (2d) 881.

III. SUBDIVISION (c).

Demurrer treated as motion to dismiss. In accord with original. See *Henderson v. Greeley Nat. Bank*, 111 Colo. 365, 142 P. (2d) 480.

Rule 8. General Rules of Pleading.

I. GENERAL CONSIDERATION.

For comments on nomenclature by Rules Committee, see Dicta XXII, No. 7, p. 154.

The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation involved. A generalized summary of the case that affords fair notice is all that is required. *Smith v. Mills*, 123 Colo. 11, 225 P. (2d) 483.

Under the Rules of Civil Procedure it is very apparent that the chief function of a complaint is to give notice. *Bridges v. Ingram*, 122 Colo. 501, 223 P. (2d) 1051.

The rules were intended to de-emphasize the theory of a "cause of action" and to place the emphasis upon the facts giving rise to the asserted claim. The new practice

is not concerned with meeting technical requirements of theories of causes of actions. *Bridges v. Ingram*, 122 Colo. 501, 223 P. (2d) 1051.

If sufficient notice concerning the transaction involved is afforded the adverse party, the theory of the pleader is not important. If, under the facts, the substantive law provided relief upon any "theory," the cause should proceed to judgment. *Id.*

And plaintiff is not required to set out "a cause of action" under the Rules of Civil Procedure. *Smith v. Mills*, 123 Colo. 11, 225 P. (2d) 483.

Transaction rather than legal rights subject matter of claim.—The basic theory of plaintiff's pleading, under our present Rules of Civil Procedure, as in the Federal Rules

of Civil Procedure, 28 U. S. C. A., is that the transaction or occurrence is the subject matter of a claim, rather than the legal rights arising therefrom. *Brown v Mountain States Tel., etc., Co.*, 121 Colo. 502, 218 P. (2d) 1063.

II. THE PARTICULAR CLAUSES.

A. Claims for Relief.

1. Grounds for Relief.

Facts need not be set forth with particularity.—The purpose of rule 8 (a) is not to require the pleader to set forth the facts with particularity, but merely to apprise the adverse party of the nature of his claim. *Smith v Mills*, 123 Colo. 11, 225 P. (2d) 483, citing *Bridges v Ingram*, 122 Colo. 501, 223 P. (2d) 1051.

Facts showing plaintiff entitled to relief but not to specific relief sought.—If the plaintiff has stated a cause of action for any relief, it is immaterial what he designates it or what he has asked for in his prayer; the court will grant him the relief to which he is entitled under the facts pleaded. *Berryman v Berryman*, 115 Colo. 281, 172 P. (2d) 446.

A motion to dismiss for failure to state a claim was improperly sustained where the complaint set out all the allegations necessary for an absolute divorce, and the prayer was for a judicial separation, for the allegations plainly showed that plaintiff was entitled to relief, though not to the specific relief prayed. *Id.*

If a plaintiff declares his intention of seeking a particular form of relief, and of refusing all other relief, the legality or propriety of the relief sought might properly be determined on a motion to dismiss, though the complaint states facts entitling plaintiff to other relief than that he seeks. *Id.*

Alleging entrance into a contract is sufficient allegation of its validity and it is not necessary to set out specifically the nature or existence of consideration to enable the complaint to withstand motion for dismissal. *Smith v Mills*, 123 Colo. 11, 225 P. (2d) 483.

Where plaintiff paid money under contract for purchase of land which defendant breached, plaintiff could recover in an action for money had and received and need not bring action for breach of contract since such a complaint is sufficient to apprise defendant of the nature of the claim. *Bridges v Ingram*, 122 Colo. 501, 223 P. (2d) 1051.

C. Affirmative Defenses and Mitigating Circumstances.

The last clear chance doctrine is new matter constituting an affirmative defense, and must be pleaded. Defendant's purpose to avail himself of such defense should be stated in his answer to plaintiff's complaint. *Markley v Hilkey Bros.*, 113 Colo. 562, 160 P. (2d) 394, 396.

Laches is an affirmative defense and must

be pleaded. *Buss v McKee*, 115 Colo. 159 170 P. (2d) 268, 271.

Res judicata is an affirmative defense and must be pleaded. *In re Crowley's Estate*, 122 Colo. 244, 221 P. (2d) 378.

Waiver and abandonment are special defenses, in the nature of confession and avoidance, and must be specially pleaded. *Seeger's Estate v Puckett*, 115 Colo. 185, 171 P. (2d) 415, 417.

Claim in mitigation of damages must be affirmatively pleaded.—Defendants destroyed a valuable property relying upon a tax deed that was invalid and compensatory damages were allowed based on the value of replacing the improvements and the value of the personalty. Their claim for reimbursement for taxes paid could only be a claim in mitigation of damages and must be affirmatively pleaded. *Carlson v McNeill*, 114 Colo. 78, 162 P. (2d) 226, 231.

Statute of frauds.—It was error to rule that an assignment was ineffective because of the statute of frauds when the statute had not been pleaded or relied upon. *Ochsner v Langendorf*, 115 Colo. 453, 175 P. (2d) 392.

Prior adjudication not set up affirmatively.—See *Kubat v Kubat (Colo.)*, 238 P. (2d) 897.

D. Effect of Failure to Deny.

A "lien waiver," as an affirmative defense, must be set forth in the answer; otherwise, the defense is deemed denied. *Trustee Co. v Bresnahan*, 119 Colo. 311, 203 P. (2d) 499.

E. Pleading to Be Concise and Direct; Consistency.

1. Concise and Direct Pleading.

Sufficiency of complaint as against motion to dismiss.—A complaint under the Rules of Civil Procedure, to be sufficient as a claim against a motion to dismiss is required to advise defendant of the nature of the relief sought against him and the grounds thereof. It is not a valid objection on such a motion that the grounds of recovery appear partly from allegations of fact and partly from allegations of legal conclusions of the pleader. *People v McCloskey*, 112 Colo. 488, 150 P. (2d) 861, 862.

In an action to recover damages for the death of relator's husband, allegedly wrongfully caused by a deputy sheriff by the exercise of unreasonable and excessive force while engaged in his official duty to preserve the peace, and in the exercise of which he struck relator's husband, knocking him to the pavement and causing a fracture of his skull, which injury resulted in his death, it was held that if the conclusions of law alleged, rather than the ultimate facts from which they flow, be accepted as not objectionable to support the claim, under Rule 8 C (e) (1), then the complaint is sufficient as against motion to dismiss. *Id.*

F. Construction of Pleadings.

Applied in *Bridges v Ingram*, 122 Colo. 501, 223 P. (2d) 1051.

Rule 9. Pleading Special Matters.**I. CAPACITY.****A. General Consideration.**

Want of legal capacity to sue must be raised by special plea. *Bohen v Board of County Com'rs*, 109 Colo. 283, 124 P. (2d) 606, 608.

II. Fraud, Mistake, Condition of the Mind.

Fraud is never presumed, and a contract should not be adjudged void for fraud, unless the allegations and proofs of fraud are clear and convincing. *Fidelity Finance Co. v Groff* (Colo.), 235 P. (2d) 994.

But it is not necessary to recite in the bill of complaint all the evidence that may be adduced to prove the fraud, it being sufficient merely to state the main facts or incidents which constitute the fraud. *Fidelity Finance Co. v Groff* (Colo.), 235 P. (2d) 994.

delity Finance Co. v Groff (Colo.), 235 P. (2d) 994.

IV. SPECIAL DAMAGE.

Loss of use of car.—Where the loss of the business use of plaintiff's car was not the usual and natural consequence of any wrongful act on defendant's part, the damages, if any, which he sustained resulting from defendant's acts were required to be specifically set forth in his complaint. *Rogers v Funkhouser*, 121 Colo. 13, 212 P. (2d) 497.

Cited in *Carlson v Bain*, 116 Colo. 526, 182 P. (2d) 909.

V. PLEADING STATUTE.

Reply as amended held to sufficiently plead the statute of limitations under this rule. *Munro v Eshe*, 113 Colo. 19, 156 P. (2d) 700, 704.

Rule 11. Signing of Pleadings

The failure to sign a complaint is not jurisdictional, but is subject to correction upon being called to the attention of the

court. *Harris v Municipal Court*, 123 Colo. 539, 234 P. (2d) 1055.

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

(a) **Responsive Pleadings; When Presented.** A defendant shall file his answer within 20 days after the service of the summons on him, or if a copy of the complaint be not served with the summons, or if the summons be served without the state, or by publication, within 30 days after the service thereof on him. In actions under subdivisions (1) to (4), inclusive, of Rule 106, the court, ex parte, before process issues, may shorten the time for answer, and thereafter may shorten any of the periods fixed in these rules. A party served with a pleading stating a cross-claim against him shall file an answer thereto within 20 days after the service on him. The plaintiff shall file his reply to a counterclaim in the answer within 20 days after the service of the answer. If a reply is ordered by the court it shall be filed within 20 days after the entry of the order, unless the order otherwise directs. The filing of a motion permitted under this rule alters these periods of time, as follows, unless a different time is fixed by the order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be filed within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement, or for a bill of particulars, or for a statement in separate counts or defenses, the responsive pleading shall be filed within 10 days after the service of the more definite statement or bill of particulars or amended pleading. [Supplants Code Secs. 36 and 66; amendment effective August 18, 1951.]

Committee Note.

The changes in wording provide a clearer statement of substance.

(b) **Defenses; How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) insufficiency of process, (4) insufficiency of service of process, (5) failure to state a claim upon which relief can be granted, (6) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or with any other motion

permitted under Rule 12 or under Rule 98. If a pleading sets forth a claim for relief to which the adverse party is not required to file a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. [Supplants part of Supreme Court Rule 4 and Code Secs. 56, 60 and 189; amendment effective August 18, 1951.]

Committee Note.

The reference to "(3), improper venue" as a defense appearing in original Rule 12 (b) has been eliminated. Motions relating to venue are covered by Rule 98, and unless filed as provided in Rule 98 (e) may be waived. Failure to join an indispensable party has been added as a defense which may be raised by motion.

The addition at the end of subdivision (b) makes it clear that on motion under Rule 12 (b) (5) extraneous material may not be considered if the court excludes it, but that if the court does not exclude such material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. It will also be observed that if a motion under Rule 12 (b) (5) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment.

The Federal court decisions are about evenly divided on whether the statute of limitations and statute of frauds must be raised by answer or may be raised by motion to dismiss under 12 (b) (5) when the

bar of the statute appears on the face of the complaint.

The final disposition of these questions should await the decision of the Colorado Supreme Court; and accordingly, the Committee withdraws its comment as to the necessity of raising the statute of limitations and statute of frauds by answer as it appeared in the original note to original Rule 12 (b).

The words "or with any other motion permitted under Rule 12," were added to overcome decisions holding that the filing of a motion under 12 (c), 12 (e) or 12 (f) with a motion based on defenses (1) to (4) in this subdivision, waives those defenses; and to insure that the filing of all motions permitted under Rule 12 at the same time would not waive those defenses.

The words "or under Rule 98" were also added to insure that the filing of a motion to change venue with a motion based on defenses (1) to (4) of this subdivision, despite the court's ruling on the motion to change venue, will not waive any of these defenses.

The filing of a motion containing any of the defenses (1) to (4), although overruled, preserves the points for consideration on review. This directly changes old Supreme Court Rule 4.

The former Committee Note is deleted.

(c) **Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. [Amendment effective August 18, 1951.]

Committee Note.

The sentence appended to subdivision (c) permits the court to consider extraneous matter on a motion for judgment on the

pleadings and is grounded on the same reasons as the corresponding sentence added in subdivision (b).

(g) **Consolidation of Defenses.** A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule. [Amendment effective August 18, 1951.]

Committee Note.

Other than as provided by subdivision (h), a party who resorts to a motion to raise any of the defenses and objections specified in Rule 12, must file with it all motions that are then available to him. Under the original

rule, defenses and objections were divided into two groups which could be the subjects of successive motions.

For motions to change venue and the time for filing same see Rule 98.

(h) **Waiver of Defenses.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received. [Supplants Code Sec. 61; amendment effective August 18, 1951.]

Committee Note.

The addition of the phrase relating to indispensable parties is one of necessity.

For motions to change venue and the time for filing same see Rule 98.

For comments on nomenclature by Rules Committee, see Dicta XXII, No. 7, p. 154.

I. RESPONSIVE PLEADING; WHEN PRESENTED.

Order of court extending the time within which the defendant might answer or plead.—which was undoubtedly entered pursuant to authority expressly granted to the court by Rule 6(b), does not derogate from the requirements of Rule 12(a). *Oldland v Gray*, 179 F. (2d) 408.

Premature judgment by default.—After constructive service by publication, a judgment by default entered before the expiration of the time allowed to plead or answer is premature. In a direct proceeding to review a judgment shown to have been so entered prematurely, a reversal for error must be granted. *Netland v Baughman*, 114 Colo. 148, 162 P. (2d) 601, 602.

Applied in *Luedke v Todd*, 109 Colo. 326, 124 P. (2d) 932.

II. DEFENSES; HOW PRESENTED.

C. Lack of Jurisdiction Over Person.

Motion to quash.—A motion to quash is a proper method of raising the question of jurisdiction over the person of the defendant where the requirements of ch. 16, § 48 (1), providing for service of process on nonresident motorists were not met, and where, in any event, such service was improper because defendant was not a nonresident at the time of the accident out of which the accident arose. *Carlson v District Court*, 116 Colo. 330, 180 P. (2d) 525.

G. Failure to State a Claim upon Which Relief Can Be Granted.

Such motion is not identical to a demurrer.—While motion under Rule 12 C (b) (6) for "failure to state a claim upon which relief can be granted," may in some cases serve the purpose of a demurrer, and is analogous to it in some respects, it is not

an identical attack. *People v McCloskey*, 112 Colo. 488, 150 P. (2d) 861, 863.

Complaint dismissed where plaintiff not entitled to relief.—A complaint will not be dismissed "unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of claim, in view of means afforded defendant by federal rules to obtain speedy disposition of claim without foundation or substance." *People v McCloskey*, 112 Colo. 488, 150 P. (2d) 861, 863, citing *Eberle v Sinclair Prairie Oil Co.*, 35 F. Supp. 296, 297.

III. MOTION FOR JUDGMENT ON THE PLEADINGS.

Motion for summary judgment—Amendment.—While a judgment of dismissal for failure to state a claim upon which the relief can be granted may be entered upon a motion for summary judgment, such judgment must specifically disclose the inadequacy of the complaint as the ground therefor, and permission to amend should be given where there is a possibility by amendment of an adequate statement of claim. *Smith v Mills*, 123 Colo. 11, 225 P. (2d) 483.

It is wholly immaterial whether the trial court considered the judgment of dismissal proper under the provisions of rule 12C(c) or rule 56C(c), if the defendant was entitled to judgment under either thereof. *Haigler v Ingle*, 119 Colo. 145, 200 P. (2d) 913.

V. MOTION FOR MORE DEFINITE STATEMENT OR BILL OF PARTICULARS.

A. General Consideration.

Cited in *Kirchhof v Sheets*, 118 Colo. 244, 194 P. (2d) 320.

VIII. WAIVER OF DEFENSES.

A. General Consideration.

A party who seeks to set aside a judgment and plead to the merits has thereby entered a general appearance and waived the right to question a summons. *Wells Aircraft Parts Co. v Kayser Co.*, 118 Colo. 197, 194 P. (2d) 326.

Cited in *Kirchhof v Sheets*, 118 Colo. 244, 194 P. (2d) 320.

Rule 13. Counterclaim and Cross-Claim.

(a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adju-

dication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action. [Supplants Code Sec. 63; amendment effective August 18, 1951.]

Committee Note.

The removal of the phrasing "not the subject of a pending action" and the addition of the new clause at the end of the subdivision insures against an undesirable possibility presented under the original rule whereby a party having a claim which

would be the subject of a compulsory counterclaim could avoid stating it as such by bringing an independent action in another court after the commencement of the action but before filing his pleading in the action.

(g) **Cross-Claim against Co-Party.** A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant. [Supplants Code Sec. 63; amendment effective August 18, 1951.]

Committee Note.

The amendment is to care for a situation such as where a second mortgagee is made defendant in a foreclosure proceeding and wishes to file a cross-complaint against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien. A claim of this sort by the

second mortgagee may not necessarily arise out of the transaction or occurrence that is the subject matter of the original action under the terms of original Rule 13 (g).

See Rule 110 (d) providing that where a cross-claim or counterclaim is filed the claimant has the same rights and remedies as if a plaintiff.

(i) **Separate Trials; Separate Judgment.** If the court orders separate trials as provided in Rule 42 (b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54 (b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of. [Amendment effective August 18, 1951.]

Committee Note.

The change is to bring about conformity and to clarify the interdependence of Rules 13 (i) and 54 (b).

I. GENERAL CONSIDERATION.

Cited in *Newby v Bock*, 120 Colo. 454, 210 P. (2d) 985; *Johnson v Neel*, 123 Colo. 377, 229 P. (2d) 939.

Rule 14. Third-Party Practice.

(a) **When Defendant May Bring in Third Party.** Before the filing of his answer a defendant may move ex parte or, after the filing of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. [Supplants Code Sec. 139; amendment effective August 18, 1951.]

Committee Note.

The provisions in Rule 14 (a) which relate to the impleading of a third party who is or may be liable to the plaintiff have been deleted by the proposed amendment. It has been held that under Rule 14 (a) the plaintiff need not amend his complaint to state a claim against such third-party if he does not wish to do so. Thus, impleader here amounts to no more than a mere offer of a party to the plaintiff, and if he rejects it, the attempt is a time-consuming futility.

For these reasons the words "or to the plaintiff" in the first sentence of subdivision (a) are removed by the amendment, and in conformance therewith the words "the plaintiff" in the second sentence of the subdivision, and the words "or to the third-party plaintiff" in the concluding sentences thereof are also eliminated.

The third sentence of Rule 14 (a) has been expanded to clarify the right of the third-party defendant to assert any defenses which the third-party plaintiff may have to the plaintiff's claim. This protects the impleaded third-party defendant where the third-party plaintiff fails or neglects to assert a proper defense to the plaintiff's action. A new sentence has also been inserted giving the third-party defendant the right to assert directly against the original plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. This permits all claims arising out of the same transaction or occurrence to be heard and determined in the same action. Accordingly, the next to the last sentence of subdivision (a) has also been revised to make clear that the plaintiff may, if he desires, assert directly against the third-party defendant either by amendment or by a new pleading any claim he may have against him arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. In such a case, the third-party defendant then is entitled to assert the defenses, counterclaims and cross-claims provided in Rules 12 and 13.

The sentence reading "The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff, or to the third-party plaintiff" has been stricken from Rule 14 (a), not to change the law, but because the sentence states a rule of substantive law which is not within the scope of a procedural rule. It is not the purpose of the rules to state the effect of a judgment.

The elimination of the words "the third-party plaintiff, or any other party" from the second sentence of Rule 14 (a), together with the insertion of the new phrases therein, are not changes of substance but are merely for the purpose of clarification.

See Rule 110 (d) providing that where a third-party complaint is filed the claimant has the same rights and remedies as if a plaintiff.

I. WHEN DEFENDANT MAY BRING IN THIRD PARTY.**A. General Consideration.**

Its purpose.—The general purpose of this rule is to settle as many conflicting inter-

ests as possible in one proceeding and thus avoid circuity of action, save time and expense, as well as eliminate a serious handicap to the defendant of a time difference between the judgment against him and a judgment in his favor against the third-party defendant. *Pioneer Mut. Compensation Co. v. Cosby* (Colo.), 244 P. (2d) 1089.

This rule was promulgated not only for the purpose of serving litigants but as a wise exposition of public policy. The object of the rule was to facilitate litigation, to save costs, to bring all of the litigants into one proceeding, and to dispose of an entire matter without the expense and the labor of many suits and many trials. *Pioneer Mut. Compensation Co. v. Cosby* (Colo.), 244 P. (2d) 1089.

Rule creates no substantive rights.—Third-party practice, and particularly the practice provided for in this rule is procedural. The rule does not abridge, enlarge nor modify the substantive rights of any litigant. It creates no substantive rights. Thus unless there is some substantive basis for the third-party plaintiff's claim, he cannot utilize the procedure of the rule. This rule does not establish a right of reimbursement, indemnity nor contribution, but where there is a basis for such right, the rule expedites the presentation, and in some cases accelerates the accrual, of such right. *Pioneer Mut. Compensation Co. v. Cosby* (Colo.), 244 P. (2d) 1089.

B. Illustrations.

Cases in which parties were properly brought in as third-party defendants.—If an insurance company has by its policy agreed to insure against liability on the part of a defendant, then a third-party procedure is justified and the third-party plaintiffs are only seeking to compel the insurance company to do that which it contracted to do but now refuses to do. This rule does not eliminate a multiplicity of suits and creates judicial procedure for the determination of the insured's liability to the injured party, and then affords a procedural method of enforcing the provisions of the insurance contract, if liability is present in the first instance. If the policy were one of indemnity rather than of liability, then this procedure would not be applicable, the insurer not being liable until an actual loss is sustained. *Pioneer Mut. Compensation Co. v. Cosby* (Colo.), 244 P. (2d) 1089.

II. WHEN PLAINTIFF MAY BRING IN THIRD PARTY.

Appeal of order denying motion to make another a third party plaintiff.—See note to Rule 111.

III. SEPARATE TRIALS.

Comment of Rules Committee.—There are many instances in which the court undoubtedly should exercise its right to order a separate trial of the third-party issues under Rules 20 (b) and 42 (b). Under these two rules it is not only proper but desirable to order separate trials if the determination of the third-party issues will unduly embarrass, delay, or put the plaintiff to expense, in all cases where the plaintiff seeks nothing from the third-party defendant and the latter seeks nothing from the plaintiff. *Dicta XXII, No. 7, p. 155.*

Rule 15. Amended and Supplemental Pleadings.

I. AMENDMENTS.

This rule assumes a service of an amendment on the other party to the action, otherwise that portion of the rule providing that a responsive pleading shall be within ten days after service of the amended pleading would be meaningless. *Myers v Myers*, 110 Colo. 412, 416, 135 P. (2d) 235; *Holman v Holman*, 114 Colo. 437, 165 P. (2d) 1015. See note to rule 5 (a).

In *Myers v Myers*, 110 Colo. 412, 135 P. (2d) 235, it was specifically held that Rule 15(a), giving the adverse party ten days after the service of notice of amendment to plead to the amended pleading, applied in a proceeding for divorce, and that where plaintiff had been permitted to amend her complaint by the insertion of a jurisdictional averment without notice to defendant, it was error for the court to deny the latter's motion—interposed before the interlocutory decree became final—to set aside the decree and permit him to answer. *Holman v Holman*, 114 Colo. 437, 165 P. (2d) 1015.

With the filing of defendant's answer the right to amend as a matter of course is lost and further amendment is within the discretion of the trial court. *Board of County Com'rs v Bullock*, 122 Colo. 218, 220 P. (2d) 877.

Where it was contended that an amended complaint merely added a second cause of action to that already stated in the original complaint, it was within the discretion of the court whether the amendment should be allowed after the defendant's answer, and it is doubtful that this discretion was abused where counsel for both sides subsequently entered into an agreed statement of facts. *Id.*

After issues joined and a cause has been set for trial, a court may in the exercise of reasonable discretion and in the interest of justice permit the filing of an amended answer pleading additional defenses. *Flanders v Kochenberger*, 118 Colo. 104, 193 P. (2d) 281.

II. AMENDMENTS TO CONFORM TO THE EVIDENCE.

A judgment based on issues not formed by the pleadings is not error where the issue was embraced in the stipulation of facts upon which the case was tried, and the complaint was not challenged in the trial court. Under subsection (b) of this rule, such an issue must now be treated in all respects as if it had been raised in the pleadings. *Sinclair Refining Co. v Shakespeare*, 115 Colo. 520, 175 P. (2d) 389.

In the absence of motions or objections, any issue that the parties see fit to present may be considered and determined by the trial court, and, in the absence of motion or objection, when an issue not pleaded is thus presented, the pleadings become *functus officio*, and the parties are before the court to present such matter as they desire. *Carlson v Bain*, 116 Colo. 526, 182 P. (2d) 909.

The amendment allowable or "such amendment" refers to situations where is-

sues are not raised by the pleadings and are tried by the express or implied consent of the parties. This is made clear by the further provision that the amendment may be made "even after judgment." *Barnes v Wright*, 123 Colo. 462, 231 P. (2d) 794.

Discretion not abused by failure to allow amendment.—In an action for part of commissions alleged to be due plaintiff wherein court denied plaintiff the privilege of amending his complaint as to evidence of services rendered by him prior to date of alleged contract, it was held that the matter rested in the sound discretion of the court, and that there had been no abuse of that discretion. *Fedderson v Goode*, 112 Colo. 38, 145 P. (2d) 981, 984.

In an action to foreclose mechanics' liens where evidence admitted without objection clearly established the right of plaintiffs to the liens, it was held that under this rule they could amend their complaint to conform to the proof either at the trial or subsequent to the judgment. *Toy v Rogers*, 114 Colo. 432, 165 P. (2d) 1017.

Amendment so as to set forth defense of compromise and settlement.—In an action to recover for personal injuries resulting from an automobile collision, where plaintiffs were advised before trial of a tendered amendment to defendant's answer and counterclaim, so as to set forth the defense of compromise and settlement, and made no objection thereto and one of the plaintiffs testified with reference to the compromise and settlement without objection, the trial court erred in refusing to grant leave to defendant to so amend after all of the evidence had been introduced. *Rogers v Funkhouser*, 121 Colo. 13, 212 P. (2d) 497.

Grant of leave to amend held error.—At the close of the evidence on the issues of negligence and contributory negligence in an automobile accident it was error to grant plaintiff over defendant's objection leave to amend the complaint to allege defendant had the last clear chance. *Barnes v Wright*, 123 Colo. 462, 231 P. (2d) 794.

Illustrations of issues being tried with express or implied consent.—

Where evidence raising an issue was received without objection, the issue was considered as if it had been raised in the pleadings. *Craft v Stumpf*, 115 Colo. 181, 170 P. (2d) 779.

In an action to foreclose mechanics' liens the evidence admitted without objection clearly established the right of the lien claimants to charge defendants' property with a lien under section 19 of chapter 101. The complaint was not based upon the provisions of section 19, and, consequently, no issue was presented thereon; nevertheless, defendants, by failing to object to evidence applicable under provisions of the section impliedly consented that the action should be tried in all respects as if the issue had been raised under this section. *Toy v Rogers*, 114 Colo. 432, 165 P. (2d) 1017.

Though special damages were not pleaded as required by Rule 9 (g), where the defendant had made no objection to the evidence on which the court based its

findings as to damages, no amendment was necessary and a judgment giving both actual and special damages would stand. *Carlson v Bain*, 116 Colo. 526, 182 P. (2d) 909.

Where it is apparent from the testimony, the exhibits and the finding of the court that the issue of the statute of limitations was tried by implied consent, the plaintiff will not be held to have waived his right to claim title under the provisions of the statute of limitations because he did not specially plead the statute either by complaint, answer to intervenor's petition, or by motion. *Rose v Roso*, 119 Colo. 473, 204 P. (2d) 1075.

In an action by a divorced wife against her former husband alleging fraud on his part in the procurement of a property settlement agreement, where the complaint charged specific false representations on the husband's part, complainant could recover upon the theory of extrinsic or constructive fraud, under this rule, where the issue of extrinsic or constructive fraud was in fact tried by express or implied consent of the parties. *United States Nat. Bank v Bartges*, 120 Colo. 317, 210 P. (2d) 600.

In an action to quiet title defendants did not allege adverse possession but there was evidence before the court that defendants and their predecessors in interest had occupied the land for more than sixty years prior to the commencement of the action. Under Rule 15 (b), it became the court's duty to determine the issue thus presented as if it had been raised by the pleadings. *Hodge v Terrill*, 123 Colo. 190, 228 P. (2d) 904.

Where express fraud was alleged in the complaint, but the evidence showed constructive fraud and throughout the trial it was apparent that the cause was being presented upon the theory of constructive fraud, without objection by plaintiffs in error, under Rule 15 (b) the judgment entered upon the issues actually tried was good. *United States Nat. Bank v Bartges*, 122 Colo. 546, 224 P. (2d) 658.

Issues not tried by express or implied consent.—This rule would be controlling were it not for the fact that the issue presented to the jury in this case was not raised by the pleadings and was not tried by express or implied consent of the parties. Defendant's counsel by his motions and tendered instructions emphatically objected to a trial of any issue not presented by the pleadings. *W. T. Grant Co. v Casady*, 117 Colo. 405, 188 P. (2d) 881.

Cited in *Jones v Gates Service Station*, 108 Colo. 201, 115 P. (2d) 396; *Gibraltar Colorado Life Co. v Brink*, 113 Colo. 304, 157 P. (2d) 134; *Newby v Bock*, 120 Colo. 454, 210 P. (2d) 985.

IV. SUPPLEMENTAL PLEADINGS.

Opposite party must be afforded opportunity to tender pleading.—This rule provides reasonable notice to the opposite party, and it follows that the opposite party be afforded an opportunity to tender a pleading thereto and thereby be prepared for the opportunity to meet the issue on the trial and not be surprised to his injury. *Harms v Harms*, 120 Colo. 212, 209 P. (2d) 552.

Rule 16. Pre-Trial Procedure; Formulating Issues.

Editor's note.—This rule is the subject of two recent articles, "Pre-Trial in Colorado in Words and at Work" by Mr. T. Raber Taylor of the Denver Bar and "A Comment on Pre-Trial Procedure" by Hon. J. Foster Symes, retired judge of the U. S. District Court for the District of Colorado. See also article entitled "Some Comments on Pre-Trial" in *Dicta*, XXVIII, p. 23.

The pre-trial conference rule is designed to expedite trials when certain facts may be admitted and the necessity of proof thereof obviated. *Duffy v Gross*, 121 Colo. 198, 214 P. (2d) 498.

It rests entirely in trial court's discretion. —Whether or not a pre-trial conference is to be called rests entirely in the discretion of the trial court and that discretion abides

throughout the procedure. *Duffy v Gross*, 121 Colo. 198, 214 P. (2d) 498.

There is nothing in this rule that is compulsory as to disclosure of details of issues to be made by pleadings. *Duffy v Gross*, 121 Colo. 198, 214 P. (2d) 498.

Defendants were not prejudiced at a pre-trial conference by the court overruling their request that plaintiffs be required to state what specific grounds of negligence they relied on, when plaintiffs' counsel in his opening statement said that they would prove that defendants' failure to observe a stop sign caused the accident and defendants' counsel failed to request a continuance or recess. *Duffy v Gross*, 121 Colo. 198, 214 P. (2d) 498.

Cited in *Light v Rogers (Colo.)*, 242 P. (2d) 234.

CHAPTER III

Parties.

Rule 17. Parties Plaintiff and Defendant; Capacity.

I. REAL PARTY IN INTEREST.

B. Who Is Real Party in Interest.

Partner in whose name contract was made.—In action for breach of contract of

sale, where plaintiff testified that she had partners and "the profits would have been split four ways," but she also testified, "I had the sole handling of the lease and everything was in my name," and defendant

made no attempt to have other parties joined, plaintiff had capacity to sue in her own name. *Monks v Hemphill*, 119 Colo. 378, 212 P. (2d) 1004.

III. INFANTS OR INCOMPETENT PERSONS.

Applied in *Welsh v Independent Lbr. Co.*, 110 Colo. 280, 133 P. (2d) 535.

Rule 18. Joinder of Claims and Remedies.

I. GENERAL CONSIDERATION.

As to joinder of liability insurance company as defendant, see article by Don W. Marshall, of the Denver Bar, in *Dicta XXII*, No. 12, p. 314.

Where a liability policy contains a "no-action" clause, providing that no action will lie against the insurer until judgment has been obtained against the insured, one injured in an accident may not sue the insured and the insurance carrier jointly or the in-

surance carrier separately, but must first obtain a judgment against the insured, and then and then only, if the provisions of the policy are such as to create a contractual relationship between the insured and the insurer, the injured party's rights against the insurer first ripens into existence. Such a provision establishes a substantive right in the insurer and does not violate the Rules of Civil Procedure. *Crowley v Hardman Bros.*, 122 Colo. 489, 223 P. (2d) 1045.

Rule 19. Necessary Joinder of Parties.

I. NECESSARY JOINDER.

A. General Consideration.

Cited in *Newby v Bock*, 120 Colo. 454,

210 P. (2d) 985; *Crowley v Hardman Bros.*, 122 Colo. 489, 223 P. (2d) 1045.

Rule 20. Permissive Joinder of Parties.

I. PERMISSIVE JOINDER.

Examples of proper joinder.—

In action for death caused by negligent operation of motor vehicle the owner was properly joined with the driver as a party defendant under this rule. *Drake v Hodges*, 114 Colo. 10, 161 P. (2d) 338.

As to joinder of liability insurance company as defendant, see article by Don W.

Marshall, of the Denver Bar, in *Dicta XXII*, No. 12, p. 314.

Quoted in *Crowley v Hardman Bros.*, 122 Colo. 489, 223 P. (2d) 1045.

Cited in *Beatty v Resler*, 108 Colo. 434, 118 P. (2d) 1084.

II. SEPARATE TRIALS.

As to separate trial of third-party issues, see note under Rule 14.

Rule 21. Misjoinder and Non-Joinder of Parties.

Cited in *Newby v Bock*, 120 Colo. 454, 210 P. (2d) 985.

Rule 23. Class Actions.

I. REPRESENTATION.

A. General Consideration.

Applied in *Denver v Gushurst*, 120 Colo. 465, 210 P. (2d) 616.

Rule 24. Intervention.

(a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or of an officer thereof. [Supplants Code Secs. 17 and 22; amendment effective August 18, 1951.]

Committee Note.

The addition to subdivision (a) (3) covers the situation where property may be in the actual custody of some other officer or

agency—but the control and disposition of the property is lodged in the court wherein the action is pending.

(b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any

regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. [Supplants Code Secs. 17 and 22; amendment effective August 18, 1951.]

Committee Note.

The addition in subdivision (b) permits the intervention of governmental officers or agencies in proper cases and thus avoids exclusionary constructions of the rule.

I. GENERAL CONSIDERATION.

The new rules must be liberally construed, etc.—

In accord with original. See *Senne v Conley*, 110 Colo. 270, 133 P. (2d) 381.

Unnecessary intervention is not error where no harm done.—Allowance of an intervention is not error although the rights of the parties might have been worked out without the presence of the intervenor, where such participation did no harm and made a more comprehensive decree possible. *North Poudre Irr. Co. v Hinderlider*, 112 Colo. 467, 150 P. (2d) 304, 308, citing *Bromfield v Trinidad Nat. Inv. Co.*, 36 F. (2d) 646, 71 A. L. R. 542.

Substitution of intervenor in place of defendant.—While an intervenor may join either plaintiff or defendant in the principal action, or may oppose both, he cannot, without the consent of plaintiff, be substituted in the place or stead of defendant. *North Poudre Irr. Co. v Hinderlider*, 112 Colo. 467, 150 P. (2d) 304, 308.

II. INTERVENTION OF RIGHT

The interest in the litigation that an intervenor must show is an interest in the subject-matter of the litigation and it is not sufficient for him to show that he has an independent right of action against the defendant based on grounds like those asserted by the plaintiff. *Hulst v Dower*, 121 Colo. 150, 213 P. (2d) 834, citing *Bickford's Inc. v Federal Reserve Bank*, 5 F. Supp. 875.

Where it did not appear that intervenors were parties to the alleged contract between plaintiff and defendants upon which right of recovery in the action proper was premised; nor did it appear that defendants were apprised of the existence of the alleged contract between plaintiff and intervenors, which was the basis of intervenors' claim against plaintiff, an application for leave to intervene was properly denied. *Hulst v Dower*, 121 Colo. 150, 213 P. (2d) 834.

Applied in *Susman v Exchange Nat. Bank*, 117 Colo. 12, 183 P. (2d) 571; *Shotkin v Atchison, etc., R. Co. (Colo.)*, 235 P. (2d) 990.

Cited in *Porter v Black*, 115 Colo. 527, 175 P. (2d) 807.

III. PERMISSIVE INTERVENTION.

Discretion not abused in allowing intervention.—In a suit to restrain state engineer from computing and limiting water deliveries to plaintiff's reservoir upon the basis of depth of water instead of by actual cubicle content, it was held that the district court did not abuse its discretion in allowing intervention under the permissive provisions of Rule 24(b) (2). *North Poudre Irr. Co. v Hinderlider*, 112 Colo. 467, 150 P. (2d) 304, 305.

But a direct or pecuniary interest is not required.—

In accord with 1st paragraph in original. See *North Poudre Irr. Co. v Hinderlider*, 112 Colo. 467, 150 P. (2d) 304, 309.

IV. PROCEDURE

Applied in *Susman v Exchange Nat. Bank*, 117 Colo. 12, 183 P. (2d) 571.

Rule 25. Substitution of Parties.

(a) Death.

(1) If a party dies and the claim is not extinguished or barred, the court within two years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of process; provided that, if the service upon persons not parties be made by publication, the publication of the notice shall be sufficient without the publication of the motion, but in such case the notice shall state the names of the persons who are sought to be substituted upon whom the service by publication is made. [Supplants part of Code Secs. 15 and all of 290; amendment effective August 18, 1951.]

Committee Note.

The federal rule requires substitution of parties within two years after death; the

amendment makes state and federal practice conform.

CHAPTER IV

Depositions and Discovery.

Rule 26. Depositions Pending Action.

(b) **Scope of Examination.** Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. [Amendment effective August 18, 1951.]

Committee Note.

The amendments make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible. Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved.

I. GENERAL CONSIDERATION.

Editor's note.—For an article, "Depositions and Discovery, Rules 26 to 37," by Col. Philip S. Van Cise, see Dicta XXVIII, p. 375.

II. WHEN DEPOSITIONS MAY BE TAKEN.

Applied in *Gottesleben v Luckenbach*, 123 Colo. 429, 231 P. (2d) 958.

IV. USE OF DEPOSITIONS.

Where defendants had taken the deposition of the plaintiff and were permitted to use it in an attempt to impeach him, the court properly refused defendants' request to use the deposition in connection with their argument for a directed verdict and as a part of their defense. *Foster v Howell*, 122 Colo. 64, 220 P. (2d) 717.

Applied in *Hiltibrand v Brown* (Colo.), 234 P. (2d) 618, as to depositions of non-resident plaintiff who failed to appear in person at trial.

VI. EFFECT OF TAKING OR USING DEPOSITIONS.

Applied in *Gottesleben v Luckenbach*, 123 Colo. 429, 231 P. (2d) 958.

Rule 27. Depositions Before Action or Pending Appeal.

Editor's note.—The paragraph under this catchline in the Replacement Volume should be deleted.

Rule 28. Persons Before Whom Depositions May Be Taken.

(a) **Within the United States.** Within the United States or within a territory or possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of this state or of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. [Supplants Code Secs. 377 and 384; amendment effective August 18, 1951.]

Committee Note.

The added language provides for the situation, occasionally arising, when depositions must be taken in an isolated place where there is no one readily available who has the power to administer oaths and take testimony according to the terms of the rule as originally stated. In addition, the

amendment affords a more convenient method of securing depositions in the case where state lines intervene between the location of various witnesses otherwise rather closely grouped. The amendment insures that the person appointed shall have adequate power to perform his duties.

Rule 30. Depositions Upon Oral Examination.

(b) **Orders for Protection of Parties and Deponents.** After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression. The provisions hereof shall be liberally construed by the court in order to prevent unnecessary inconvenience and expense to parties and to witnesses, and to avoid unnecessary delay. [Amendment effective August 18, 1951.]

Committee Note.

The last sentence has been added to make clear the intent of the rule.

Rule 33. Interrogatories to Parties.

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership, association, or body politic, by any officer or agent who shall furnish such information as is available to the party. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto. Such objections shall be determined by the court at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

Interrogatories may relate to any matters which can be inquired into under Rule 26 (b), and the answers may be used to the same extent as provided in Rule 26 (d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30 (b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule. [Amendment effective August 18, 1951.]

Committee Note.

In the first paragraph of Rule 33, the word "service" is substituted for "delivery" in conformance with the use of the word "serve" elsewhere in the rule. The portion of the rule dealing with practice on objections has been revised so as to afford a clearer statement of the procedure. The addition of the words "to interrogatories to which objection is made" insures that only the answers to the objectionable interrogatories may be deferred, and that the answers

to interrogatories not objectionable shall be forthcoming within the time prescribed in the rule. Under the original wording, answers to all interrogatories might be withheld until objections, sometimes to but a few interrogatories, are determined. The amendment expedites the procedure of the rule and serves to eliminate the strike value of objections to minor interrogatories. The elimination of the last sentence of the original rule is in line with the policy stated subsequently in this note.

The added second paragraph in Rule 33 contributes clarity and particularity to the use and scope of interrogatories to the parties. The field of inquiry will be as broad as the scope of examination under Rule 26 (b). There is no reason why interrogatories should be more limited than depositions, particularly when the former represent an inexpensive means of securing useful information. Under amended Rule 33, the party interrogated is given the right to invoke such protective orders under Rule 30 (b) as are appropriate to the situation. At the same time, it is provided that the number of or number of sets of interrogatories to be served may not be limited arbitrarily or as a general policy to any particular number, but that a limit may be fixed only as justice requires to avoid annoyance, expense, embarrassment or oppression in individual cases. The party interrogated, therefore, must show the necessity for limitation on that basis. It will be noted that in accord with this change the last sentence of the present rule, restricting the sets of interrogatories to be served, has been stricken. By

virtue of express language in the added second paragraph of Rule 33, as amended, any uncertainty as to the use of the answers to interrogatories is removed.

The second sentence of the second paragraph in Rule 33, as amended, concerns the situation where a party wishes to serve interrogatories on a party after having taken his deposition, or vice versa. Rule 33, as amended, permits either interrogatories after a deposition or a deposition after interrogatories. It may be quite desirable or necessary to elicit additional information by the inexpensive method of interrogatories where a deposition has already been taken. The party to be interrogated, however, may seek a protective order from the court under Rule 30 (b) where the additional deposition or interrogation works a hardship or injustice on the party from whom it is sought.

I. GENERAL CONSIDERATION.

Applied in *Godfrit v Judd*, 116 Colo. 489, 182 P. (2d) 907.

Rule 34. Discovery and Production of Documents and Things for Inspection, Copying or Photographing.

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, sampling, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26 (b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. [Supplants Code Secs. 279, 280, 390 and 399; amendment effective August 18, 1951.]

Committee Note.

The changes in clauses (1) and (2) correlate the scope of inquiry permitted under Rule 34 with that provided in Rule 26 (b), and thus remove any ambiguity created by the former differences in language. At the same time the addition of the words follow-

ing the term "parties" makes certain that the person in whose custody, possession, or control the evidence reposes may have the benefit of the applicable protective orders stated in Rule 30 (b).

See 1935 C. S. A., c. 110, Sec. 211, for inspection of mines.

Rule 35. Physical and Mental Examination of Persons.

I. ORDER FOR EXAMINATION.

Applied in *Richardson v Richardson* (Colo.), 236 P. (2d) 121.

Rule 36. Admission of Facts and of Genuineness of Documents.

(a) **Request for Admission.** After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. Copies of the documents shall be served with the request unless copies

have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. Such objections shall be determined by the court at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder. [Amendment effective August 18, 1951.]

Committee Note.

The change in the first sentence of Rule 36 (a) brings Rule 36 in line with Rules 26 (a) and 33. There is no reason why these rules should not be treated alike. Other provisions of Rule 36 (a) give the party whose admissions are requested adequate protection.

The substitution of the word "served" for "delivered" in the third sentence of the amended rule is in conformance with the use of the word "serve" elsewhere in the rule. The substitution of "shorter or longer" for "further" will enable a court to designate a lesser period than 10 days for answer. This conforms with a similar provision already contained in Rule 33.

The addition of clause (2) specifies the method by which a party may challenge the propriety of a request to admit. There has been considerable difference of judicial opinion as to the correct method, if any, available to secure relief from an allegedly improper request. The changes in clause (1) are merely of a clarifying and conforming nature.

The first of the added last two sentences prevents an objection to a part of a request from holding up the answer, if any, to the remainder. See similar change in Rule 33. The last sentence strengthens the rule by making the denial accurately reflect the party's position. It is taken, with necessary changes, from Rule 8 (b).

Rule 37. Refusal to Make Discovery: Consequences.

Subdivision (d) applied in *Johnson v George*, 119 Colo. 594, 206 P. (2d) 345.

CHAPTER V

Trials.

Rule 38. Jury Trial.

I. WHERE JURY RIGHT EXISTS.

A. In General.

Trial by jury in civil actions is not a matter of right in Colorado. *Johnson v Neel*, 123 Colo. 377, 229 P. (2d) 939.

Generally in purely equitable cases, the trial must be to the court.—

For case under § 191 of the former Code of Civil Procedure, see *Dohner v Union Cent. Life Ins. Co.*, 109 Colo. 35, 121 P. (2d) 661.

Rule 39. Trial by Jury or by the Court.

I. TRIAL BY JURY.

Where a litigant acquiesces in a trial before the court, thereby consenting thereto, he cannot thereafter contend for the first time in the supreme court that a jury should have been called. *Johnson v Neel*, 123 Colo. 377, 229 P. (2d) 939.

Where formal demand for jury trial is made by a party and the cause thereafter

proceeds to trial by the court without a jury, and there is no objection to such trial by either party, the unsuccessful party cannot thereafter secure reversal of the judgment entered against him upon the ground that there was no formal disposition of the demand for jury trial in strict compliance with Rule 39 (a). *Id.*

Rule 41. Dismissal of Actions.

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; By Stipulation. Subject to the provisions of Rule 23 (c), of Rule 66, and of any statute, an action may be dismissed by the plaintiff upon

payment of costs without order of court (i) by filing a notice of dismissal at any time before filing or service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim. [Supplants Supreme Court Rule 5 and Code Sec. 184; amendment effective August 18, 1951.]

Committee Note.

The insertion of the reference to Rule 66 correlates Rule 41 (a) (1) with the express provisions concerning dismissal set forth in amended Rule 66 on receivers.

The change in Rule 41 (a) (1) (i) gives the service of a motion for summary judgment by the adverse party the same effect in preventing unlimited dismissal as was originally given only to the service of an answer. The omission of reference to a motion for summary judgment in the original rule was subject to criticism. A motion for summary judgment may be forthcoming

prior to answer, and if well taken will eliminate the necessity for an answer. Since such a motion may require even more research and preparation than the answer itself, there is good reason why the service of the motion, like that of the answer, should prevent a voluntary dismissal by the adversary without court approval.

The word "generally" has been stricken from Rule 41 (a) (1) (ii) in order to avoid confusion and to conform with the elimination of the necessity for special appearance by original Rule 12 (b).

(b) Involuntary Dismissal:

(1) **By Defendant:** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or failure to file a complaint under Rule 3, operates as an adjudication upon the merits. [Amendment effective August 18, 1951.]

Committee Note.

The motion for dismissal after the presentation of plaintiff's evidence provided for in this Rule supplants a motion for nonsuit under Code Sec. 184-Fifth.

In some cases tried without a jury, where at the close of plaintiff's evidence the defendant moves for dismissal under Rule 41 (b) on the ground that plaintiff's evidence is insufficient for recovery, the plaintiff's own evidence may be conflicting or present questions of credibility. In ruling on defendant's motion, questions arise as to the function of the judge in evaluating the testimony and whether findings should be made if the motion is sustained. The added sentence in Rule 41 (b) incorporates the view that on such a motion in a non-jury case the judge may pass on conflicts of evidence and credibility, and if he performs that function of evaluating the testimony and grants the motion on the merits, findings are required.

I. VOLUNTARY DISMISSAL.

A. By Plaintiff.

Plaintiff has right without order of court to dismiss, etc.—

In an action for divorce, defendant not

having interposed any cross complaint or answer, plaintiff sought to dismiss the proceeding as follows: "Comes now the plaintiff and hereby dismisses the above entitled action without prejudice." Upon the filing of the dismissal in form as stated, the action stood dismissed without order of court; thus the court erred in declining to dismiss the case. *Chamberlain v. Chamberlain*, 108 Colo. 538, 120 P. (2d) 641, 138 A. L. R. 1097.

Dismissal order held not to contravene paragraph (a) (1).—See *Hilliard v. Klein* (Colo.), 238 P. (2d) 882.

II. INVOLUNTARY DISMISSAL.

A. By Defendant.

A motion for nonsuit is not proper under this rule. The motion should be for dismissal. *Toy v. Rogers*, 114 Colo. 432, 165 P. (2d) 1017; *Shearer v. Snyder*, 115 Colo. 232, 171 P. (2d) 663; *W. T. Grant Co. v. Casady*, 117 Colo. 405, 188 P. (2d) 881.

And on appeal the court will treat a motion for nonsuit as one to dismiss under the new rule. *Shearer v. Snyder*, 115 Colo. 232, 171 P. (2d) 663.

The plaintiff and not the defendant must prosecute the case in due course and with-

out unusual delay under this rule. *Johnson v Westland Theatres*, 117 Colo. 346, 187 P. (2d) 932.

Plaintiff not guilty of failure to prosecute.—Where the plaintiff put forth every effort to have her case prosecuted, and finally obtained new counsel in order to speed the proceedings, it cannot be said that she was guilty of failing to prosecute under this section. *Johnson v Westland Theatres*, 117 Colo. 346, 187 P. (2d) 932.

Proper case for dismissal under (b) (1).—At the close of the evidence on the issues

of negligence and contributory negligence in an automobile accident, it was error to grant plaintiff over defendant's objection leave to amend the complaint to allege last clear chance. Instead of allowing the amendment, the trial court, under section (b) (1) of this rule, could have dismissed plaintiff's complaint with a specification that such dismissal would not operate as an adjudication upon the merits. *Barnes v Wright*, 123 Colo. 462, 231 P. (2d) 794.

Applied in *O'Done v Shulman* (Colo.), 238 P. (2d) 1117.

Rule 42. Consolidation; Separate Trials.

I. CONSOLIDATION.

Whether actions shall be consolidated is in discretion of trial judge.—The rule for consolidation of causes of action and actions is a departure from the Code and gives to the trial judge authority to consolidate in the exercise of his discretion. It is only when it clearly appears that this discretion has been abused that courts of review will hold that the consolidation was prejudicial to a complaining party. *Willy v Atchison, etc., Ry. Co.*, 115 Colo. 306, 172 P. (2d) 958.

Several tort actions growing out of one accident.—The trial judge did not abuse his discretion in consolidating actions by a widow for the death of her husband, for medical care of her minor child, and, as next friend of her minor child, for injuries suffered by the child, all of which actions grew out of the same accident. *Willy v Atchison, etc., Ry. Co.*, 115 Colo. 306, 172 P. (2d) 958.

II. SEPARATE TRIALS.

As to separate trial of third-party issues, see note under Rule 14.

Rule 43. Evidence.

II. SCOPE OF EXAMINATION AND CROSS-EXAMINATION.

Where defendant is the only witness it is not necessary for plaintiff to wait for the close of defendant's case to make his cross-examination. *Shearer v Snyder*, 115 Colo. 232, 171 P. (2d) 663.

Admitting exhibits out of the usual order

was held immaterial where the objecting party was the only witness, the order of proof being in the sound discretion of the court. *Shearer v Snyder*, 115 Colo. 232, 171 P. (2d) 663, 666.

Cited in *American Mining Co. v Himrod-Kimball Mines Co.* (Colo.), 235 P. (2d) 804.

Rule 44. Proof of Official Record.

Quoted, in part, in *Brown v People* (Colo.), 238 P. (2d) 847.

Rule 45. Subpoena.

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things. [Amendment effective August 18, 1951.]

Committee Note.

The added words "or tangible things" in subdivision (b) merely make the rule for the subpoena duces tecum at the trial con-

form to that of subdivision (d) for the subpoena at the taking of depositions. The insertion of the words "or modify" in clause (1) affords desirable flexibility.

(d) Subpoena for Taking Depositions: Place of Examination.

(1) Presentation of a notice to take a deposition (either before or after service thereof) as provided in Rules 30 (a) and 31 (a), or of a stipulation for the taking thereof, constitutes a sufficient authorization for the issuance by the judge or clerk of any court of record in the county where the deposition

is to be taken, or by the notary public or other officer authorized to take the deposition, of subpoenas for the persons named or described therein. A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be issued without an order of the court. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b), but in that event the subpoena will be subject to the provisions of subdivision (b) of Rule 30 and subdivision (b) of this Rule 45. [Supplants Code Sec. 382; amendment effective August 18, 1951.]

(2) A resident of this state may be required by subpoena to attend an examination upon deposition only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state may be required by subpoena to attend only in the county wherein he is served with the subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court. [Amendment effective August 18, 1951.]

Committee Note.

The added last sentence of amended subdivision (d) (1) properly gives the subpoena for documents or tangible things the same scope as provided in Rule 26 (b), thus promoting uniformity.

The changes in subdivision (d) (2) give the court the same power in the case of residents of the state as is conferred in the case of non-residents, and permit the court to fix a place for attendance which may be more convenient and accessible for the parties than that specified in the rule. The remaining changes are clarifying.

V. SUBPOENA FOR A HEARING OR TRIAL.

The refusal of the industrial commission, and later the court, to reopen compensation case for the purpose of taking testimony relative to the giving of oral order to deceased not to ride on truck which crushed him was held not error where there was no showing that any subpoena was issued under the provisions of Rule 45 C (e) (1). *Pacific Employers Ins. Co. v Kirkpatrick*, 111 Colo. 470, 143 P. (2d) 267, 270.

Rule 46. Exceptions Unnecessary.

This rule is mandatory, and the supreme court may refuse to consider a specification where it has not been complied with. An-

derson v Anderson (Colo.), 234 P. (2d) 903.

Rule 47. Jurors.

(h) **Peremptory Challenges.** Each side shall be entitled to four peremptory challenges, and if there be more than one party to a side they must join in such challenges. Additional peremptory challenges in such number as the court may see fit may be allowed to parties appearing in the action either under Rule 14 or Rule 24 if the trial court in its discretion determines that the ends of justice so require. [From Code Sec. 199; amendment effective August 18, 1951.]

Committee Note.

The added sentence is intended to cover cases in which there are third-party defendants or intervenors and to permit the court in its discretion to allow peremptory challenges to such parties.

XVI. WHEN SEALED VERDICT.

Failure of trial judge to be present when verdict received.—Where, assuming that

there was an order for a sealed verdict, the defendant sought reversal on the ground of irregularity in the failure of the trial judge to be present when the verdict was received, it was held that the defendant was not substantially prejudiced by the trial court's procedure and had no right to complain of the action of the trial court in entering its judgment on the verdict. *Sowder v Inhelder*, 119 Colo. 196, 201 P. (2d) 533.

Rule 49. Special Verdicts and Interrogatories.

I. SPECIAL VERDICTS.

Will contest.—It is not error, in a will contest, for the court to submit the case to the jury on special interrogatories. In *re Piercen's Estate*, 118 Colo. 264, 195 P. (2d) 725.

Applied in *Westing v Marlatt* (Colo.), 238 P. (2d) 193.

II. GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES.

Where in an action by a widow for the death of her husband when struck by defen-

dant's automobile, defendant requested that certain interrogatories be submitted to the jury which would have required the jury to answer whether they could determine where the accident happened, whether the deceased was attempting to cross the street, whether defendant was guilty of negligence, whether

deceased was guilty of negligence, as well as other questions, refusal to submit the interrogatories to the jury was not an abuse of discretion by the court, as under this rule the submission of interrogatories is discretionary and not mandatory. *Lambrecht v Archibald*, 119 Colo. 356, 203 P. (2d) 897.

Rule 50. Motion for a Directed Verdict.

I. WHEN MADE: EFFECT.

Motion of both sides for a directed verdict, etc.—

In accord with 1st paragraph in original. See *American Nat. Ins. Co. v Gregg*, 123 Colo. 476, 231 P. (2d) 467.

Appellate court will not consider denial of motion, etc.—

In accord with 1st paragraph in original. See *Sharoff v Iacino*, 123 Colo. 456, 231 P. (2d) 959.

This rule specifically provides that "a motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts." This follows the rule and practice in federal courts. *Klipp v Grusing*, 119 Colo. 111, 200 P. (2d) 917.

Where the court erred in submitting case to the jury, it was held that it should have

granted defendant's motion for a directed verdict and, failing that, should have sustained its motion for judgment under this rule. *First Nat. Bank v Henning*, 112 Colo. 523, 150 P. (2d) 790, 795.

Where evidence does not warrant the direction of a verdict for either party, but the trial court directs a verdict for the plaintiff, the judgment must be reversed and a new trial granted, notwithstanding a motion by both sides for a directed verdict. *Klipp v Grusing*, 119 Colo. 111, 200 P. (2d) 917.

Applied in *Simon v Williams*, 123 Colo. 505, 232 P. (2d) 181.

II. RESERVATION OF DECISION ON MOTION.

A. In General.

Applied in *Alden Sign Co. v Roblee*, 119 Colo. 409, 217 P. (2d) 867.

Rule 51. Instructions to Jury.

I. GENERAL CONSIDERATION.

Cited in *Sowder v Inhelder*, 119 Colo. 196, 201 P. (2d) 533.

II. WRITTEN INSTRUCTIONS REQUIRED.

It is error to instruct a jury orally.—

Home Public Market v Newrock, 111 Colo. 428, 142 P. (2d) 272, 273.

V. REVIEW LIMITED TO OBJECTIONS.

Objections to instructions not specifically made in the lower court, etc.—

In accord with 1st paragraph in original. See *Boynton v Fox Denver Theaters*, 121 Colo. 227, 214 P. (2d) 793; *Sharoff v Iacino*, 123 Colo. 456, 231 P. (2d) 959.

Agreement extending the time for making objections is ineffectual.—An agreement between the parties' attorneys, approved by the court, that objections made to plaintiff's instructions for the first time in defendant's motion for a new trial should be considered as having been made before the instructions were given to the jury is ineffectual. *Thompson v Davis*, 117 Colo. 82, 184 P. (2d) 133.

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts and state its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b). [Supplants part of Code Sec. 191; amendment effective August 18, 1951.]

Committee Note.

Retain present Committee Note and add the following:

The amended rule makes clear that the requirement for findings of fact and conclusions of law thereon applies in a case

with an advisory jury. This removes an ambiguity in the rule as originally stated, but carries into effect what has been considered its intent.

The two sentences added at the end of Rule 52 (a) eliminate certain difficulties

which have arisen concerning findings and conclusions. The first of the two sentences permits findings of fact and conclusions of law to appear in an opinion or memorandum of decision. Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issues and the determination thereon. They thus not only aid the appellate court on review, but they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment. These findings should represent the judge's own determination and not the long, often argumentative statements of successful

counsel. Consequently, they should be a part of the judge's opinion and decision, either stated therein or stated separately. But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts.

The last sentence of Rule 52 (a) as amended will remove any doubt that findings and conclusions are unnecessary upon decision of a motion, particularly one under Rule 12 or Rule 56, except as provided in amended Rule 41 (b).

(b) Amendment.

Committee Note.

Compare Rule 59 (f).

I. EFFECT.

The court's findings made in detail upon all major issues were held in full compliance with Rule 52 (a). *Johnson v. Neel*, 123 Colo. 377, 229 P. (2d) 939.

When the trial court found specifically that a "cost-plus" contract had been made, it necessarily found against the petitioners' claim that the contract was for a fixed sum less the cost of materials paid for by petitioners which was diametrically opposed to respondent's claim. *Johnson v. Neel*, 123 Colo. 377, 229 P. (2d) 939.

Oral findings sufficient to support judgment.—The trial court made no written, detailed findings of fact or conclusions of law, but made oral findings to the effect that the issues joined were in favor of plain-

tiff. The defendant stood on his motion to dismiss and submitted no evidence; therefore, there were no disputed facts in the case and the oral findings of the court were sufficient to support the judgment. *Massachusetts Bonding, etc., Co. v. Central Finance Corp.* (Colo.), 237 P. (2d) 1079.

Rule disregarded.—See *Light v. Rogers* (Colo.), 242 P. (2d) 234.

II. AMENDMENT.

Questioning trial court's finding in supreme court.—Where the judgment in the trial court was for defendant it was held that the defendant was not bound by the court's finding but may question it in supreme court even though the record disclosed neither objection nor exception thereto in the lower court. *C. I. T. Corp. v. K. & S. Finance Co.*, 111 Colo. 378, 142 P. (2d) 1005.

Rule 53. Masters.

I. APPOINTMENT AND COMPENSATION.

Stated in *Hyman & Co. v. Velsicol Corp.*, 123 Colo. 563, 233 P. (2d) 977.

II. REFERENCE.

The showing of an exceptional condition requiring the reference of a case to a master was not necessary under Rule 53 (b) where, subsequent to the appointment of the master, the parties made voluntary stipulation that the master should act as arbitrator, and he continued in the case as arbitrator rather

than as master. *Zelinger v. Mellwin Const. Co.*, 123 Colo. 149, 225 P. (2d) 844.

V. REPORT.

B. In Non-Jury Actions.

Master's findings of fact accepted unless error clearly appears.—

Under customary practice and our rules of procedure the Supreme Court should accept the referee's findings unless clearly erroneous. *People v. Denious*, 118 Colo. 342, 196 P. (2d) 257.

CHAPTER VI

Judgment.

Rule 54. Judgments; Costs.

(b) Judgment upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims. [Supplants Code Secs. 185, 242, 243 and 246: amendment effective August 18, 1951.]

Committee Note.

For judgment on the pleadings see Rule 12 (c).

Rule 54 (b) was originally adopted in view of the wide scope and possible content of the newly created "civil action" in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case. It was not designed to overturn the rule against piece-meal disposal of litigation. In practice situations have arisen where a court has entered what the parties have thought amounted to a judgment, although a trial remained to be had on other claims similar or identical with those disposed of. Hence, the question of the finality of a partial judgment has arisen. The amendment retains the rule against piece-meal disposal of litigation but gives discretionary power to afford a remedy in the infrequent harsh case.

For the possibility of staying execution where not all claims are disposed of under Rule 54 (b), see amended Rule 62 (c).

II. JUDGMENT AT VARIOUS STAGES.

Editor's note.—The cases cited under this analysis line were decided prior to the amendment of Rule 54 (b).

Determination of one of several asserted legal rights.—Where several items of damage alleged in a complaint all resulted from, and grew out of, a single transaction or occurrence, these items of damage still constituted a single claim and the determination of one of the several asserted legal rights was not a final judgment. *Brown v. Mountain States Tel., etc., Co.*, 121 Colo. 502, 218 P. (2d) 1063.

Final determination of distinct claim arising out of different transaction.—Under this rule a judgment disposing of less than the entire case can be final and subject to review by writ of error only where it is a final determination of a distinct claim arising out of a different transaction or occurrence from the other claims involved. *Brown v. Mountain States Tel., etc., Co.*, 121 Colo. 502, 218 P. (2d) 1063.

An order dismissing an action as to two of the defendants and directing that plaintiffs should have a stated time within which to "Prepare the record in order to apply to the Supreme Court for writ of error," was a final judgment, to review which a writ of error must be issued within one year from the date of entry. *Ruhter v. Steele*, 120 Colo. 367, 209 P. (2d) 771.

Applied in *Hudler v. New Red Top Valley Ditch Co.*, 121 Colo. 489, 217 P. (2d) 613; *Hoff v. Armbruster* (Colo.), 244 P. (2d) 1069 (judgments of dismissal).

Cited in *Beatty v. Resler*, 108 Colo. 434, 118 P. (2d) 1084.

III. DEMAND FOR JUDGMENT.

Relief demanded as limiting relief granted.—See *Snell v. Public Utilities Comm.*, 108 Colo. 162, 114 P. (2d) 563, citing § 187 of the former Code of Civil Procedure.

Relief not demanded.—Under this rule it is the duty of the court to grant relief to

which a party is entitled, even though not specifically demanded in the prayer. *Spears Free Clinic, etc. v. State Board of Health*, 122 Colo. 147, 220 P. (2d) 872.

Where the state board of health issued a void license for the operation of a chiropractic sanitarium, and on review it was determined that a proper license should have been issued, the supreme court instructed the trial court to enter a proper decree for the issuance of a license for the maintenance of the sanitarium. *Id.*

Immaterial that plaintiff not entitled to specific relief sought.—If the plaintiff has stated a cause of action for any relief, it is immaterial what he designates it or what he has asked for in his prayer; the court will grant him the relief to which he is entitled under the facts pleaded. *Berryman v. Berryman*, 115 Colo. 281, 172 P. (2d) 446.

A motion to dismiss a complaint setting out all the usual allegations for divorce, but praying for a judicial separation, equitable division of property, and other relief, was improperly sustained, for the allegations plainly showed that plaintiff was entitled to relief, though not to the specific relief prayed for. *Id.*

If a plaintiff declares his intention to seek a particular form of relief, and to refuse all other relief, the legality or propriety of the relief sought might properly be determined on a motion to dismiss, though the complaint states facts entitling plaintiff to other relief than that he demands. *Id.*

Applied in *Bridges v. Ingram*, 122 Colo. 501, 223 P. (2d) 1051.

Stated in *Vogt v. Hansen*, 123 Colo. 105, 225 P. (2d) 1040.

IV. COSTS.

Allowance of costs in discretion of court.—

Consistency with the principle of discretion in the assessment of costs is preserved in county court procedures by Rule 54 (d). *Greenwald v. Molloy*, 114 Colo. 529, 166 P. (2d) 983.

VI. REVIVAL OF JUDGMENTS.

Source of twenty year limitation.—The source of the twenty year limitation on revived judgments under rule 54 C (h) is Chapter 93, § 2, '35 C. S. A. See *Dicta XX*, No. 1, p. 20.

Full faith and credit.—Where the Supreme Court of Missouri, in regard to a Colorado judgment obtained in 1927 and revived in 1945 as provided by statute in Colorado, held that, though assuming that the judgment was valid in Colorado, it would not enforce it because under Missouri law the original judgment could not have been revived in 1945, the Supreme Court of the United States held that the decision of the Missouri Court that the Colorado judgment was not entitled to full faith and credit in Missouri was erroneous. *Union Nat. Bank of Wichita, Kansas v. Lamb*, 337 U. S. 38, 69 S. Ct. 911, 93 L. Ed. 1190, reversing 213 S. W. (2d) 416.

Rule 55. Default.**II. JUDGMENT.****B. By the Court.****Failure to give required notice held error.**

Action of the trial court in entering default judgment on its own motion without the requisite three days notice to defendant constituted prejudicial, reversible error. *Emerick v Emerick*, 110 Colo. 52, 129 P. (2d) 908, 909.

In divorce cases.—The provision as to serving party against whom default judgment is sought with notice of application therefor at least three days prior to hearing thereon applies in divorce cases, and if not followed is ground for reversal. *Holman v Holman*, 114 Colo. 437, 165 P. (2d) 1015.

"The interest of the public in divorce cases, including the possibility of collusive arrangements therein, is such that a divorce may not be granted on a judgment

by default without proof of a cause for divorce." *Id.*

Default where account or proof of any fact is necessary to assess damages.—Upon default in an action where the taking of an account, or the proof of any fact, is necessary to enable the court to assess damages or give judgment, final judgment need not be rendered, and ordinarily is not, until the amount of damages is assessed in some appropriate manner. *Melville v Weybrew*, 108 Colo. 520, 120 P. (2d) 189, decided under § 186 of the former Code of Civil Procedure.

III. SETTING ASIDE DEFAULT.**Waiver of right to question summons.**—

A party who seeks to set aside a judgment and plead to the merits has thereby entered a general appearance and waived the right to question a summons. *Wells Aircraft Parts Co. v Kayser Co.*, 118 Colo. 197, 194 P. (2d) 326.

Rule 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after filing of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. [Amendment effective August 18, 1951.]

Committee Note.

The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Since Rule 12 (a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56

(c) means that under original Rule 56 (a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself files a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

(c) Motion and Proceedings Thereon. The motion shall not be heard until at least 10 days after the service thereof. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. [Amendment effective August 18, 1951.]

Committee Note.

The amendment makes it clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, inter-

locutory in character, and the precise amount of recovery left for trial.

I. GENERAL CONSIDERATION.

Comment of Rules Committee.—"Motion for summary judgment" under this rule should be so captioned and referred to. *Dicta XXII*, No. 7, p. 155.

Purposes of rule.—

The obvious purpose to be served by this rule is to further the prompt admin-

istration of justice and expedite litigation by avoiding needless trials, and enable one speedily to obtain a judgment by preventing the interposition of unmeritorious defenses for purpose of delay. The provisions of the rule provide a method whereby it is possible to determine whether a genuine cause of action or defense thereto exists and whether there is a genuine issue of fact warranting the submission of the case to a jury. *Blaine v. Yockey*, 117 Colo. 29, 184 P. (2d) 1015.

But a summary judgment should be awarded, etc.—

In accord with 2nd paragraph in original. See *Tamblyn v. City and County of Denver*, 118 Colo. 191, 194 P. (2d) 299; *Parrish v. De Remer*, 117 Colo. 256, 187 P. (2d) 597; *Smith v. Mills*, 123 Colo. 11, 225 P. (2d) 483; *Koon v. Steffes (Colo.)*, 239 P. (2d) 310.

Where there exists a genuine issue as to a very material fact which must be determined, a motion for summary judgment should be denied. *Tamblyn v. City and County of Denver*, 118 Colo. 191, 194 P. (2d) 299.

A summary judgment should never be entered, save in those cases where the movant is entitled to such beyond all doubt. The facts conceded should show with such clarity the right to a judgment as to leave no room for controversy or debate. They must show affirmatively that plaintiff would not be entitled to recover under any and all circumstances. *Smith v. Mills*, 123 Colo. 11, 225 P. (2d) 483.

To authorize the granting of a summary judgment the complete absence of any genuine issue of fact must be apparent, and all doubts thereon must be resolved against the moving party. *Koon v. Steffes (Colo.)*, 239 P. (2d) 310.

Summary judgment is a drastic remedy under the rule, and is never warranted except on clear showing that there is no genuine issue as to any material fact. *Hatfield v. Barnes*, 115 Colo. 30, 168 P. (2d) 552.

Trial courts should exercise great care in granting motions for summary judgment, and should not deny a litigant a trial where there is the slightest doubt as to the facts. *Smith v. Mills*, 123 Colo. 11, 225 P. (2d) 483.

Summary judgment procedure was not intended to deprive a litigant of the right to trial on the merits of the case. *Tamblyn v. City and County of Denver*, 118 Colo. 191, 194 P. (2d) 299.

The rule does not compel a party to try his case on affidavits with no opportunity to cross-examine affiants. *Hatfield v. Barnes*, 115 Colo. 30, 168 P. (2d) 552; *Parrish v. De Remer*, 117 Colo. 256, 187 P. (2d) 597.

Motion for dismissal and not for summary judgment.—See *Smith v. Mills*, 123 Colo. 11, 225 P. (2d) 483.

Cited in *Kirchhof v. Sheets*, 118 Colo. 244, 194 P. (2d) 320.

II. FOR CLAIMANT.

The material allegations of the complaint must be accepted as true even in the face of

denials in the answer. *Tamblyn v. City and County of Denver*, 118 Colo. 191, 194 P. (2d) 299; *Parrish v. De Remer*, 117 Colo. 256, 187 P. (2d) 597.

Unless the depositions and admissions on file, together with the affidavits, clearly disclose that there is no genuine issue as to any material fact, and that, as a matter of law, the summary judgment should be entered. *Parrish v. De Remer*, 117 Colo. 256, 187 P. (2d) 597.

Applied in *People v. Neary*, 113 Colo. 12, 154 P. (2d) 48.

Cited in *Inter-Mountain Iron, etc., Co. v. Cortinez*, 114 Colo. 89, 162 P. (2d) 237.

III. FOR DEFENDING PARTY.

Applied in *People v. Montrose*, 109 Colo. 487, 126 P. (2d) 1040; *Klancher v. Anderson*, 113 Colo. 478, 158 P. (2d) 923, 927.

IV. MOTION AND PROCEEDINGS THEREON.

It is wholly immaterial whether the trial court considered the judgment of dismissal proper under the provisions of rule 12C(c) or rule 56C(c), if the defendant was entitled to judgment under either thereof. *Haigler v. Ingle*, 119 Colo. 145, 200 P. (2d) 913.

Question of fact cannot be decided on motion for summary judgment.—

To authorize the granting of summary judgment the complete absence of any genuine issue of fact must be apparent, and all doubts thereon must be resolved against the moving party. *Hatfield v. Barnes*, 115 Colo. 30, 168 P. (2d) 552.

Where an issue of fact was raised which was not determinable on affidavits and answers to interrogatories propounded to defendants, the motion for summary judgment should have been denied. *Id.*

Particularly on such issues as good faith, intent and purpose, the bald declaration of a party by affidavit is not sufficient to resolve the issue in the face of a pleaded denial, and a motion for summary judgment should be denied. *Hatfield v. Barnes*, 115 Colo. 30, 168 P. (2d) 552.

Judgment of dismissal.—While a judgment of dismissal for failure to state a claim upon which the relief can be granted may be entered upon a motion for summary judgment, such judgment must specifically disclose the inadequacy of the complaint as the ground therefor, and permission to amend should be given where there is a possibility by amendment of an adequate statement of claim. *Smith v. Mills*, 123 Colo. 11, 225 P. (2d) 483.

Court cannot consider files, records, etc., in prior case.—In an action by an insurance company which was to be decided under summary judgment proceedings, and in which action the plaintiff seeks to recover money paid out as a result of an automobile collision involving defendants, the court cannot consider the district court's files and records nor the Supreme Court's decision in a case by a passenger injured in the same collision. And such case will not be res judicata against plaintiff. *Parrish v. De Remer*, 117 Colo. 256, 187 P. (2d) 597.

No distinction between law and equity.—The phrase "as a matter of law," as used in subsection (c) contains no distinction between legal and equitable principles. If there is no question concerning material facts, and the only contention arises over the application of a rule of law, whether "legal" or "equitable" in nature, a summary judgment may be entered. *Linch v. Game & Fish Comm.* (Colo.), 234 P. (2d) 611.

Subsection (c) authorizes a trial court to enter a decree for specific performance of a contract upon motion for a summary judgment over the objection that a summary judgment can only be granted in an action at law, as technically distinguished from an equitable proceeding. *Linch v. Game & Fish Comm.* (Colo.), 234 P. (2d) 611.

Rule 57. Declaratory Judgments.

I. GENERAL CONSIDERATION.

Act not intended to be a substitute for proper pleading.—The Uniform Declaratory Judgments Act was never intended to be a substitute for, or a short cut to, proper pleading and specifically provides that all issues of fact shall be tried and determined as in other cases. *Home Owners' Loan Corp. v. Meyer*, 110 Colo. 501, 507, 136 P. (2d) 282.

Dismissal is proper.—Where, under the pleadings in an action for a declaratory judgment, no question is presented which is properly cognizable under the Uniform Declaratory Judgments Act, the suit should be dismissed. *Fairall v. Frisbee*, 104 Colo. 553, 92 P. (2d) 748.

Cited in *Wooldridge v. Denver, etc., R. Co.*, 118 Colo. 25, 191 P. (2d) 882; *Smith v. Greenburg*, 121 Colo. 417, 218 P. (2d) 514.

II. THE PARTICULAR PROVISIONS.

A. Power to Declare Rights, etc.—Force of Declaration.

Applied in *Colorado Nat. Bank v. Bedford*, 105 Colo. 373, 98 P. (2d) 1120, affirmed in 310 U. S. 41, 60 S. Ct. 800, 84 L. Ed. 1067; *Gordon v. Wheatridge Water Dist.*, 107 Colo. 128, 109 P. (2d) 899; *McNichols v. Denver*, 109 Colo. 269, 124 P. (2d) 601; *Carpenter v. Carman Distributing Co.*, 111 Colo. 566, 144 P. (2d) 770, to determine whether certain sales of tangible personalty were subject to sales tax; *Bedford v. Sinclair*, 112 Colo. 176, 147 P. (2d) 486, to determine allocation of revenue under old age pension amendment; *School Dist. No. 26 v. Hards*, 112 Colo. 319, 149 P. (2d) 651, to determine the status of certain school districts.

B. Who May Obtain Declaration of Rights.

Constitutionality of statute may be tested.—

Where results to occur from the enforcement of a statutory provision can be predicted with certainty or where the basic right of the state to enter legislative fields said to be the domain of the federal government is questioned, a court properly may declare with respect to the validity of a statute. *American Federation of Labor v. Reilly*, 113 Colo. 90, 155 P. (2d) 145, 151.

A court should not enter into a speculative inquiry for the purpose of upholding or condemning statutory provisions, the effect of which, in concrete situations not yet developed, could not be definitely perceived. *Id.*

F. When Court May Refuse to Declare Right.

In a suit to procure a declaratory judgment fixing the applicability of the sales tax to certain merchandising transactions, where it appears from the record that matters other than those shown by the pleadings must be presented to disclose the real controversy, the actual dispute can only be resolved by a consideration of proven or stipulated facts. In such a situation the trial court, although properly holding that a demurrer to the complaint should be overruled, should, notwithstanding defendant elects to stand upon his demurrer, refuse to render judgment granting the relief asked until evidence is produced affording a basis for conclusions with respect to proper declarations to be made and the relief to be granted. *Armstrong v. Carman Distributing Co.*, 108 Colo. 223, 115 P. (2d) 386.

Rule 58. Entry and Satisfaction of Judgment.

(a) Entry. Unless the court otherwise directs and subject to the provisions of Rule 54 (b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the judgment docket as provided by Rule 79 (d) constitutes the entry of the judgment; and the judgment is not effective before such entry. [Supplants Code Sec. 244; amendment effective August 18, 1951.]

Committee Note.

The reference to Rule 54 (b) is made necessary by the amendment of that rule.

The substitution of the more inclusive phrase "all relief be denied" for the words "there be no recovery," makes it clear that the clerk shall enter the judgment forthwith in the situations specified without awaiting

the filing of a formal judgment approved by the court.

The phrase "all relief be denied" covers such cases as where judgment is against the plaintiff in an action to quiet title or in an action for a declaratory judgment or in an action for the construction of a will or in any other action where a judgment for money is not sought.

Rule 59. New Trials; Amendment of Judgments.**Committee Note.**

The words "Amendment of Judgments" are incorporated into the title in order to

include in such title the subject matter of the new subdivision (e) of this rule.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment. [Amendment effective August 18, 1951.]

Committee Note.

This subdivision has been added to make clear that the trial court possesses the power to alter or amend a judgment after its entry. The subdivision deals only with

alteration or amendment of the original judgment in a case and does not relate to a judgment upon motion as provided in Rule 50 (b).

(f) No Review Unless Made. The party claiming error in the trial of any case must, unless otherwise ordered by the trial court, move that court for a new trial, and, without such order, only questions presented in such motion will be considered on review. [Supreme Court Rule 8 retained. Supplants Code Sec. 424; amendment effective August 18, 1951.]

I. GROUNDS.**A. In General.**

When error exists as to only one or more issues and the judgment is in other respects free from error, a reviewing court may, when remanding the cause for a new trial, whether by the court or a jury, limit the new trial to the issues affected by the error whenever these issues are entirely distant and separable from the matters involved in other issues and the trial can be had without danger of complication with other matters. *Murrow v. Whiteley (Colo.)*, 244 P. (2d) 657.

But where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. *Murrow v. Whiteley (Colo.)*, 244 P. (2d) 657.

Access of jury to excluded exhibits.—One ground on which a new trial was sought was based upon a mistake or inadvertence whereby the jury was permitted to have access to an exhibit which had been excluded from consideration. This was an irregularity in the proceedings, and under the provisions of this rule, the proper method of presenting it in a motion for a new trial is to support and file an affidavit with the motion. *Maloy v. Griffith (Colo.)*, 240 P. (2d) 923.

Applied in *Simon v. Williams*, 123 Colo. 505, 232 P. (2d) 181.

E. Excessive or Inadequate Damages.

New trial may be had as to single issue of damages.—

In accord with original. See *Whiteside v. Harvey (Colo.)*, 239 P. (2d) 989.

After liability is once established, the question as to the sum to be awarded as

damages is entirely separate, distinct and apart therefrom and not interwoven therewith. This rule is applicable and no retrial on all the issues is required. *Murrow v. Whiteley (Colo.)*, 244 P. (2d) 657.

But should not be granted, etc.—

Before granting a partial new trial on the question of damages only, it should clearly appear that the matter involved is entirely distinct and separable from the other matters involved in the other issues and that no possible injustice can be done to either party. *Murrow v. Whiteley (Colo.)*, 244 P. (2d) 657.

It is an abuse of discretion on the part of the court to set aside the verdict of the jury and grant a new trial solely on the ground of inadequacy of the verdict unless, under the evidence, it can be definitely said that the verdict is grossly and manifestly inadequate, or unless the amount thereof is so small as to clearly and definitely indicate that the jury neglected to take into consideration evidence of pecuniary loss or were influenced either by prejudice, passion or other improper considerations. *Lehrer v. Lorenzen (Colo.)*, 233 P. (2d) 382.

Plaintiff entitled to new trial.—In action against physician for damages suffered from careless and negligent treatment by defendant, where undisputed evidence showed plaintiff incurred actual expenses of \$681.45, and there was no resistance of allegations of negligence, plaintiff was entitled to a new trial after judgment awarding \$236.50 because of inadequacy of damages awarded and insufficiency of evidence to support the award. *Hedgpeth v. Schoen*, 109 Colo. 341, 125 P. (2d) 632.

F. Insufficiency of the Evidence.

Cited in *Griffith v. Anderson*, 109 Colo. 265, 124 P. (2d) 599.

II. TIME FOR MOTION.

No change in practice in criminal cases.—Adoption of the Rules of Civil Procedure did not bring about any change or modification of the practice in criminal cases. *Smith v. People*, 120 Colo. 39, 206 P. (2d) 826.

Failure to file motion in time is fatal.—The failure to file a motion for a new trial within the time provided by this rule, or within the extended period fixed by the court for so doing, is fatal to the right of review. Therefore, the county court was without jurisdiction to entertain a motion for a new trial after the time allowed by the court; and such motion should have been stricken from the files. *Niles v. Shinkle*, 119 Colo. 458, 204 P. (2d) 1077.

Court of review will assume extension was properly made.—Where the time for filing a motion for new trial was extended to fifteen days after the entry of judgment, the court of review will assume that the extension was properly made, in the absence of proper objections to the order of the county court. *Niles v. Shinkle*, 119 Colo. 458, 204 P. (2d) 1077.

V. NO REVIEW UNLESS MADE.

A. In General.

Editor's note.—The amendment inserted subdivision (e) and designated former subdivision (e) as subdivision (f).

Motion for new trial is a condition precedent, etc.

Where record on review contains nothing to show that a motion for new trial was made or dispensed with, the writ of error may be dismissed either upon motion, or court's own initiative. *Williams v. Williams*, 110 Colo. 473, 475, 135 P. (2d) 1016.

Issues of fact determined by the trial court cannot be reviewed in the absence of

a motion for a new trial or an order dispensing therewith. In such case consideration may be given only to specifications involving questions of law. *Galiger v. Armstrong*, 114 Colo. 397, 165 P. (2d) 1019, 1021, citing *Chain O' Mines v. Lewison*, 100 Colo. 186, 66 P. (2d) 802.

Under this rule only questions presented in the motion for new trial will be considered on review. *Campbell v. People (Colo.)*, 232 P. (2d) 738.

It only requires that the questions be presented in the motion.—

Where an alleged error of the trial court in dismissing the first cause of action set out in the complaint was not mentioned in the motion for a new trial, it cannot require reversal when argued for the first time in the Supreme Court on writ of error. *Bovnton v. Fox Denver Theaters*, 121 Colo. 227, 214 P. (2d) 793.

Where the grounds for a motion for new trial did not present the questions raised in the specifications of points filed in the Supreme Court, there was nothing presented there for review. *Howard v. American Law Book Co.*, 121 Colo. 5, 212 P. (2d) 1006.

Cited in *Maloy v. Griffith (Colo.)*, 240 P. (2d) 923.

B. When Motion Unnecessary.

Circumstances making motion unnecessary.—Ordinarily, a motion to dismiss a writ of error on the ground that the record discloses no motion for a new trial or order dispensing therewith, requires dismissal of the writ of error; but circumstances, as in the instant case, may be such as to justify a waiver of the requirements of the rule. *Bailey v. Bullock*, 110 Colo. 205, 132 P. (2d) 783.

Rule 60. Relief from Judgment or Order.

(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal or a writ of error, such mistakes may be so corrected before the case is docketed in the appellate court, and thereafter while the appeal or writ of error is pending may be so corrected with leave of the appellate court. [Amendment effective August 18, 1951.]

Committee Note.

This permits correction after docketing with leave of the appellate court and elimi-

nates any contention that upon the taking of an appeal the trial court loses its power to act.

(b) Mistake; Inadvertence; Surprise; Excusable Neglect; Fraud, etc. On motion, and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1) and

(2) not more than 6 months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an independent action to relieve a party from a judgment, order, or proceeding, or (2) to set aside a judgment for fraud upon the court, or (3) when, for any cause, the summons in an action has not been personally served within or without the state on the defendant, to allow, on such terms as may be just, such defendant, or his legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. [Supplants part of Code Sec. 50 (par. e) and Sec. 81; amendment effective August 18, 1951.]

Committee Note.

When promulgated, the rules contained a number of provisions, including those found in Rule 60 (b), describing the practice by a motion to obtain relief from judgments, and these rules, coupled with the reservation in Rule 60 (b) of the right to entertain a new action to relieve a party from a judgment, were generally supposed to cover the field. Since the rules have been in force, the question has been raised that the use of bills of review, coram nobis, or audita querela, to obtain relief from final judgments is still proper, and that various remedies of this kind still exist although they are not mentioned in the rules and the practice is not prescribed in the rules. It is obvious that the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments.

The reconstruction of Rule 60 (b) has for one of its purposes a clarification of this situation. Two types of procedure to obtain relief from judgments are specified in the amended rules. One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment. Various rules, such as the one dealing with a motion for new trial and for amendment of judgments, Rule 59, one for amended findings, Rule 52, and one for judgment notwithstanding the verdict, Rule 50 (b), and including the provisions of Rule 60 (b) as amended, prescribe the various types of cases in which the practice by motion is permitted. In each case there is a limit upon the time within which resort to a motion is permitted, and this time limit may not be enlarged under Rule 6 (b). If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action. Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations.

The transposition of the words "the court" and the addition of the word "and" at the beginning of the first sentence are merely verbal changes. The addition of the qualify-

ing word "final" emphasizes the character of the judgments, orders or proceedings from which Rule 60 (b) affords relief; and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.

The qualifying pronoun "his" has been eliminated on the basis that it is too restrictive, and that the subdivision should include the mistake or neglect of others which may be just as material and call just as much for supervisory jurisdiction as where the judgment is taken against the party through his mistake, inadvertence, etc.

Fraud, whether intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party are express grounds for relief by motion under amended subdivision (b). There is no sound reason for their exclusion. The incorporation of fraud and the like within the scope of the rule also removes confusion as to the proper procedure.

All of the present Rule 60 (b), beginning with "A motion under this subdivision does not affect the finality of a judgment or suspend its operation" is left as it now is, except that the word "independent" is inserted before the word "action" in order to make it clear that the "action" which may be taken after the expiration of the six months is not a motion filed in the same case, but is an "independent" suit, and except that there is added the provision that the rule does not limit the power of the court to set aside a judgment for fraud upon the court and except that the last sentence is added, to abolish the old common law writs of coram nobis, coram vobis, etc. The Colorado Supreme Court has said that it is doubtful if the writ of coram nobis still exists in this jurisdiction. *Hailey v. People*, 113 Colo. 290, 155 P. (2d) 993.

II. MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLIGENCE.

A. General Consideration.

Denial of petition to have judgment set aside held error.—Where a stockholder of a corporation, acting promptly after the entry of a default judgment against the latter, presented to the trial court a petition to have the judgment set aside and for leave to file an answer, it appearing from

the petition—not controverted—that he was not a party to the original proceeding, would be prejudiced by the judgment if it was permitted to stand, and that he had a good defense to the action, the petition should have been granted, and denial thereof constituted prejudicial, reversible error. *Senne v Conley*, 110 Colo. 270, 133 P. (2d) 381.

Waiver of right to question summons.—A party who seeks to set aside a judgment and plead to the merits has thereby entered a general appearance and waived the right to question the summons. *Wells Aircraft Parts Co. v Kayser Co.*, 118 Colo. 197, 194 P. (2d) 326.

Stated in *Fidelity Finance Co. v Groff* (Colo.), 235 P. (2d) 994.

Cited in *Netland v Baughman*, 114 Colo. 148, 162 P. (2d) 601; *Zlaten v Zlaten*, 117 Colo. 296, 186 P. (2d) 583.

B. Time for Motion.

Petition to vacate judgment held filed in apt time.—Where a stockholder of a corporation, not a party to the original action, filed a petition to have a default judgment against the company set aside, the judgment being entered April 1, and the petition to vacate being presented May 16, it is held that the latter was in apt time. *Senne v Conley*, 110 Colo. 270, 133 P. (2d) 381.

Rule 61. Harmless Error.

"Substantial right" defined.—In construing this rule, as well as rule 118(f), the court held: "For our purpose here we hold that a substantial right is one which relates to the subject matter and not to a matter of procedure and form." *Sowder v Inhelder*, 119 Colo. 196, 201 P. (2d) 533.

Errors of counsel.—Under this rule errors and deficiencies of counsel will be disregarded where not to do so would result in palpable injury. *Griffith v Anderson*, 109 Colo. 265, 124 P. (2d) 599.

Splitting cause of action.—In an action on account the contention of defendant that in amending the complaint plaintiff had split its cause of action was overruled, with the statement that if the contention was

tenable it was so technical that it would be disregarded under this rule and rule 15 (b). *Jones v Gates Service Station*, 108 Colo. 201, 115 P. (2d) 396.

Clerk receiving verdict instead of trial judge.—Where the defendant contended that no valid verdict had been reached because the clerk, rather than the trial judge, received the verdict, it was held that defendant's rights had not been substantially violated by the trial court's procedure, and, therefore, under this rule and as directed mandatorily in rule 118 (f), the defendant had no right to complain of the action of the trial court in entering its judgment on the verdict. *Sowder v Inhelder*, 119 Colo. 196, 201 P. (2d) 533.

Rule 62. Stay of Proceedings to Enforce a Judgment.

(b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52 (b), or pending the filing and determination of an application to the supreme court for a supersedeas. [Supplants Supreme Court Rule 9; amendment effective August 18, 1951.]

Committee Note.

The addition of the words "or to alter or amend a judgment" is necessary because of

the incorporation of subdivision (e) in Rule 59.

(c) Stay of Judgment upon Multiple Claims. When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54 (b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered. [Amendment effective August 18, 1951.]

Committee Note.

The revision of Rule 54 (b) makes it advisable to include a separate provision in Rule 62 for stay of enforcement of a final

judgment in cases involving multiple claims. Colorado Rule 62 (c) is the same as Federal Rule 62 (h).

CHAPTER VII.

Injunctions, Receivers, Deposits in Court, Offer of Judgment.**Rule 65. Injunctions.**

(c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or of any county or municipal corporation of this state or of any officer or agency thereof acting in official capacity. If at any time it shall appear to the court that security given under this rule has become impaired or is insufficient, the court may vacate the restraining order or preliminary injunction unless within such time as the court may fix the security be made sufficient. A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known. [Supplants Code Secs. 163, 164, 165 and 173: amendment effective August 18, 1951.]

Committee Note.

In all cases the litigant should have a right to proceed on the bond in the same proceeding in the manner provided in Rule 113 (f) for a similar situation. The addition to Rule 65 (c) insures this result and is in the interest of efficiency. There is no reason why Rules 65 (c) and 113 (f) should operate differently.

Cross Reference.

As to applications for restraining orders and injunctions without notice to defendant in divorce cases, see Dicta XX No. 2, p. 46.

II. SUBDIVISION (b).

Does not apply to suits for divorce.—Where, in a divorce action, a temporary restraining order was issued against the husband preventing him from disposing of his property. "pending the further order of the court." such order is not controlled by the provisions of this section which specifically provides in subdivision C(h) that this rule shall not apply to suits for divorce, alimony, separate maintenance or custody of

infants. *Gillespie v. District Court*, 119 Colo. 242, 202 P. (2d) 151.

III. SUBDIVISION (c).

Action on bond where suit dismissed at instance of plaintiff.—In an action on a bond to secure a temporary injunction the fact that the injunction suit was dismissed at the instance of the plaintiff is not to be taken as an admission that an emergency requiring the issuance of an injunction did not exist, if the dismissal was for matters done or arising subsequent to the issuance of the injunction, and the original issuance was proper. *Hammaker v. Behm*, 116 Colo. 523, 182 P. (2d) 141.

V. SUBDIVISION (f).

This section is a correct statement of the general law. *Cuddigan v. San Juan Federation, etc.*, 110 Colo. 97, 103, 130 P. (2d) 923.

VI. SUBDIVISION (h).

Applied in *Gillespie v. District Court*, 119 Colo. 242, 202 P. (2d) 151; *Wolfberg v. Noland*, 122 Colo. 338, 222 P. (2d) 426.

Rule 66. Receivers.

(c) **Dismissal of Receivership Action.** An action in which a receiver has been appointed shall not be dismissed except by order of the court. [Amendment effective August 18, 1951.]

Committee Note.

This prevents a dismissal by any party after a receiver has been appointed, except

upon leave of court. A party should not be permitted to oust the court and its officer without the consent of that court.

Rule 68. Offer of Judgment.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible

except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. [Supplants Code Sec. 313; amendment effective August 18, 1951.]

Committee Note.

The third sentence of Rule 68 has been altered to make clear that evidence of an unaccepted offer is admissible in a proceeding to determine the costs of the action but is not otherwise admissible.

The two sentences substituted for the deleted last sentence of the rule assure a party the right to make a second offer where the situation permits—as, for example, where a prior offer was not accepted but the plaintiff's judgment is nullified and a new trial ordered, whereupon the defendant desires to make a second offer. It is implicit, how-

ever, that as long as the case continues—whether there be a first, second or third trial—and the defendant makes no further offer, his first and only offer will operate to save him the costs from the time of that offer if the plaintiff ultimately obtains a judgment less than the sum offered. In the case of successive offers not accepted, the offeror is saved the costs incurred after the making of the offer which was equal to or greater than the judgment ultimately obtained. These provisions should serve to encourage settlements and avoid protracted litigation.

CHAPTER VIII

Execution and Supplemental Proceedings; Judgment for Specific Acts; Vesting Title; Proceedings in Behalf of and Against Persons Not Parties.

Rule 69. Execution and Proceedings Subsequent Thereto.

I. IN GENERAL.

Editor's note.—For a discussion of this rule by Mr. William Rann Newcomb of the Denver Bar, see "Supplementary Proceedings in Enforcement of Judgments," Dicta XXVII, No. 4, p. 128.

Stated, in part, in *Urbancich v Mayberry* (Colo.), 236 P. (2d) 535.

Cited in *People v Anderson*, 117 Colo. 342, 187 P. (2d) 934.

Rule 71. Process in Behalf of and Against Persons Not Parties.

Sufficient interest to be a party.—In an action to quiet title, the plaintiff named as defendants all "persons who claim any interest in the subject matter of this action". A person who has advanced money in con-

nection with the realty has a sufficient interest to be a party and to be awarded a lien to secure such advance. *Hahn v Pitts*, 118 Colo. 173, 193 P. (2d) 716.

CHAPTER IX.

Court Administration.

Rule 79. Books Kept by the Clerk and Entries Therein.

(b) **Civil Order Book.** The clerk shall keep a book for civil actions entitled "civil order book" in which shall be kept in the sequence of their making exact copies of all judgments and orders; provided, however, that two such books may be kept concurrently, one for divorce cases, the other for all other civil cases. Photographic copies may be used if deemed advisable. [Amendment adopted May 22, 1947.]

CHAPTER X.

General Provisions.

Rule 81. Applicability in General.

(b) **Divorce and Separate Maintenance.** These rules shall not govern procedure and practice in actions in divorce or separate maintenance in so far as they may be inconsistent or in conflict with the procedure and practice provided by the applicable statutes. [Amendment effective August 18, 1951.]

Committee Note.

The change is to remove any doubt that the statutes referred to are those in effect at the time of the action and not those in effect at the time of the adoption of the Rules.

For an article relative to the number of times process must be published, by J. P. Helman of Grand Junction Bar, see *Dicta XXI*, No. 3, p. 62.

For statute adopting the process, practice and procedure of the rules in divorce,

separate maintenance and annulment proceedings, see chapter 56, § 5 (1).

"Where the divorce statutes are silent as to any method of procedure the rules govern." *Holman v Holman*, 114 Colo. 437, 165 P. (2d) 1015, quoting *Myers v Myers*, 110 Colo. 412, 135 P. (2d) 235.

Applied in *People v Routt County Court*, 110 Colo. 428, 135 P. (2d) 232 (subdivision (b)); *Niles v Shinkle*, 119 Colo. 458, 204 P. (2d) 1077.

Rule 84. Forms.

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate. [Amendment effective August 18, 1951.]

Committee Note.

The amendment serves to emphasize that the forms contained in the Appendix of Forms are sufficient to withstand attack

under the rules under which they are drawn, and that the practitioner using them may rely on them to that extent.

CHAPTER XI.**Change of Judge; Place of Trial; Water Rights.****Rule 97. Change of Judge.**

The interest of a judge upon which he may disqualify himself must necessarily relate to the subject matter of the litigation, or be of a pecuniary interest in the outcome of the litigation, and not as it might relate to a determination of the facts and legal questions presented. Primarily, it is the duty of a judge to sit in a case in the absence of a showing that he is disqualified. In compliance with the rules, there should be a supporting affidavit to the motion to disqualify. *Kubat v Kubat* (Colo.), 238 P. (2d) 897.

Judge assisting arbitrator in preparation of findings.—After the reference of a case to a special master the parties made voluntary stipulation that he should act as arbitrator and make report of his findings of fact to the court. It was held that the participation of the trial judge in the preparation of

such findings did not disqualify him from rendering judgment, where it did not appear that such participation had been to the extent of creating prejudice in examining and determining issues of law which might be involved. *Zelinger v Mellwin Const. Co.*, 123 Colo. 149, 225 P. (2d) 844.

Insufficient ground for disqualification.—In a proceeding to attack an adoption decree before the same judge who granted the decree, the suggestion in a motion to disqualify the judge that he will "undoubtedly" be called as a witness is not ground for disqualification, since, in a matter of adoption proceedings, the judge who entered the adoption decree had a continuing jurisdiction and was the proper one to review or consider that judgment or decree when it was attacked. *Kubat v Kubat* (Colo.), 238 P. (2d) 897.

Rule 98. Place of Trial.

(c) **Venue for Tort, Contract and Other Actions.** Except as provided in subparagraphs (a) and (b) of this rule, an action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county; or if the defendant be a nonresident of this state, the same may be tried in any county in which the defendant may be found in this state, or in the county designated in the complaint, and if any defendant is about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had; provided, however, that an action on book account or for goods sold and delivered may also be tried in the county where the plaintiff resides or where the goods were sold; an action upon contract may also be tried in the county in which the contract was to be performed; an action upon note or bill of exchange may also be tried in the county where the same was made payable; and an action for tort may also be tried in the county where the tort was committed. [From Code, Sec. 29.]

(e) **Motion to Change Venue; When Presented; Waiver; Effect of Filing.**

(1) A motion to change venue under the provisions of subdivisions (a) to (d), inclusive, and (1) of subdivision (f) of this rule, must be filed within

the time permitted for the filing of motions under the defenses numbered (1) to (4) of subdivision (b) of Rule 12, and if any such motion, or any other motion permitted by Rule 12, is filed within said time, simultaneously therewith. Unless so filed, the right to file it is waived. A motion under (2) of subdivision (f), or under subdivision (g) of this rule, must be filed prior to the time a case is set for trial, or the right to file it is waived, unless the court, in its discretion, upon motion filed or of its own motion, finds that a change of venue should be ordered.

(2) If a motion to change venue is filed within the time permitted by subdivision (a) of Rule 12 for the filing of a motion under the defenses numbered (1) to (4) of subdivision (b) of Rule 12, the filing of such motion by a party under the provisions of (1) of this subdivision (e) alters his time to file his responsive pleading as follows: if the motion is overruled the responsive pleading shall be filed within ten days thereafter unless a different time is fixed by the court, and if it is allowed the responsive pleading shall be filed within ten days after the action has been docketed in the court to which the action is removed unless that court fixes a different time.

(3) Except as otherwise provided in an order allowing a motion to change venue, earlier ex parte and other orders affecting an action, or the parties thereto, shall remain in effect, subject to change or modification by order of the Court to which the action is removed. [Amendment effective August 18, 1951.]

Committee Note.

The amendment to Rule 12 (b) eliminates "improper venue" as a ground for motion because "improper venue" is not a defense. The manner of presenting the question of "improper venue" is now covered by Rule 98 (e).

I. VENUE FOR PROPERTY, FRANCHISES AND UTILITIES.

A. General Consideration.

The word "affect", as used in this rule, is as broad a term as "to determine a right or interest in". *Jameson v. District Court*, 115 Colo. 298, 172 P. (2d) 449.

The substance, not the form, of the action must control. *Jameson v. District Court*, 115 Colo. 298, 172 P. (2d) 449.

This provision is not restricted to real property. *Jameson v. District Court*, 115 Colo. 298, 172 P. (2d) 449.

This provision has to do with actions affecting specific property and does not control in an action in which there is no issue as to title, lien, injury, quality or possession, but which is concerned only with recovery of the purchase price. *Craft v. Stumpf*, 115 Colo. 181, 170 P. (2d) 779.

An action to recover the reasonable value of furniture, fixtures and equipment of a restaurant and liquor sales business sold to defendant was not an action affecting property within subdivision (a) of this rule. *Craft v. Stumpf*, 115 Colo. 181, 170 P. (2d) 779.

An action to terminate lease and recover possession of real estate, upon the ground that covenants of the lease have been violated, is an action "affecting" real estate and is properly brought in the county in which the said real estate is located. *Gordon Inv. Co. v. Jones*, 123 Colo. 253, 227 P. (2d) 336.

Cited in *Kirchhof v. Sheets*, 118 Colo. 244, 194 P. (2d) 320.

B. Actions to Which Subdivision Is Applicable.

An action to rescind a contract to sell timber is in substance an action to deter-

mine title to the timber, and thus must be tried in the county in which the timber or a substantial part of it is located. *Jameson v. District Court*, 115 Colo. 298, 172 P. (2d) 449.

III. VENUE FOR TORT, CONTRACT AND OTHER ACTIONS.

B. Actions on Contracts.

1. In General.

Action may be tried in county where contract is to be performed.—

In accord with 2nd paragraph in original. See *Gobatti Engineering, etc., Corp. v. Oliver Well Works*, 111 Colo. 193, 139 P. (2d) 269.

As this rule applies only where the contract is, by express terms, to be performed in a certain place.—

In accord with 2nd paragraph in original. See *Gobatti Engineering, etc., Corp. v. Oliver Well Works*, 111 Colo. 193, 139 P. (2d) 269.

The word "goods", as used in subdivision (c) of this rule, should not be restricted to merchandise sold in course of trade. The word should be given the broad meaning ordinarily ascribed to it and be held to include furniture and equipment. *Craft v. Stumpf*, 115 Colo. 181, 170 P. (2d) 779.

F. Other Actions.

1. Suits for Divorce.

This subdivision applies to actions for divorce.

On the question of venue in divorce actions, this subdivision is controlling, notwithstanding chapter 56 '35 C. S. A., concerning divorce actions and kindred matters. *People v. Routt County Court*, 110 Colo. 428, 135 P. (2d) 232.

2. Miscellaneous.

An action for damnification brought by a mortgagor against an assuming grantee who failed to pay the mortgage debt, thus forcing the mortgagor to pay, is one of the undesignated actions comprehended in the expression, "in all other cases", in subsec-

tion (c), and a motion for change of venue to the county of defendant's residence was properly granted. *Cave v Belisle*, 117 Colo. 180, 184 P. (2d) 869.

X. ALL PARTIES MUST AGREE ON CHANGE.

Consent is not a mere acquiescence. It "is not a vacant or neutral attitude, it is affirmative in its nature." *Kirchhof v Sheets*, 118 Colo. 244, 194 P. (2d) 320.

Statement that venue is immaterial does

not constitute consent.—A motion for change of venue is properly overruled when made by one defendant, when another defendant states that venue is immaterial. *Kirchhof v Sheets*, 118 Colo. 244, 194 P. (2d) 320.

XI. ONLY ONE CHANGE; NO WAIVER.

This subdivision has no application in an action for divorce. *People v Routt County Court*, 110 Colo. 428, 135 P. (2d) 232.

Rule 99. Water Rights.

Under this rule abandonment of a priority in an irrigation ditch is a matter that properly may be litigated in a suit to change

the point of diversion of water. *Flasche v Westcolo Co.*, 112 Colo. 387, 149 P. (2d) 817, 819.

CHAPTER XIII.

Seizure Of Person Or Property.

Rule 101. Arrest and Exemplary Damages.

I. BODY EXECUTION.

A. General Consideration.

Cited in *Carlson v McNeill*, 114 Colo. 78, 162 P. (2d) 226.

IV. EXEMPLARY DAMAGES.

A. General Consideration.

Erroneous instruction.—

An instruction that "if you find * * * that in committing the acts complained of the defendant was guilty of a wanton and reckless disregard of the rights and safety of the plaintiff * * * you may assess exemplary damages in favor of the plaintiff and against the defendant in such sum as you may deem

proper, in any event not to exceed the sum \$2,500.00" was held to be erroneous as it did not follow this rule on exemplary damages and as an intimation on the part of the court that the defendant was guilty of committing the acts complained of. *Goldblatt v Chase*, 121 Colo. 355, 216 P. (2d) 435.

Evidence insufficient to justify submission to jury.—See *Weinchel v Adamic* (Colo.), 242 P. (2d) 219.

Quoted in *Heil v Zink*, 120 Colo. 481, 210 P. (2d) 610.

Cited in *Carlson v McNeill*, 114 Colo. 78, 162 P. (2d) 226.

Rule 102. Attachments.

II. AFFIDAVIT; CAUSES.

A. General Consideration.

Affidavit not stating grounds for attachment.—An affidavit stating that "the debt is for farm products, house rent, household furniture" and other necessities for the debtor and his family did not state grounds for attachment under this rule. *Markle v Dearmin*, 117 Colo. 45, 184 P. (2d) 495.

E. Subdivisions (b)(10), (b)(11), (b)(12).

The essence of subdivision 10 is misrepresentation and fraud, and it is only applicable where no credit has been given. *Markle v Dearmin*, 117 Colo. 45, 184 P. (2d) 495.

XXI. APPLICATION TO DISCHARGE ATTACHMENT

Applied in *Markle v Dearmin*, 117 Colo. 45, 184 P. (2d) 495.

Rule 103. Garnishment.

VIII. SUBDIVISION (h).

Applied in *Susman v Exchange Nat. Bank*, 117 Colo. 12, 183 P. (2d) 571.

XI. SUBDIVISION (m).

The answer of the garnishee and the traverse of the plaintiffs are the only pleadings provided by the rules, and therein any new matter plead in the traverse is deemed

to be denied, or avoided. The answer of the garnishee and the traverse of the plaintiffs make up the issues in garnishment proceedings. *General Accident Fire, etc., Corp. v Mitchell*, 120 Colo. 531, 211 P. (2d) 551.

XII. SUBDIVISION (n).

Applied in *Susman v Exchange Nat. Bank*, 117 Colo. 12, 183 P. (2d) 571.

Rule 104. Replevin.

II. CAUSES; AFFIDAVIT.

Where plaintiffs sold trailer under conditional sales contract, retaining title, discounted the contract with a bank and, when default occurred, were obligated to make the payments, plaintiffs had a special interest in the property and for security reasons

were entitled to possession, thus meeting the conditions of this rule that plaintiff show "that plaintiff is the owner of the property claimed, * * * or is lawfully entitled to the possession thereof." *Reavis v Stockel*, 120 Colo. 82, 208 P. (2d) 94.

CHAPTER XIV. Real Estate.

Rule 105. Actions Concerning Real Estate.

Substance and not form determines the nature of an action relating to real estate, since the adoption of Rule 105 (a). *Vogt v. Hansen* (Colo.), 225 P. (2d) 1040, holding that action to cancel tax deed as cloud on title was really in the nature of a suit to quiet title and for possession, so that defendant in possession could set up section 262, chapter 142, '35 C. S. A., as a defense.

Not necessary to show possession.—In an action brought for the purpose of obtaining a complete adjudication of the rights of all parties thereto with respect to real property, under the provisions of this rule it is not necessary for the plaintiff to allege and prove that he had possession of the real estate in question. Possession of the property in controversy in either party is wholly immaterial, under this rule. *Siler v. Investment Securities Co.* (Colo.), 244 P. (2d) 877.

Whether or not an action was one for possession of land was held to depend not on the form of the action, but on the fact of possession. *Vogt v. Hansen*, 123 Colo. 105, 225 P. (2d) 1040.

Effect of decree following old terminology for quieting title.—In an action for reformation of a mortgage and a sheriff's

deed issued on its foreclosure, so as to include a parcel inadvertently omitted, the decree in form followed the old terminology for quieting title, and it was urged that the court could not quiet title in the plaintiff, since he held no title thereto. However, it was held that this contention was without merit, since the action was specifically an action for reformation, setting out properly the basis of the claim and complying sufficiently with this rule, as an action to obtain an adjudication of the rights of the parties with respect to real estate. *Stubbs v. Standard Life Ass'n* (Colo.), 242 P. (2d) 819.

When evidence should be submitted to jury.—In an action for the adjudication of the right to possession of real estate and for damages for alleged wrongful trespass brought under this rule, it was held that, where there are a number of fact issues and the evidence is in conflict, the evidence should be submitted to the jury for determination. *Klipp v. Grusing*, 119 Colo. 111, 200 P. (2d) 917.

Applied in *Jones v. Sturgis*, 118 Colo. 579, 199 P. (2d) 645; *Mitchell v. Espinosa* (Colo.), 243 P. (2d) 412; *McGregor v. McGregor*, 101 F. Supp. 848.

CHAPTER XV Remedial Writs and Contempt.

Rule 106. Forms of Writs Abolished.

I. SUBDIVISION (a) (1).

Purpose of rule.—Under the old Code complaints apparently setting out facts sufficient for relief were held demurrable because the actions sought special writs. It was because of this result that Rule 106 was adopted abolishing forms of writs and the special forms of pleadings formerly required. *Berryman v. Berryman*, 115 Colo. 281, 172 P. (2d) 446.

This rule abolishes the special forms that have heretofore been considered necessary and peculiar to the writ of habeas corpus, and relief may now be obtained either by an action or by a motion under the new practice set up in the Rules of Civil Procedure. *Rogers v. Best*, 115 Colo. 245, 171 P. (2d) 769.

A petition for habeas corpus was held fatally defective for failing to set forth circumstances which rendered it necessary or proper that the supreme court exercise its original jurisdiction, as required by Rule 116. *Rogers v. Best*, 115 Colo. 245, 171 P. (2d) 769.

Cited in *Gill v. Justice of Peace Court*, 111 Colo. 160, 139 P. (2d) 271.

II. SUBDIVISION (a) (2).

A. Grounds for Relief in General.

The substantive aspects of mandamus proceedings are preserved even though this rule "abolishes the special form of plead-

ing." writ and name of the remedy therefore known as mandamus, and relief of the same nature as was formerly provided in mandamus actions may be granted in accordance with precedents established under the old practice. *North Poudre Irr. Co. v. Hinderlider*, 112 Colo. 467, 150 P. (2d) 304, 308; *Hall v. City and County of Denver*, 117 Colo. 508, 190 P. (2d) 122.

The trial court was justified in drawing the distinction between the writ of mandamus and proceedings under this rule. *Hall v. City and County of Denver*, 117 Colo. 508, 190 P. (2d) 122.

In this case counsel for plaintiffs definitely rejected their right to amend and proceed under this rule. "We can now only interpret the record, therefore, as one in which they insist that they have a right to what would correspond under the old pleadings to a writ of mandamus, which would entitle them, if granted, to a new trial on the merits rather than to have a district court act as a court of review." *Hall v. City and County of Denver*, 117 Colo. 508, 190 P. (2d) 122.

Action lies to compel performance of purely ministerial duty involving no discretionary right.

In accord with original. See *Hall v. City and County of Denver*, 117 Colo. 508, 190 P. (2d) 122.

It is not an ordinary action or proceeding available as matter of right. It is maintain-

able only when there is no other adequate legal remedy, and the courts are invested with a sound discretion as to its issuance. *Hall v. City and County of Denver*, 117 Colo. 508, 190 P. (2d) 122.

In cases where adequate relief may be had by an action for damages, etc.—

In accord with original. See *Hall v. City and County of Denver*, 117 Colo. 508, 190 P. (2d) 122.

Applied in *State Civil Service Comm. v. Lehl*, 108 Colo. 397, 118 P. (2d) 1080; *McDevitt v. Corfman*, 108 Colo. 571, 120 P. (2d) 963; *Knauss v. Seventh-Day Adventist Ass'n* 117 Colo. 540, 190 P. (2d) 590; *MacArthur v. Wycaver*, 120 Colo. 525, 211 P. (2d) 556; *Rothwell v. Coffin*, 122 (Colo.), 140, 220 P. (2d) 1063.

B. When Properly Allowed.

To compel officer to act.—

The nonperformance of a mandatory public duty, such as filling vacancies occurring in offices required by the social and governmental needs of a community, suggests mandamus as an adequate judicial remedy. *McNichols v. Denver*, 109 Colo. 269, 124 P. (2d) 601, 604.

Where city charter provides for the appointment of at least two justices of the peace, any vacancy in such offices to be filled by the mayor, mandamus would lie to compel the mayor to fill any vacancy, at least to the number of two, as required by the charter. *Id.*

When a tax assessor refuses to perform a purely ministerial function, which the law imposes, performance may be enforced by mandamus. *Bohen v. Board of County Com'rs*, 109 Colo. 283, 124 P. (2d) 606, 608.

C. When Properly Refused.

Or to control discretion of mayor as to appointments.—Under city charter, authorizing mayor to appoint justices of the peace, the discretion of the mayor as to whom he appoints, except as it may be limited by the charter, cannot be controlled by mandamus. *McNichols v. Denver*, 109 Colo. 269, 124 P. (2d) 601, 604.

Applied in *Hawkins v. Hunt*, 113 Colo. 468, 160 P. (2d) 357.

III. SUBDIVISION (a) (3).

A. General Consideration.

Subdivision does not enlarge or abridge substantive rights.—The present Rules of Civil Procedure, and particularly this rule can only operate on or with respect to matters of procedure, therefore, this subdivision is not a statute and does not, and cannot, have the force and effect of a statute, and cannot enlarge or abridge substantive rights. *Enos v. District Court (Colo.)*, 238 P. (2d) 861.

Applied in *People v. Neary*, 113 Colo. 12, 154 P. (2d) 48.

IV. SUBDIVISION (a) (4).

A. General Consideration.

This rule provides a plain, speedy and adequate remedy for reviewing a decision of the conservation board as to the sufficiency of a petition, by virtue of which rule the district court is authorized to determine

whether or not the board had jurisdiction or abused its discretion. *Friesen v. People*, 118 Colo. 1, 192 P. (2d) 430.

This subdivision has no application in an action for divorce. *People v. Routt County Court*, 110 Colo. 428, 135 P. (2d) 232.

Court cannot interfere with commission's findings if supported by competent evidence.

—The scope of review in certiorari proceedings, and the authority of courts to interfere with the findings of tribunals vested with exclusive jurisdiction to determine particular issues, have, by a long line of decisions, been judicially defined. We cannot consider herein whether the commission's findings are right or wrong, substitute our judgment for that of the commission, or interfere in any manner with the commission's findings if there is any competent evidence to support the same. *State Civil Service Comm. v. Hazlett*, 119 Colo. 173, 201 P. (2d) 616.

Refusal by the civil service commission to restore a former policeman to his previous position on the police force of Denver after his honorable discharge from the armed forces of the United States because he volunteered when he was in no immediate danger of being drafted was an abuse of discretion as contemplated by this rule and hence the supreme court had jurisdiction to reinstate him. *Hanebuth v. Patton*, 115 Colo. 166, 170 P. (2d) 526.

Where a city charter forbade the auditor to disburse city funds except in payment of legal obligations, an action could not be maintained to compel him to issue warrants as directed by the city council for the payment of a mere moral obligation. *Cross v. McNichols*, 118 Colo. 442, 195 P. (2d) 975.

In eminent domain proceedings, where an order for temporary possession was clearly interlocutory, and a writ of error would not lie to review the same, complainants had no plain, speedy or adequate remedy at law, and certiorari will lie. *Swift v. Smith*, 119 Colo. 126, 201 P. (2d) 609.

Review of decision of state board of health.—An action under ch. 78, § 21 (12), providing for a review in the district court of a decision of the state board of health, is a statutory action and not controlled by this rule. *Grimm v. Colorado State Board of Health*, 121 Colo. 269, 215 P. (2d) 324.

A review of the action of the state board of health in revoking a license for the operation of a chiropractic sanitarium was held to be limited to the inquiry as to whether jurisdiction has been exceeded, discretion abused, or authority regularly pursued. *Spears Free Clinic, etc. v. State Board of Health*, 122 Colo. 147, 220 P. (2d) 872.

Necessity for calling attention to lack of jurisdiction.—Order in the nature of a writ of prohibition will not be issued to an inferior court unless the attention of the court whose proceedings it is sought to arrest first has been called to the lack of jurisdiction alleged, unless extraordinary circumstances are present. *Justice Court v. People*, 109 Colo. 287, 124 P. (2d) 934, 936.

Amended answers filed subsequent to remanding order of supreme court should

be struck.—In an original proceeding for relief as in certiorari under Rule 106 (a) (4) it was held that the district court should strike amended and amending answers which it allowed to be filed subsequent to supreme court's remanding order, and at its judicial convenience proceed to the trial of the case on the specific pleadings mentioned by the supreme court in and out of which the trial court should ascertain the issues and on which it should conduct the trial. *People v Greeley Nat. Bank*, 112 Colo. 274, 148 P. (2d) 580.

Applied in *Shearer v Board of Trustees of Firemen's Pension Fund*, 121 Colo. 592, 218 P. (2d) 753; *Rothwell v Coffin*, 122 Colo. 140, 220 P. (2d) 1063; *MacArthur v Sanzalone*, 123 Colo. 166, 225 P. (2d) 1044; *Bacon v Steigman*, 123 Colo. 62, 225 P. (2d) 1046; *Berger v People*, 123 Colo. 403, 231 P. (2d) 799.

C. Extent of Review.

It is confined to questions of jurisdiction.—

Under subdivision (a) (4) the court is limited to a determination of questions of jurisdiction and abuse of discretion. *Hawkins v Hunt*, 113 Colo. 468, 160 P. (2d) 357, 358.

In a proceeding in the nature of prohibition brought pursuant to this rule, the trial court was held not to have exceeded its jurisdiction or abused its discretion in denying motion to dismiss condemnation proceedings and in finding that the parties to the condemnation proceedings had failed to reach an agreement as to the purchase price of the land thereby giving the trial court jurisdiction over such proceedings. *Old Timers Baseball Ass'n v Housing Authority*, 122 Colo. 597, 224 P. (2d) 219.

Rule 107. Civil Contempt.

I. DEFINITION.

B. What Constitutes Contempt.

1. In General.

The question of contempt does not depend on intention, etc.—

In accord with original. See *In re People* (Colo.), 239 P. (2d) 706.

2. Disobeying or Failure to Obey Orders of Court.

Constructive or indirect contempt.—

Where a court having jurisdiction has ordered the payment of money into the registry of the court and the person to whom the order is directed fails to make the payment as commanded and contempt proceedings are instituted, the alleged contempt is constructive or indirect. *Urbancich v Mayberry* (Colo.), 236 P. (2d) 535.

Violation of quiet-title decree.—The supreme court does not recognize the violation of the term of a decree in a quiet-title action as being contempt of court unless the decree contained a mandatory or prohibitive provision. *McMullin v City and County of Denver* (Colo.), 242 P. (2d) 240.

C. Power of Court to Punish.

When power should be exercised.—The power to punish for contempt should be used sparingly, with caution, deliberation, and due regard to constitutional rights. It should be exercised only when necessary to prevent actual, direct obstruction of, or interference with, the administration of justice. *In re People* (Colo.), 239 P. (2d) 706.

Procedure must be complied with.—Under the Code of Civil Procedure which contained provisions relating to contempt, substantially in accord with this rule the supreme court has repeatedly held that compliance with the procedure governing contempt matters is essential before jurisdiction to punish for contempt attaches. *Urbancich v Mayberry* (Colo.), 236 P. (2d) 535.

Procedure held violative of provisions of this rule.—The only citation served upon the defendant was that which commanded him to appear before the county court "for

examination upon oath on the matter of said complaint and to abide by the orders of this court entered upon said hearing." At the time he appeared he was not informed by the citation that he was being subjected to proceedings in contempt. No order of the county court had as yet been entered requiring any act on his part. On the date of his appearance, the county court at one and the same time, entered the order requiring the performance of an act within thirty days, and erroneously adjudged that a warrant for the imprisonment of plaintiff in error might issue at the expiration of that time if the act commanded was not performed. This procedure was in violation of the mandatory provisions of this rule. *Urbancich v Mayberry* (Colo.), 236 P. (2d) 535.

III. OUT OF PRESENCE OF COURT.

Motion may be included in affidavit.—

An affidavit containing a statement equivalent to a motion for the issuance of a citation is a sufficient "motion supported by affidavit"; the fact that the motion is included in the affidavit instead of being presented as a separate document does not invalidate it. *Shapiro v Shapiro*, 115 Colo. 501, 175 P. (2d) 387.

Rule not complied with.—See *McMullin v City and County of Denver* (Colo.), 242 P. (2d) 240.

IV. TRIAL AND PUNISHMENT.

Remedial orders and punitive orders.—

In formulating Rule 107 (d), the court recognized the distinction between a remedial order, the purpose of which is primarily to enforce obedience to its writ, and a punitive order to vindicate the authority of the law and uphold the dignity of the court. In the former case the fine which may be imposed is limited to the damages and expense resulting from the contempt and is payable to the person damaged thereby, and the imprisonment which may be imposed may continue only until the contemnor shall comply with the order of the court. In the latter case the fine or imprisonment is not dependent on

damage or subsequent performance, but is a matter solely within judicial discretion. *Shapiro v. Shapiro*, 115 Colo. 501, 175 P. (2d) 387.

A punitive fine or imprisonment may be imposed only if the citation so states. *Shapiro v. Shapiro*, 115 Colo. 501, 175 P. (2d) 387.

Direct criminal contempts are punishable summarily without affidavit, notice, rule to show cause, or other process. *Shotkin v. Atchison, etc., R. Co. (Colo.)*, 235 P. (2d) 990.

Where the contempt is a direct one made in the presence of the court and the court proceeds at once to try the contemnor and sentence him, such sentence will be upheld, though made after the contemnor has left the presence of the court. *Shotkin v. Atchison, etc., R. Co. (Colo.)*, 235 P. (2d) 990.

As appears from this rule, two types of civil contempt are recognized: One, consisting of a present refusal to perform an act in the power of the person to perform, which normally constitutes injury to others for whose benefit it is required; the other, conduct which is derogatory to the authority or dignity of the court. In the former case, the court may order the respondent imprisoned, not for a definite time, but until he performs the act which he is commanded and is able to perform; in the lat-

ter case, the court may order punishment to vindicate the dignity of the court by fine or imprisonment, or both, which should be definite as to amount and time, regardless of subsequent compliance with the court order. In the former case, the court must, upon hearing, make a finding both of the facts constituting contempt and of a present duty and ability to perform; in the latter case, the court must make a finding of facts constituting misbehavior and that the conduct is offensive to the authority and dignity of the court. *In re People (Colo.)*, 239 P. (2d) 706.

Review of punishment.—While punishment for contempt which consists of conduct derogatory is discretionary, the supreme court not only may inquire as to jurisdiction and regularity of procedure, but also may determine whether or not the punishment imposed is so excessive and incommensurate with the gravity of the offense as to be arbitrary and vindictive. *In re People (Colo.)*, 239 P. (2d) 706.

Punishment held arbitrary and oppressive.—See *In re People (Colo.)*, 239 P. (2d) 706.

Punishment held excessive.—See *Shotkin v. Atchison, etc., R. Co. (Colo.)*, 235 P. (2d) 990.

Evidence insufficient to support order to vindicate dignity of court.—See *In re People (Colo.)*, 239 P. (2d) 706.

CHAPTER XVI

Affidavits, Arbitration, Miscellaneous.

Rule 109. Arbitration.

VII. ARBITRATED MATTERS HELD ADJUDICATED—EXCEPT FOR FRAUD, ETC.

A mere assertion that the finding of the arbitrators was contrary to the law and evidence does not bring the case within the categories of relief from judgments on the grounds of "mistake, inadvertence, surprise or excusable neglect", but rather brought the case within the statutory prohibition that a "matter so arbitrated shall be held to have been adjudicated and settled, and not open, either directly or indirectly, for review." *Twin Lakes Reservoir, etc., Co. v. Rogers*, 112 Colo. 155, 147 P. (2d) 828, 835.

Issue as to interest brought within terms of submission.—Where defendant's statements of claim, incorporated in arbitration agreement, concluded with a demand for "interest at six per cent on all items on above claims found to be due us", it was held that the interest issue was within the terms of the submission, and court could not impeach the award because of an alleged mistake or error of arbitrators as to the law and facts. *Twin Lakes Reservoir, etc., Co. v. Rogers*, 112 Colo. 155, 147 P. (2d) 828, 835.

Single award covering several claims.—In an action to set aside an arbitration award, made under the procedure outlined under this rule, where the claims all arose from a canal excavation: One for extra costs; another for extra yardage, and a third for a proper classification of material moved, it was held that the single award based upon arbitrators' determination of the actual yardage moved, and its proper classification, did no more than allow defendant compensation for the materials actually excavated on the canal but for which no payment had been made, and that the award returned was concerned solely with the questions which either were directly submitted or necessarily arose from the three submissions, and were within their scope. *Twin Lakes Reservoir, etc., Co. v. Rogers*, 112 Colo. 155, 147 P. (2d) 828, 832.

Where parties agreed that a special master to whom a case had been referred should serve as arbitrator rather than as master, he was not required to follow the order of reference and the arbitration was valid even though it was not a statutory arbitration. *Zelinger v. Mellwin Const. Co.*, 123 Colo. 149, 225 P. (2d) 844.

CHAPTER XVII
Supreme Court Proceedings.

Rule 111. Writ of Error.

(c) **How Obtained.** To obtain a writ of error a party shall within the time fixed by this rule docket the case in the supreme court either by filing a praecipe for a writ of error or by filing a record of the proceedings in the trial court prepared in compliance with Rule 112. There shall also be filed with the record a designation of the parties, which lists the names of the plaintiffs in error and of the defendants in error. Where the record is not filed at the time of the docketing, the clerk of the supreme court shall issue and transmit to the clerk of the trial court a writ of error commanding that a correct transcript of the record of the case be certified to the supreme court within 60 days from the receipt of such writ, or within such additional time as the supreme court may order. Where the record is filed at the time of the docketing, the clerk of the supreme court shall issue a writ of error and shall file the same with the record of the case. [Part new and part from Supreme Court Rule 19.]

(f) **Specification of Points.** No assignments of error, assignments of cross error or formal joinder in error shall be required. Plaintiff in error shall file a "Specification of Points" upon which he relies for reversal or modification of the judgment and a defendant in error shall file a "Cross-Specification of Points" upon which he relies if he seeks a reversal or modification of the judgment or the correction of adverse findings, orders or rulings of the trial court. Each such specification shall set out separately and particularly each point relied upon and shall be filed at or before the time of the filing of the brief of the party filing the specification and it may be a separate paper or may be included in the brief of such party, in which case it shall be separate from the remainder thereof. Counsel will be confined to the points so specified but the court may in its discretion notice any error appearing of record. No writ of error shall be dismissed and no specification of points shall be disregarded on account of any technical defect not affecting the substantial rights of the parties. A dismissal by plaintiff in error of the writ of error shall not affect the right of a defendant in error to seek reversal or modification of the judgment where cross-specification, or notice of intention to file the same, has theretofore been filed. [Supplants parts of Supreme Court Rules 23, 27A, 29, 34 and all of 32, also Code Sec. 421; amendment effective August 18, 1951.]

Committee Note.

A plaintiff in error may desire a mere modification of a judgment and not a reversal thereof. The amendment makes it clear that a defendant in error "shall" file cross-specifications if he desires to object to any action of the trial court. This clarifies the rule by bringing it in line with such decisions as *Markle v Dearmin*, 117 Colo. 45, 184 P. (2d) 495; *City Real Estate v Sullivan*, 116 Colo. 169, 180 P. (2d) 504; *Cahill v Readon*, 85 Colo. 9, 273 P. 653; *Kahnt v Caldwell*, 85 Colo. 496, 277 P. 471; *Newt Olson Lbr. Co. v School District*, 83 Colo. 272, 263 P. 723; *Bennett v Morrison*, 78 Colo. 464, 242 P. 636; and *First Nat. Bank v Follett*, 46 Colo. 452, 104 P. 954.

I. MATTERS REVIEWABLE.

A. General Consideration.

"The writ of error is a writ of right."—

In accord with original. See *Wheeler Kelly Hagny Trust Co. v Williamson*, 111 Colo. 515, 143 P. (2d) 685.

The particular office of the writ is to require the clerk of the court in which the judgment complained of is entered, to certify the record for review. *Wheeler Kelly*

Hagny Trust Co. v Williamson, 111 Colo. 515, 143 P. (2d) 685, 686, quoting *Hull v Denver Tramway Corp.*, 97 Colo. 523, 50 P. (2d) 791, 792.

The writ of error and the supersedeas are two separate things and the writ can be sustained without a supersedeas which is merely an auxiliary process designed to supersede the enforcement of the judgment of the court below brought up by a writ of error for review. *Monks v Hemphill*, 119 Colo. 378, 203 P. (2d) 503.

Judgment of district court on appeal from assessment.—Under par. (a) (1) of this rule, error lies to the supreme court to review the judgment of the district court rendered in a proceeding based on ch. 142, § 116, relating to appeals from assessments made by the county assessor. *Denver v Hover Motors*, 120 Colo. 511, 212 P. (2d) 99.

Trial court cannot grant enlargement of time.—Following commencement of a new action in the supreme court by procurement of a writ of error therefrom, the trial court is without further authority to grant a motion for enlargement of time. Such extension if desired can come properly only

by order of the supreme court; such is within the contemplation of this rule which provides that the record of the case shall be certified to this court within sixty days from the receipt of the writ of error, "or within such additional time as the supreme court may order." *Moreau v. Buchholz* (Colo.), 236 P. (2d) 540.

Applied, as to noticing error appearing of record, in *Graham v. Swift*, 123 Colo. 309, 228 P. (2d) 969.

Quoted in *Savageau, Inc. v. Larsen*, 117 Colo. 229, 185 P. (2d) 1012.

Cited in *Bankers Trust Co. v. Hall*, 116 Colo. 566, 183 P. (2d) 986; *Zlaten v. Zlaten*, 117 Colo. 296, 186 P. (2d) 583.

B. Final Judgment.

A writ of error lies to a final judgment only.—

In accord with original. See *Julius Hyman & Co. et al. v. Velsicol Corporation*, 119 Colo. 121, 201 P. (2d) 380.

Entry of final judgment is a prerequisite to the right to prosecute error. *Stonebraker v. Konugres*, 117 Colo. 429, 188 P. (2d) 894.

It is elementary that other than to orders of the kinds specifically enumerated in this rule, a unit of error lies only to a final judgment, and that questions with respect to other interlocutory orders may be presented only on review of the final judgment. *State v. Harrah*, 118 Colo. 468, 196 P. (2d) 256.

An order denying defendant's motion to make another a third party plaintiff in a suit to quiet title, being "interlocutory", and not a "final judgment", could be presented only on review of the final judgment as a writ of error will not lie to review such order. *Burks v. Maudlin*, 109 Colo. 281, 124 P. (2d) 601.

And if it appears on review, etc.

Where record discloses only the sustaining of a motion to dismiss the action without the entry of any order of dismissal, no "matter reviewable" being presented, the writ of error will be dismissed. *Slifka v. Viettie*, 110 Colo. 138, 131 P. (2d) 417.

Where there was no final judgment for money against plaintiffs in error lent only an injunction to desist from manufacturing and selling their products, and an accounting was still to be had, a writ of error will not lie and must be dismissed. *Julius Hyman & Co. v. Velsicol Corporation*, 119 Colo. 121, 201 P. (2d) 380.

To be final the judgment must end the particular suit in which it is entered.—

In accord with original. See *Julius Hyman & Co. v. Velsicol Corporation*, 119 Colo. 121, 201 P. (2d) 380.

Save in the exceptional instances mentioned in (a) (2), (3) and (4) of this rule, a writ of error lies to a final judgment only. The practice under the Code of Civil Procedure was analogous. *Burks v. Maudlin*, 109 Colo. 281, 124 P. (2d) 601.

The order entered on a motion to discharge a receiver, although intermediate in a sense, expressly is made reviewable on error before final judgment. *Melville v. Weybrew*, 108 Colo. 520, 120 P. (2d) 189, citing Supreme Court Rule 18.

IA. LIMITATION ON TIME OF ISSUANCE.

Waiver of rule.—Where a Colorado attorney became connected with the military establishment of the republic, and Kansas counsel, who was attending to the proceedings necessary to be taken to get the case before the supreme court, was unfamiliar with Colorado practice, and failed to docket the case in the supreme court within the time provided by this rule, it was held that the court could not consistently waive the rule which was recognized by all concerned, and which was properly invoked by those who opposed waiver. *Wheeler Kelly Hagny Trust Co. v. Williamson*, 111 Colo. 515, 143 P. (2d) 685, 686.

IB. SPECIFICATION OF POINTS.

Rule should be followed.—In order to present a matter for the supreme court's consideration, rule 111(f) should be followed. The supreme court is entitled to be advised, with definiteness and particularity, as to the particular grounds of attack upon which the rulings, judgment and actions of the trial court are challenged, and, without so doing, there is nothing specifically presented for consideration. *Kubat v. Kubat*, 120 Colo. 590, 212 P. (2d) 853.

Effect of failure to object to sustaining demurrers.—Where no objection relating to the action of the trial court in sustaining demurrers was contained in the specification of points, as required under subdivision (f) of this rule, it was held that the only questions before the supreme court were those raised by the specification of points. *Stanton v. Union Oil Co.*, 111 Colo. 414, 142 P. (2d) 285, 287.

Failure to object to order granting nonsuit.—If the record shows no specification of points as required by subsection (f) the judgment will be affirmed, though the only ruling in question is an order granting a nonsuit, where appellant contends the case should have been submitted to the jury under the doctrine of *res ipsa loquitur*. *Clow v. Denver Coca-Cola Bottling Co.*, 115 Colo. 351, 173 P. (2d) 888.

Provision of rule not waived by court.—On writ of error to review vacation of a workmen's compensation award, the consideration of the case was objected to because plaintiffs in error had filed no specification of points at or before the time of filing of their brief. Claimant's injury occurred on March 31, 1941. His claim was not filed with the industrial commission until January 8, 1945. It was held that in view of the staleness of claimant's demand and the doubtful propriety of its late presentation, there was nothing appearing to appeal to the court's discretion for waiving the provision of the rule. *Gregorich v. Oliver Coal Co.*, 114 Colo. 481, 166 P. (2d) 993. See also, *Gregorich v. Industrial Commission*, 121 Colo. 477, 217 P. (2d) 614.

Refusal of instructions.—This rule requires that each specification "shall set out separately and particularly each point relied upon," so that where the defendant's specification before the supreme court

lumped together fourteen tendered instructions without setting forth any point at all and a study of the instructions given showed that the defendant's theory of the case was covered by them, the supreme court would not attempt to ferret out error in the refusal of the court to give these further instructions. *Dottavio v Lohr*, 122 Colo. 294, 222 P. (2d) 428.

Waiver of right to present objection on review.—Where an objection is not set out in the motion for a new trial, plaintiff in error waives his right to present it on review. However, such waiver neither prevents nor requires a consideration of the point by the appellate tribunal, as under this rule the court may in its discretion notice any error appearing of record. *United Brotherhood of Carpenters, etc. v Salter*, 114 Colo. 513, 167 P. (2d) 954.

Error appearing of record and technical defects.—In a proceeding under ch. 142, § 116, relating to appeals from assessments made by county assessor, the supreme court applied the provision of this rule that the court may notice any error appearing of record and shall disregard technical defects, where the issue as to constitutional and statutory construction involved in the assessment of automobiles was so apparent and of such public importance that justice required its prompt consideration regard-

less of technical rule. *Denver v Hover Motors*, 120 Colo. 511, 212 P. (2d) 99.

Under this rule, while counsel are confined to the points properly specified, "the court may in its discretion notice any error appearing of record." It is the duty of the trial court, on its own motion, in the absence of a request therefor, to instruct the jury as to the element of damages, the basis on which the assessment thereof shall be made, and within what limits the damages may be estimated. And where the jury is not so instructed, the supreme court may take notice of such error, even though no objection was made in the trial court and no instructions tendered. *Maloy v Griffith (Colo.)*, 240 P. (2d) 923.

Applied in *Stone v Lerner*, 118 Colo. 455, 195 P. (2d) 964.

Cited in *Forney Mfg. Co. v Cairns*, 121 Colo. 184, 214 P. (2d) 375.

III. SOLE METHOD FOR REVIEW.

Laws 1941, p. 369, § 1, provides: "Writs of error to any inferior tribunal shall be the only method for review by the supreme court of any action or proceeding, whether civil, criminal, special, statutory, common law or otherwise."

This statute abolished appeals. *Northrup v Nicklas*, 115 Colo. 207, 171 P. (2d) 417.

Rule 112. Record on Error.

Failure to comply with rule.—Where a record on review fails to conform with this rule, the writ of error may be dismissed either on motion or the court's own initiative. *Williams v Williams*, 110 Colo. 473, 135 P. (2d) 1016; *Clayton College v County Court*, 110 Colo. 365, 135 P. (2d) 138.

But although a record on error may not comply with this rule, the supreme court may, in its discretion, elect to pass upon questions presented in order that further delay, and expense to the parties, may be avoided. *Williams v Williams*, 110 Colo. 473, 135 P. (2d) 1016.

Failure to include judgment in record.—This rule requiring the inclusion of the judgment in the record is mandatory, and, without a compliance therewith, there is nothing for this court to review; consequently, an order of dismissal should be

entered. *Savageau, Inc. v Larsen*, 117 Colo. 229, 185 P. (2d) 1012.

Where the record did not disclose any final judgment entered in the court below, in violation of this rule, there was nothing presented for review. *Howard v American Law Book Co.*, 121 Colo. 5, 212 P. (2d) 1006.

Granting of extension of time limit within discretion of trial court.—See note to Rule 6.

Cited in *Clayton College v County Court*, 109 Colo. 476, 126 P. (2d) 502, 503; *Wheeler Kelly Hagney Trust Co. v Williamson*, 111 Colo. 515, 143 P. (2d) 685; *Alden Sign Co. v Roblee*, 119 Colo. 409, 203 P. (2d) 915; *Trustee Co. v Bresnahan*, 119 Colo. 311, 203 P. (2d) 499; *Forney Mfg. Co. v Cairns*, 121 Colo. 184, 214 P. (2d) 375; *Anderson v Anderson (Colo.)*, 234 P. (2d) 903; *Moreau v Buchholz (Colo.)*, 236 P. (2d) 540.

Rule 113. Supersedeas and Stay of Execution.

I. SUBDIVISION (a).

Supersedeas is merely an auxiliary process designed to supersede the enforcement of the judgment of the court below brought up by a writ of error for review; the writ and supersedeas are two separate things, and the writ can be sustained without a supersedeas. *Monks v Hemphill*, 119 Colo. 378, 203 P. (2d) 503.

Where a stay of execution is desired by plaintiff in error, such relief must be sought by application for supersedeas. *Alden Sign Co. v Roblee*, 119 Colo. 409, 203 P. (2d) 915.

Where the plaintiff in error has not filed an application for supersedeas, his motion

for a stay of execution will, therefore, be denied, but without prejudice to the right to apply for supersedeas, although the court may conclude to make final determination of the cause upon such application, or may even deny supersedeas. *Alden sign Co. v Roblee*, 119 Colo. 409, 203 P. (2d) 915.

II. SUBDIVISION (B).

Applied in *Shotkin v Atchison, etc., R. Co. (Colo.)*, 235 P. (2d) 990.

VI. SUBDIVISION (f).

A bond in the form prescribed by c. 43, § 10 for a cost bond is not a supersedeas bond and is not within Rule 113(f). *Fifer v Fifer*, 120 Colo. 10, 206 P. (2d) 336.

**Rule 115. Abstracts, Statement of Case, Briefs, Motions and
Withdrawal of Papers.**

(a) **Statement of Case.** No abstract of the record is required. The plaintiff in error shall set forth in his brief a concise statement of the case containing all that is material to the consideration of the questions presented with appropriate folio references to the record. Pertinent provisions of the pleadings, documentary evidence, instructions given or refused, to which proper objections were made, findings and conclusions of the trial court, and judgment may be set forth in the brief or in an appendix thereto. [From Supreme Court Rules 36 and 38 and Code Sec. 442. Amendment adopted May 2, 1952, effective May 6, 1952.]

(b) **Briefs; When Filed.** Except as provided by Rule 118 (b) and subdivision (k) of this rule, the brief of plaintiff in error shall be filed within 30 days after filing the record or, where application for supersedeas is pending, within 30 days from the date of the determination thereof unless the court makes final determination of the case on such application for supersedeas. The defendant in error shall file his brief within 30 days after service upon him of copies of the brief of the plaintiff in error. The plaintiff in error may file a reply brief within 20 days after service of the brief of the defendant in error upon him. Supplemental briefs shall be filed only upon leave of court. Fifteen copies of every brief shall be filed. [From Supreme Court Rules 38 and 39 and Code Sec. 442. Amendment adopted May 2, 1952, effective May 6, 1952.]

(c) **Briefs; Contents.** Every brief filed in the supreme court, except one filed in support of or in opposition to a motion, shall contain separately in the order following:

(1) A subject of the entire brief.

(2) A table of all cases and statutes cited. Cases shall be first stated in alphabetical order giving title, volume and page with citations to the official reports and to the reporter system. Colorado statutes shall be cited by reference to official publication only. Each case or statute shall be indexed to every page on which it is cited.

(3) A concise statement of the case as required by subdivision (a) of this rule.

(4) A brief statement of the argument setting forth clearly and succinctly the points to be argued.

(5) The argument exhibiting clearly, separately, and without unnecessary repetition the points of fact and law being presented and citing the authorities and statutes relied upon. When other than a Colorado statute is cited so much thereof as may be necessary to the decision shall be printed in full either in the body of the argument or in an appendix. References to the record shall be accompanied by appropriate folio numbers. When the reference is to the evidence, to the giving or refusal to give an instruction, or to a ruling upon the report of a master, the folio citation must be specific, and if the reference is to an exhibit, both the folio number at which the exhibit appears and at which it was offered in evidence must be indicated.

(6) Such appendices as are proper under these rules.

Briefs of defendants in error need not contain a statement of the case unless that presented in the brief of plaintiff in error is controverted or deemed insufficient. Reply briefs shall be confined strictly to answering new matters raised by the adversary's brief. [From Supreme Court Rules 37 to 42 both inclusive. Also from Rule 27, U. S. Supreme Court, and the rules of the U. S. Courts of Appeal. Amendment adopted May 2, 1952, effective May 6, 1952.]

(h) **Printed or Typewritten Abstracts and Briefs.** All abstracts of records and briefs shall bear, on the front cover, the number and title of the case, the court to which the writ of error lies, the name of the trial judge, and the names and addresses of attorneys filing the same. Typewritten briefs shall be legible and upon good paper eight and one-half inches by thirteen or fourteen inches. Except as otherwise provided, all briefs shall be printed and shall be on white

wove antique finish book paper weighing sixty pounds to the ream, twenty-five inches by thirty-eight inches. They shall be printed on pages nine and one-quarter inches by six and one-eighth inches when trimmed, in plain face eleven or twelve point type two point leaded, with face of type page twenty-four by forty-five ems pica, including the running head. Extracts and quotations must be in the same type indented two ems. Briefs and abstracts not in conformity herewith shall not be accepted by the clerk for filing except upon order of the court. [Amendment adopted February 24, 1948, effective June 1, 1948.]

(i) **Number of Copies to be Filed and Served.** One original copy of every typewritten brief and typewritten abstract, and one original copy of every motion shall be filed. Two copies of each printed brief, abstract, or other printed paper, and one copy of each typewritten paper shall be served on all parties, and proof of service filed with the clerk. No such service shall be required upon a defendant in error who has not entered his appearance in the supreme court as stated in the summons to hear errors, but in lieu of such service one additional copy of each such paper shall be filed. [From Supreme Court Rules 38 and 46.]

Note—For service see Rule 5. See also subdivisions (a) and (b) of this Rule 115.

I. SUBDIVISION (a).

A. General Consideration.

"The purpose of the abstract under this rule should be obvious, and is threefold: First, to point out to the court the essential parts of the record so that it will not be necessary for us to labor over portions which are not pertinent to the issues here raised; second, to provide enough copies of this essential record so that each of the appellate judges may have one available for his study, and third, to present this essential record in convenient form and uniform type so as to facilitate our investigation of the facts and issues involved." *Lakewood Sanitation Dist. v. Public Utilities Comm.*, 118 Colo. 537, 198 P. (2d) 456.

Taxing cost of supplemental abstract.—Where it was probable that omissions of certain testimony from defendant's abstract might be accounted for by the elimination of evidence relating to the case of co-defendant, whose motion for directed verdict was sustained, and dispute as to the remainder of abstract largely arose from the zealous insistence of both counsel that the abstract recitals should be in the form most favorable to their respective contentions and the same disposition would have been reached in the case without the filing of the supplemental abstract, the supreme court declined to tax the cost thereof to defendant. *Edwards v. Quackenbush*, 112 Colo. 337, 149 P. (2d) 809, 816.

Cited in *Clayton College v. County Court*, 109 Colo. 476, 126 P. (2d) 502, 503.

B. Application.

Instructions.—

The penalty of omission from the abstract of the given instructions or any of tendered instructions, to the refusal of which error was specified, as well as failure to set out therein in any manner, except by way of reference one of the affidavits for new trial which is quoted from or commented on at length in the brief ordinarily lies in the results of a non-consideration of points of error specified and not in a taxing of costs. *Edwards v. Quackenbush*, 112 Colo. 337, 149 P. (2d) 809, 816.

Abstract held insufficient.—An abstract containing no index, footnotes with num-

bers in three-point type substituted for marginal folio numbers in eleven point type, and no information as to the pleadings or pertinent parts of the record is insufficient, and the writ of error will be dismissed. *Lakewood Sanitation Dist. v. Public Utilities Comm.*, 118 Colo. 537, 198 P. (2d) 456.

Where an abstract of record imparted "no information whatever . . . concerning the contents of the pleadings or other essential parts of the record," from which even the general nature of the action could be determined, a writ of error will be dismissed, for complete failure to comply with the mandatory provisions of this section. *Boggs v. McMickle*, 119 Colo. 527, 205 P. (2d) 642.

1A. SUBDIVISION (b).

Time for filing an answer brief on the merits, where a motion to dismiss is denied, shall commence to run on the date of the announcement of the opinion; otherwise, this rule will control in the matter of filing briefs. *Johnson et al. v. George*, 119 Colo. 153, 200 P. (2d) 931.

II. SUBDIVISION (c).

Pertinent federal statutes.—Where taxpayer appealed from adverse decision in quo warranto action challenging right of member of federal rent advisory board to hold office as city councilman and the federal statutes were not quoted or cited or summarized or analyzed in the abstract of record or in the taxpayer's brief, the appellate court would not search through the federal statutes to find grounds of technical disability in order to remove the councilman from office. *People v. Cavender*, 123 Colo. 175, 226 P. (2d) 562.

Cited in *Mountain States Oil Corp. v. Sandoval*, 109 Colo. 401, 125 P. (2d) 964; *Cruse v. Marston*, 112 Colo. 291, 148 P. (2d) 1004.

III. SUBDIVISION (e).

Purpose and observance of rule.—The rule fixing the time within which abstracts and briefs shall be filed, is "for the proper dispatch of business," and its "observance is required in the interests of litigants generally." *People v. Cooper Enterprises*, 111 Colo. 338, 141 P. (2d) 414, quoting *Wilson v. People*, 25 Colo. 375, 55 P. 721, 722.

Rule 116. Original Jurisdiction.**Relief is discretionary, etc.—**

The supreme court will not exercise original jurisdiction when the question may be properly submitted and determined and the rights of the petitioner fully protected and enforced in the lower court. *Rogers v Best*, 115 Colo. 245, 171 P. (2d) 769.

Question of venue raised on application and order to show cause.—In view of the importance of determining the question raised, and of preventing the delay and expense of a re-trial, the supreme court in *Jameson v District Court*, 115 Colo. 298, 172 P. (2d) 449, considered the question of venue on application and order to show cause as to jurisdiction, though not obliged to do so.

An order in the nature of a writ of prohibition should be entertained where it is

apparent that no judgment in favor of the plaintiff in the court below could be affirmed, for want of jurisdiction over the person of the defendant, who was improperly served with process under ch. 16, § 48 (1) providing for service on nonresident motorists. *Carlson v District Court*, 116 Colo. 330, 180 P. (2d) 525.

A petition for a writ of habeas corpus was held fatally defective for failing to set forth the circumstances which rendered it necessary or proper that the supreme court exercise its original jurisdiction. *Rogers v Best*, 115 Colo. 245, 171 P. (2d) 769.

This rule has no application in an action for divorce. *People v Routt County Court*, 110 Colo. 428, 135 P. (2d) 232.

Applied in *Berger v People*, 123 Colo. 403, 231 P. (2d) 799.

Rule 117. Oral Arguments.

Oral arguments may be had on final hearing only by order of court, either on its own motion or on separate written request or motion therefor filed by a party at any time prior to the expiration of 15 days after the time when the reply brief may be filed; provided, however, that should the court conclude to make a final determination of any cause on application for supersedeas, oral argument will be allowed thereon if a separate motion therefor be filed before the expiration of 5 days from the time the reply brief may be filed. The clerk shall give the attorneys notice of the date set for argument. Arguments will be limited to 30 minutes to a side unless the court extends the time upon request filed before the date of argument has been set. If a case is argued orally in department, a party may during the argument request further oral argument should the case be heard by the court en banc, and failure to make such request shall constitute a waiver of the privilege. Oral argument will not be permitted on petition for rehearing. Failure to file opening, answer or reply brief shall preclude the party so failing from demanding oral argument. Reading of written or printed arguments or lengthy citations will not be permitted. [Amendment effective June 3, 1948.]

Rule 118. Disposition of Cause.**III. DISPOSITION OF CAUSE.****A. General Consideration.**

Applied in *Brinker v City of Sterling*, 121 Colo. 430, 217 P. (2d) 613.

B. Divided Court.**Where one justice did not sit, etc.—**

In accord with original. See *Roefeldt v Rinker*, 108 Colo. 359, 116 P. (2d) 964; *Henderson v Anderson*, 108 Colo. 529, 120 P. (2d) 195; *Butler v Byrne*, 108 Colo. 507, 120 P. (2d) 196; *Hinkley v Oriental Refining Co.*, 116 Colo. 33, 178 P. (2d) 416; *DeWitt v Victor American Fuel Co.*, 116 Colo. 450, 181 P. (2d) 816; *White v Jensen*, 116 Colo. 378, 182 P. (2d) 139; *State v Knight-Campbell Music Co.*, 117 Colo. 326, 187 P. (2d) 931; *Oestereick v Roper*, 122 Colo. 59, 220 P. (2d) 551; *Eresch v Hines*, 122 Colo. 588, 225 P. (2d) 59; *In re McNeal's Estate* (Colo.), 234 P. (2d) 622; *Hix v Stanchfield* (Colo.), 238 P. (2d) 200; *Jabelonsky v Fike* (Colo.), 244 P. (2d) 1081.

Applied in *Metropolitan Life Ins. Co. v Hoffman*, 122 Colo. 431, 222 P. (2d) 620.

C. Error Not Affecting Substantial Rights of the Parties.

"Substantial right" defined.—In construing this rule, as well as rule 61, the court held: "For our purpose here we hold that a substantial right is one which relates to the subject matter and not to a matter of procedure and form." *Sowder v Inhelder*, 119 Colo. 196, 201 P. (2d) 533.

Error cannot be predicated on any defect in a summons unless the defect results in prejudice. *Hocks v Farmers Union Co-operative Gas, etc., Co.*, 116 Colo. 282, 180 P. (2d) 860.

Verdict received in absence of trial judge.—In the instant case, the jury was brought into court by the officer in charge thereof, their names were called; they were asked by the clerk if they had agreed upon a verdict, and their answer being in the affirmative, the verdict was handed to the clerk, and regularity attended throughout, although the trial judge was not present during this procedure. It was held that, although the court did not recommend the practice followed by the trial court, never-

theless, it did not appear that any substantial rights of the defendant were violated by the trial court's procedure, and, as directed

by this rule, mere technicalities would not constitute ground for reversal. *Sowder v. Inhelder*, 119 Colo. 196, 201 P. (2d) 533.

CHAPTER XVIII

Military Service Provisions.

Rule 120. Orders Authorizing Sales Under Powers.

(b) **Sales of Real Estate.** Provided, however, that when the property to be sold is real estate and the power of sale is contained in a deed of trust to a public trustee, the motion need state the names of only those persons who were the grantor, or grantors, in such deed of trust and those persons who appear to have acquired a record interest in such real estate, subsequent to the recording of such deed of trust, whether by deed, mortgage, judgment or any other instrument of record, and the address of each such person as such address is given in the recorded instrument of writing and copies of the notice need be mailed only to each person so named in the motion whose address is so stated. If such recorded instrument of writing does not give such address no copy of the notice need be mailed to the particular person whose address is not so given; provided, however, that when only the county and state is given as the address of such person, then the copy of the notice shall be mailed to the county seat of such county. [Amendment effective August 18, 1951.]

Committee Note.

The amendment of subdivision (b) makes the language of the rule follow more closely the language of Sec. 64, Ch. 40, 1935 C. S. A., which governs the mailing by the public trustee of copies of the notice of the foreclosure sale, and makes it clear that the persons to whom the clerk is, under the rule, to mail copies of the notice of the hearing on the motion for order authorizing the sale and the addresses to which they are to be mailed are identical with the persons to whom the public trustee is, under said Sec. 64, to mail copies of the notice of sale and the addresses to which they are to be mailed.

Editor's Note—For article on "War Legislation Affecting Titles to Real Estate" by Royal C. Rubright, of Denver, see *Dicta* XXI, No. 1, p. 11.

The provisions of this rule are predicated upon the requirements of the soldiers' and sailors' civil relief act, and the rule was adopted for the purpose of establishing a procedure for compliance therewith. That act by its plain provisions does not prevent the foreclosure of security for any obligation pursuant to a written agreement of the parties executed during the period of military service. *Whitaker v. Hearnberger* (Colo.), 233 P. (2d) 389.

EFFECTIVE DATE OF AMENDMENTS; PREFIX "C"

Rule 121. Effective Date of Amendments.

The amendments adopted and promulgated by the Supreme Court of the State of Colorado on May 17, 1951, shall take effect three months after such date. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies. [Amendment effective August 18, 1951.]

Committee Note.

Laws of 1939, Chap. 80, p. 264, provides that general rules prescribed by the Su-

preme Court "shall take effect three months after their promulgation." The last sentence of Rule 121 is taken from Federal Rule 86.

Prefix "C" Deleted

Delete the prefix "C" wherever it appears in the rules. [Amendment effective August 18, 1951.]

CHAPTER XIX

Rules Governing Admissions to the Bar.

Rule 201. Examining Committees.

Subject to prior approval by the Court, each member of the Law Committee may appoint an assistant, who shall receive for his services one hundred dollars (\$100.00) for each examination in which such assistant participates. [Amendment adopted April 29, 1948.]

Editor's note.—The 1948 amendment added the above provision to Rule 201.

Rule 204. Affidavit as to Qualifications; Examination Fees.

Every applicant shall accompany his application with an examination fee, which shall be fifty dollars (\$50.00) for applicants in classes A and B, and, after July 5, 1948, fifteen dollars (\$15.00) for applicants in classes C and D, and shall attach thereto his own affidavit stating that he is a citizen of the United States; that he believes in the form of government thereof, and has never been disloyal thereto; that he is over the age of twenty-one years (giving his age); that he is a citizen of Colorado (giving his address); that he has never been convicted of a felony; and, if admitted, it is his intention to begin the practice of law within this state, or the teaching of law in an approved law school in Colorado, within three months from the date of his admission, and to make the same his permanent and usual occupation.

Out of every examination fee paid by applicants in classes A and B a sum not exceeding thirty-five dollars (\$35.00) shall be paid over to the Bar Committee to defray the expenses of the Committee's investigation of the character of such applicant. [Amendment adopted May 6, 1948.]

APPENDIX A FORMS

Form 18.—Motion to Bring in Third-Party Defendant

(Form for motion remains unchanged.)

EXHIBIT A

(Form for summons as part of Exhibit A remains unchanged.)

IN THE DISTRICT COURT IN AND FOR THE CITY AND
COUNTY OF DENVER AND STATE OF COLORADO
CIVIL ACTION NO.....DIV.....

A.B.,

C.D.,

E.F.,

vs.

vs.

Plaintiff,

Defendant and Third-Party Plaintiff,

Third-Party Defendant.

THIRD-PARTY
COMPLAINT

1. Plaintiff A.B. has filed against defendant C.D. a complaint, a copy of which is hereto attached as "Exhibit C."

2. [Here state the grounds upon which C.D. is entitled to recover from E.F., all or part of what A.B. may recover from C.D. The statement should be framed as in an original complaint.]

Wherefore C.D. demands judgment against third-party defendant E.F. for all sums that may be adjudged against defendant C.D. in favor of plaintiff A.B.

Signed:
Attorney for C.D., Third-Party Plaintiff.
Address:
Address of Third-Party Plaintiff:

[Amendment effective August 18, 1951.]

Committee Note.
The change in Form 18 is made necessary by the amendment of Rule 14.

Form 21.—Request for Admission under Rule 36

Plaintiff A.B. requests defendant C.D. within _____ days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.

[Here list the documents and describe each document.]

2. That each of the following statements is true.

[Here list the statements.]

Signed: _____
Attorney for Plaintiff.

Address: _____

[Amendment effective August 18, 1951.]

Committee Note.

Form 21 has been amended to include a provision for the designation of a time limit within which to comply with the request. Under Rule 36 as amended such a

period must be fixed in the request, extending any length of time desired "not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice."

APPENDIX B

**Miscellaneous Provisions of the Code of Civil Procedure
Left in the Statutes.**

§ 11. Transcript of Justice's Judgment May Be Filed in District Court; Execution; Lien.

District court judgment based upon uncertified transcript is void.—If the transcript of a judgment of a justice of the peace, upon which a judgment of the district court is based, fails to show certification as provided by this section, the judgment of the district court is void, because the requirement of certification is mandatory. *Ferrier v Morris*, 109 Colo. 154, 122 P. (2d) 880, 881.

And may be cancelled where appeal is not adequate remedy.—Action to cancel judgment of district court based upon uncertified transcript was sustained where appeal would not afford an adequate remedy in that defendant could not take advantage of the fact that the judgment was void as such objections would be waived under § 149 of chapter 96. *Ferrier v Morris*, 109 Colo. 154, 122 P. (2d) 880.

§ 31. Courts May Issue Proper Writs; Ne Exeat.

Cited in *Struble v Hicks*, 123 Colo. 16, 224 P. (2d) 932.

PROPERTY OF U. S. ARMY

